LAST WORDS: A SURVEY AND ANALYSIS OF FEDERAL JUDGES' VIEWS ON ALLOCUTION IN SENTENCING

Mark W. Bennett[*] *and Ira P. Robbins*[**]

ABSTRACT

Allocution—the penultimate stage of a criminal proceeding at which the judge affords defendants an opportunity to speak their last words before sentencing—is a centuries-old right in criminal cases, and academics have theorized about the various purposes it serves. But what do sitting federal judges think about allocution? Do they actually use it to raise or lower sentences? Do they think it serves purposes above and beyond sentencing? Are there certain factors that judges like or dislike in allocutions? These questions—and many others—are answered directly in this first-ever study of judges' views and practices regarding allocution.

The authors surveyed all federal district judges in the United States. This Article provides a summary and analysis of the participants' responses. Patterns both expected and unexpected emerged, including, perhaps most surprisingly, that allocution does not typically have a large influence on defendants' final sentences. Most of the judges agreed, however, that retaining this often-overlooked procedural right remains an important feature of the criminal-justice process.

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* U.S. District Court Judge for the Northern District of Iowa. I have sentenced more than 3,500 defendants in four districts spanning two Circuits and nineteen years. I am deeply appreciative for the assistance of my former law clerk, Melissa Carrington, especially in the survey design process. I am also grateful to the thousands of defendants whose allocutions have enriched my judicial experience and inspired me to study this topic.

** Barnard T. Welsh Scholar and Professor of Law and Justice, American University, Washington College of Law. A.B. University of Pennsylvania; J.D. Harvard University. I am more than ordinarily grateful to my superb and indispensable research assistants—Christina Copsey, Jacob M. Eden, Alexandra Haney, Kristel T. Isakson, Alison Ives, and Meghan Quinn—whom I consider to be my colleagues and my friends, and to the American University Law School Research Fund for providing summer financial support.

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This Article also synthesizes judges' recommendations for both defendants and defense attorneys aiming to craft the most effective allocution possible. Critical factors include preparing beforehand, displaying genuine remorse, and tailoring the allocution to the predilections of the sentencing judge.

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I am not a victim. It was stupid. I was wrong.

—Kwame Brown, Former D.C. Councilman[1]

Others can take my life. They can take and make me out as a monster. They can treat me as a monster. But they can't take away my heart, and in my heart I know I did not do those alleged disgusting, hideous acts.

—Jerry Sandusky, Former Pennsylvania State University Assistant Football Coach[2]

Your Honor, I cannot offer you an excuse for my behavior. How do you excuse betraying thousands of investors who entrusted me with their life savings? How do you excuse deceiving 200 employees who have spent most of their working life working for me? How do you excuse lying to your brother and two sons who spent their whole adult life helping to build a successful and respectful business? How do you excuse lying and deceiving a wife who stood by you for 50 years, and still stands by you? And how do you excuse deceiving an industry that you spent a better part of your life trying to improve?

. . . .

Apologizing and saying I am sorry, that's not enough. Nothing I can say will correct the things that I have done. . . . There is nothing I can do that will make anyone feel better for the pain and suffering I caused them, but I will live with this pain, with this torment for the rest of my life.

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1. Editorial, *'I Was Wrong': Brown Sentenced But Justice Has Not Been Served*, WASH. POST, Nov. 14, 2012, at A18, *available at* http://www.washingtonpost.com/opinions/kwame-brown-sentenced-but-justice-hasnt-been-served/2012/11/13/be7b826a-2ddb-11e2-89d4-040c9330702a_story.html.

2. Transcript of Proceedings (Sexually Violent Predator Hearing & Sentencing) at 38, Commonwealth v. Sandusky, No. CP-14-CR-2421-2011 (Pa. Commw. Ct. Oct. 9, 2012) [hereinafter Sandusky Sentencing Transcript], *available at* http://co.centre.pa.us/centreco/media/upload/SANDUSKY%20GERALD%20100912%20Sentencing%20Transcript.pdf. Although Sandusky was sentenced in state court and the focus of this paper is on federal proceedings, his allocution is still illustrative.

I apologize to my victims. I will turn and face you. I am sorry. I know that doesn't help you.

Your Honor, thank you for listening to me.

—Bernard Madoff, Former NASDAQ Chairman[3]

INTRODUCTION

Sentencing: "[T]hat gut-wrenching courtroom moment when a real life intersects with esoteric legal arguments and sentencing guidelines that never truly capture a case's nuances."[4] Some individualization does, however, enter the sentencing process through allocution—the defendant's opportunity to stand up and address the court.[5] Despite this opportunity—or perhaps because of it—many judges consider tailoring the sentence to the specifics of a case the "most difficult and draining aspect of their work."[6] The three excerpts above illustrate how drastically different allocutions can be. While Brown and Madoff readily admitted guilt, Sandusky vehemently denied all wrongdoing and instead portrayed himself as the victim. Sandusky was sentenced to thirty-to-sixty-years imprisonment for sexual abuse,[7] and Brown was sentenced to one day in custody plus community service for bank fraud.[8] Soon after hearing Madoff's allocution, then-Federal District Judge Denny Chin condemned Madoff's actions as "extraordinarily evil" and imposed a 150-year sentence—three times longer than the federal probation office had recommended and more than ten times longer than Madoff's lawyers had requested.[9] Given these radically

3. Transcript of Sentencing Hearing at 36–38, United States v. Madoff, No. 09-CR-213 (S.D.N.Y. June 29, 2009), *available at* http://www.justice.gov/usao/nys/madoff/20090629sentencingtranscript corrected.pdf.

4. Del Quentin Wilber, *After 31 Years, Still a Gut Wrenching Moment*, WASH. POST, June 5, 2012, at A1, *available at* http://www.washingtonpost.com/local/crime/judge-calls-it-quits-after-31-years-sentencing-too-much-to-bear/2012/06/01/gJQA1u3F8U_story.html.

5. *Black's Law Dictionary* defines allocution as "[a]n unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence." BLACK'S LAW DICTIONARY 88 (9th ed. 2009).

6. Wilber, *supra* note 4.

7. Tim Rohan, *Sandusky Gets 30 to 60 Years for Sex Abuse*, N.Y. TIMES, Oct. 10, 2012, at A1, *available at* http://www.nytimes.com/2012/10/10/sports/ncaafootball/penn-state-sandusky-is-sentenced-in-sex-abuse-case.html.

8. Del Quentin Wilber & Keith L. Alexander, *Brown Gets One Day in Custody*, WASH. POST, Nov. 12, 2012, at B1, *available at* http://www.washingtonpost.com/local/crime/tuesday-sentencing-for-kwame-brown-in-bank-fraud-case/ 2012/11/12/9412c386-2d08-11e2-89d4-040c9330702a_story.html.

9. *See* Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES, June 29, 2009, at A1, *available at* www.nytimes.com/2009/06/30/business/30madoff.html?adxnnl=1&pagewanted=all&adxnnlx=1328544191-X4Mda8y1OjU8duFYG67Q/A. One of Madoff's attorneys claimed that the sentence "bordered on absurd," emphasizing that "[v]engeance is not the goal of

different approaches and the various sentences imposed, did the allocutions serve any valuable purpose? Did Madoff's apologetic allocution make any difference?

In theory, allocution provides an opportunity for defendants to accept responsibility,[10] to humanize themselves and their transgressions,[11] and to mitigate their sentences,[12] thus ensuring that the sentences are "tailored to fit both the crime and the person who committed it."[13] From the earliest days of allocution to the present time, defendants' procedural rights have expanded in criminal trials, including the right to testify on one's behalf,[14]

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punishment" and that even with a lesser sentence, given his age, Madoff expected to live out his years in prison. *Id*. The sentencing judge, however, explained that the purpose of the seventy-one-year-old's lengthy sentence was to further the traditional deterrence and retribution goals of punishment and to help the victims heal. Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1574–75 (2012) ("'The symbolism is important because the message must be sent that in a society governed by the rule of law, Mr. Madoff will get what he deserves, and that he will be punished according to his moral culpability.' I also had in mind an objective not included among the traditional goals of punishment—helping victims heal." (footnote omitted) (quoting Transcript of Sentencing Hearing at 47, United States v. Madoff, No. 09-0213 (S.D.N.Y. June 29, 2009))).

10. *See* Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2657 (2007) (indicating that retributive theories support the need for allocution because retribution can reach only as far as the defendant's individual actions); Caren Myers, Note, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 COLUM. L. REV. 787, 805 (1997) (stressing that allocution can be important for retribution purposes because it provides the defendant an opportunity to take responsibility for his actions—atoning publicly for the crime—thus allowing the "sentencer . . . [to] be able to determine that defendant's fate in better conscience").

11. *See* Myers, *supra* note 10, at 804 (stating that humanizing the defendant through allocution is the last means for the defense to "induce . . . moral doubt"); *see also* Mark W. Bennett, *Heartstrings or Heartburn: A Federal Judge's Musings on Defendant's Right and Rite of Allocution*, 35 CHAMPION, No. 2, at 26 (Mar. 2011) ("For me, a defendant's right of allocution is one of the most deeply personal, dramatic, and important moments in federal district court proceedings."); D. Brock Hornby, *Speaking in Sentences*, 14 GREEN BAG 2D 147, 147 (2011) ("Federal Judges sentence offenders face-to-face. The proceedings showcase . . . profound human dimensions that cannot be captured in mere transcript or statistics. . . . In a world of vanishing trials, these public communal rituals are vital opportunities for federal courts to interact openly and regularly with citizens.").

12. Mitigation is often cited as a basis for the right of allocution because it promotes a goal of accurate sentencing by permitting the offender to convey information to the judge that is necessary to impose a correct sentence. *See, e.g.*, United States v. Myers, 150 F.3d 459, 463–65 (5th Cir. 1998) (stating that defendant's allocution could have allowed him the opportunity to emphasize the minor role he had in the crime, compared with the actions of his co-defendants, which may have led to mitigation of the defendant's sentence), *abrogated on other grounds by* United States v. Reyna, 358 F.3d 344 (5th Cir. 2004).

13. Thomas, *supra* note 10, at 2676. *See generally id*. at 2655–67 (explaining that the three major theories supporting allocution are mitigation, retribution, and humanization).

14. *See, e.g.*, Rock v. Arkansas, 483 U.S. 44, 49 (1987) ("At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense. This, of course, is a change from the historic common-law view . . . ."); Harris v. New York, 401 U.S. 222, 225 (1971) ("Every [] defendant is privileged to testify in his own defense, or to refuse to do so."); Ferguson v. Georgia, 365 U.S. 570, 596 (1961) ("We . . . hold that . . . Georgia, consistently with the Fourteenth Amendment, could not . . . deny appellant the right to have his counsel question him to elicit his statement.").

the right to counsel,[15] the mandatory preparation of presentence reports,[16] and the right to object to their contents.[17] Has this evolution of rights greatly altered the rationale behind the need for allocution?[18] Whatever the answer to this question may be, ultimately judicial discretion is the greatest factor affecting how much weight will be accorded to a defendant's allocution. But this truism raises many critical questions, including the following: When might allocution help the defendant? When might it hurt? Do defense attorneys take allocution seriously? Do they prepare their clients adequately for allocution? How much do federal judges weigh allocution in deciding the final sentence? What features of allocution carry the most weight?

While commentators have addressed some of these questions in a scholarly or anecdotal manner,[19] this Article answers these questions more directly through a first-ever survey of all federal district judges regarding allocution. This Article discusses the importance of allocution and the relevance, attention, and weight federal judges place on this often-overlooked stage of the criminal-justice process. Part I explores the history of the right to allocute from its foundations in seventeenth-century common law to its modern-day application. Part II outlines our expectations prior to conducting the survey, some aspects of the participating judges' backgrounds and statuses, and the format of the survey. Part III summarizes the results of the survey. Part IV expounds on the survey's findings and includes recommendations for effective allocution and for future surveys

15. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

16. *See* FED. R. CRIM. P. 32(c)–(d).

17. *See id*. R. 32(f).

18. *Compare* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 38 (1973) ("Speaking . . . of the usual case, defendant's turn in the spotlight is fleeting and inconsequential."), *and* Jonathan Scofield Marshall, *Lights, Camera, Allocution: Contemporary Relevance or Director's Dream*, 62 TUL. L. REV. 207, 212 (1987) ("Modern criminal procedure has rendered allocution virtually obsolete."), *with* Green v. United States, 365 U.S. 301, 304 (1961) ("We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century . . . . But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation."), *and* Bennett, *supra* note 11, at 26–27 ("I disagree with claims by academics in law review articles that changes in criminal procedure have rendered the historic rite of allocution meaningless. In my courtroom, allocution is always factored into the crucible of intense scrutiny that I give the [18 U.S.C.] § 3553(a) factors when imposing a sentence.") (footnote omitted). *See generally* Thomas, *supra* note 10, at 2647–48 (summarizing the arguments of critics of allocution).

19. *See generally* Paul W. Barrett, *Allocution*, 9 MO. L. REV. 115 (1944); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004); Marshall, *supra* note 18; Thomas, *supra* note 10, at 2677; Celine Chan, Note, *The Right to Allocution: A Defendant's Word on Its Face or Under Oath?*, 75 BROOK. L. REV. 579 (2009); Myers, *supra* note 10.

on this subject. Finally, this Article concludes with a brief summary of the federal district judges' allocution advice.

I. A BRIEF HISTORY OF ALLOCUTION

Allocution was first recognized in 1689, when the English courts acknowledged that, in cases in which the defendant faced a possible sentence of death, the failure to ask the defendant directly if he had anything to say prior to sentencing constituted a basis for reversal.[20] Generally speaking, the "object of allocution was to afford the prisoner an opportunity to move in arrest of judgment pleading specific legal defenses available to him."[21]

Although both English and American courts in the late seventeenth and early eighteenth centuries permitted or required allocution, the great commentators on the common law—Blackstone, Chitty, and Archbold (in England), and Wharton and Bishop (in the United States)—did not agree "as to when allocution was required, what it consisted of and who was to perform the ceremony."[22] However, these scholars all described some degree of either required or permissible allocution in capital cases.[23]

In England, allocution was not an infrequent occurrence, as "[t]he common law punishment for all felonies except petty larceny and mayhem was death. Though there were said to be degrees of judgments in treason, they invariably resulted in the same punishment—death—if and when the sentence was carried out."[24] After the seventeenth century, however, the frequency of imposition of the death penalty declined markedly in England, and consequently, the common-law circumstances requiring allocution declined as well.[25]

Because allocution was not restricted to the death-penalty context in the United States, it remained alive and well there even after the decline of

20. *See* Rex & Regina v. Geary, (1689) 91 Eng. Rep. 532 (K.B.), 2 Salk. 630; Anonymous, (1689) 87 Eng. Rep. 175 (K.B.), 3 Mod. 265; *see also Green*, 365 U.S. at 304 ("As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal."). At common law, allocution was sometimes required even at the appellate level. *See* 2 HALE, THE HISTORY OF THE PLEAS OF THE CROWN 401 (1736) (1st Am. ed. 1847) ("[I]f the record of the conviction be removed into the king's bench by *certiorari*, and the prisoner also be removed thither by *habeas corpus*, that court may give judgment upon that conviction, but there must be first a filing of the record in the king's bench, . . . and he must be called to say what he can, why judgment should not be given against him, and thereupon judgment may be given.").

21. Marshall, *supra* note 18, at 210, *quoted in* State v. Canfield, 116 P.3d 391, 393 (Wash. 2005) (en banc).

22. *See* Barrett, *supra* note 19, at 116.

23. *See generally id*. at 116–19.

24. *Id*. at 119 (footnote omitted).

25. *See id*. at 124 (noting that in 1935, allocution was no longer utilized in non-capital felonies in England, but some scholars urged continued utilization of allocution for all felonies).

the practice in England.[26] The right of allocution grew formal roots in the federal-court system in the 1940s. Rule 32(a) appeared in the original version of the Federal Rules of Criminal Procedure[27] and provided in relevant part: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."[28] That language remained until the 1960s.

In 1961, in *Green v. United States*,[29] the Supreme Court addressed whether "Rule 32(a) constitutes an inflexible requirement that the trial judge specifically address the defendant [personally]."[30] Resolving a split among the circuits, Justice Felix Frankfurter argued that it was not enough that courts afford the defendant's attorney the opportunity to speak[31] and wrote, "Trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing."[32] This does not, of course, actually require the defendant to speak—only that the judge personally gives him the opportunity to do so.[33]

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26. *See, e.g.*, Ball v. United States, 140 U.S. 118, 131 (1891) (citing, *inter alia*, cases from several state courts) ("[T]he defendant should be personally present before the court at the time of pronouncing the sentence . . . [so] that he might have an opportunity to say why judgment should not be given against him . . . .").

27. FED. R. CRIM. P. 32(a) (effective Mar. 21, 1946). Both a preliminary draft of the 1943 Advisory Committee Report on Rules of Criminal Procedure and the 1944 final report contained identical language, although the allocution rule was numbered 34(a). *See* ADVISORY COMM. ON RULES OF CRIMINAL PROCEDURE, FEDERAL RULES OF CRIMINAL PROCEDURE: REPORT OF ADVISORY COMMITTEE at 43 (June 1944), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR06-1944.pdf; ADVISORY COMM. ON RULES OF CRIMINAL PROCEDURE , FINAL REPORT 1943 TO SUPREME COURT: NOT ADOPTED BUT FURTHER REVISED AND SECOND PRELIMINARY DRAFT FOLLOWED at 69 (Nov. 1943), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR11-1943.pdf.

28. FED. R. CRIM. P. 32(a). Rule 32(a) did not limit allocution to capital cases.

29. 365 U.S. 301 (1961) (plurality opinion).

30. *Id*. at 303.

31. *Id*. at 304.

32. *Id*. at 305*; see also* Hill v. United States, 368 U.S. 424, 426 (1962) ("Although there was no Court opinion in the *Green* case, eight members of the Court concurred in the view that Rule 32(a) requires a district judge before imposing sentence to afford every convicted defendant an opportunity personally to speak in his own behalf."). In *Hill*, the Court held that the failure to follow the formal requirements of Rule 32(a) is not of itself an error that can be raised by collateral attack under 28 U.S.C. § 2255 or as a motion to correct an illegal sentence under Rule 35. *See Hill*, 368 U.S. at 425–30.

33. Lower courts have regularly enforced *Green*'s holding, finding that a query by a judge to the defendant's attorney does not fulfill the defendant's right. *See, e.g.*, United States v. Noel, 581 F.3d 490, 501–04 (7th Cir. 2009) (holding that the trial judge's failure to personally address the defendant was plain error); United States v. Carney, 88 F. App'x 534, 536–37 (3d Cir. 2004) (remanding for failure to address defendant personally during sentencing); United States v. Adams, 252 F.3d 276, 279 (3d Cir. 2001) (finding that the judge's inquiry, "Would your client like to exercise his right of allocution?," was insufficient); *see also* United States v. Robertson, 537 F.3d 859, 861–63 (8th Cir. 2008) (recognizing the trial court's duty to address defendant personally).

To incorporate the Supreme Court's holding in *Green* and to provide a discrete opportunity for counsel to speak on the defendant's behalf,[34] Rule 32 was amended in 1966 to read: "Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment."[35] After a complete restyling and reorganization,[36] the current iteration of Rule 32 became effective on December 1, 2002,[37] and reads in relevant part:

> **Rule 32. Sentencing and Judgment**
>
> . . . .
>
> (i) Sentencing.
>
> . . . .
>
> (4) Opportunity to Speak.
>
> (A) *By a Party*. Before imposing sentence, the court must:
>
> (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;
>
> (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and
>
> (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.[38]

This is the language that governs allocutions in federal court today.[39]

34. FED. R. CRIM. P. 32(a)(i) advisory committee's note, PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES COURTS at 37 (1965), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR05-1965.pdf.

35. AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE, 39 F.R.D. 69, 263 (1966) (eff. July 1, 1966).

36. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES 111 (May 10, 2001), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR05-2001.pdf (recommending amendments to the Federal Rules).

37. AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE, 207 F.R.D. 89, 251 (2002).

38. FED. R. CRIM. P. 32(i)(4)(A).

39. In a case of first impression, the Third Circuit recently held that trial judges have discretion under Rule 32 to require that an allocution be under oath. United States v. Ward, 732 F.3d 175, 180–84 (3d Cir. 2013). The authors did not address this issue in the survey because we were unaware that some judges placed defendants under oath prior to allocution.

II. SURVEY OVERVIEW

Surprisingly, no empirical study has ever been published about state or federal court judges' views on allocution,[40] and only one non-empirical article on allocution exclusively from a judge's perspective has been published.[41] In addition to filling this void, this Article examines the role that allocution plays in determining the ultimate sentence imposed by federal district judges. To ascertain the judges' views, Federal District Judge Mark W. Bennett sent an e-mail[42] to all active and senior federal district judges inviting them to participate in an online survey.[43]

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40. One interesting recent study using mock written materials discusses the role of contrition in the courtroom. It evaluated the responses of U.S. state judges, federal district judges, and Canadian judges to a variety of hypothetical civil, quasi-criminal, and criminal scenarios. Like all empirical studies, this one has significant limitations (e.g., some of the data was nearly ten years old) and we found the choice of scenarios, like the threat on a judge, difficult to generalize from and therefore to be of limited use for trial attorneys. *See* Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Contrition in the Courtroom: Do Apologies Affect Adjudications?*, 98 CORNELL L. REV. 1189 (2013).

41. *See generally* Bennett, *supra* note 11 (musing on what factors contribute to an effective allocution based on the author's personal experience with more than 2500 allocutions on the bench).

42. The e-mail, sent on April 10, 2012, read as follows:

> Dear Judge [name],
>
> I request your invaluable assistance for the first ever empirical research study on the role of defendants' allocutions in federal sentencing. With the technical assistance of the FJC, Professor Ira Robbins of the American University Washington College of Law and I have prepared a survey that seeks information about your experiences with defendants' allocutions. After the data is analyzed, we will draft a law review article that we will share with you upon publication.
>
> The survey is administered online and is designed to take no more than 15 minutes to complete. Your answers will be completely anonymous.
>
> We greatly appreciate your willingness to contribute to this project. Your participation will assist greatly by producing a high response rate that will improve the quality of the data. Please respond by Friday, April 20. Thank you so much for your assistance.
>
> Please click on the link below to begin the survey.
> [link omitted]
>
> Thank you!
>
> Mark Bennett
> U.S. District Court Judge
> Northern District of Iowa

E-mail from Mark W. Bennett, U.S. District Court Judge, to U.S. District Court Judges (Apr. 10, 2012) (on file with authors).

43. The co-authors, with the help of Dr. Dunn and Dr. Rauma of the FJC, began designing and drafting the survey in November 2011. A preliminary online survey was tested on a sample of federal district judges; the final version went live on April 10, 2012. Judge Bennett sent a follow-up e-mail to non-responders on April 17, 2012.

A. Expectations and Reasons for Survey

The survey was designed to elicit responses that would confirm or dispel various beliefs about how judges respond to defendants' allocutions. Given the political nature of the judicial appointment process, we expected the survey to reveal significantly different responses based on the political affiliation of the president who appointed the judge. We also speculated that the survey would disclose differing opinions among judges based on their previously held positions. Specifically, we expected that former defense attorneys would reduce sentences more frequently than former prosecutors would.

In addition, we assumed that allocutions actually affect sentencing. We believed that "good" allocutions result in shorter sentences, while "bad" allocutions do not, and that judges use allocutions to tailor sentences to the specific circumstances of each defendant's crime. Finally, we presumed that judges generally provide defendants *Miranda*-type warnings that allocution may result in an increased sentence.

B. Survey Format and Participating Judges

The thirty-two-question survey[44] addressed a broad array of issues concerning allocution. To present these topics, the survey utilized a variety of question formats, including dichotomous questions;[45] Likert Scale[46] questions that allow judges to respond on a bipolar[47] scale where (1) signifies "never" and (7) denotes "always";[48] and ranking questions that provide the opportunity for open-ended narrative responses.[49]

Judge Bennett e-mailed the survey to all 953 district judges, including 609 active judges and 344 senior judges. The overall response rate was 54.5% (519 judges),[50] with response rates of 49.1% (169) for senior judges

44. *See infra* Appendix A (containing the survey questions and results).

45. A dichotomous question is a question with two possible responses (e.g., yes or no). *See* William M.K. Trochim, Web Center for Social Research Methods, *Types of Questions*, RESEARCH METHODS KNOWLEDGE BASE, http://www.socialresearchmethods.net/kb/questype.htm (last updated Oct. 20, 2006).

46. *See* Justin Sevier, *The Unintended Consequences of Local Rules*, 21 CORNELL J.L. & PUB. POL'Y 291, 325 n.250 (2011) ("A Likert Scale is a psychometric scale commonly used in questionnaires to capture data from ordinal variables (from one to seven)." (citing ROBERT M. LAWLESS ET AL., EMPIRICAL METHODS IN LAW 172 (2010))).

47. It is referred to as bipolar because there is a neutral point (4) between two ends at opposite positions of the scale.

48. This Article uses the term "frequently" to refer to the combined percentage (or number) of judges who chose five through seven on the Likert Scale. Conversely, "rarely" refers to the combined percentage (or number) of judges who chose one through three.

49. All open-ended narrative responses to the survey are on file with the authors.

50. *See infra* Appendix A.

and 57.5% (350) for active judges.[51] Some judges who responded did not answer every question. And a few judges who declined to participate in the survey nevertheless e-mailed Judge Bennett with less than encouraging support. For example, one judge wrote, "On a more personal note, I can't say that I see anything relevant coming from this . . . study."[52]

The survey gathered various background data, including the judges' employment prior to becoming a federal district judge, whether they are currently on senior status, and the political affiliation of their appointing presidents. Among the 519 respondents, the largest percentage had previously been state court trial judges (31.0% or 161 judges), followed by private criminal defense lawyers (27.2% or 141), and state court prosecutors (22.0% or 114).[53] The fewest judges had previously been federal public defenders (1.0% or 5), assistant federal public defenders (1.5% or 8), or full-time law professors (3.5% or 18).[54]

In addition, at the time of responding, 67.4% (350) of the judges were on active status and 32.6% (169) were on senior status.[55] The mean[56] length of service for all responding judges was 15.2 years, with a range of three months to fifty years.[57] On average, senior judges had been on senior status for 6.8 years, ranging from one month to twenty-seven years.[58] 46.3% (237) of the participants had sentenced 1000 or fewer defendants; 53.7% (275) of the participants had sentenced at least 1000 defendants.[59] Further, 15.8% (81) of the judges had sentenced between 2000 and 3000 defendants; 14.3% (73) had sentenced more than 3000 defendants.[60]

Finally, we determined the political affiliation of each judge's appointing president based on how many years the judge had served on the bench.[61] Republican presidents appointed 54.7% (283) of the responding

51. *See infra* Appendix A, Table 30.

52. E-mail to Judge Bennett from a federal district judge (on file with authors). Another judge wrote: "This survey strikes me as an improper and woefully unnecessary exercise and intrusion into judicial decision making." E-mail to Judge Bennett from a federal district judge (on file with authors).

53. *See infra* Appendix A, Table 32.

54. *See infra* Appendix A, Table 32.

55. *See infra* Appendix A, Table 30.

56. The mean is defined as "[t]he average of a set of numerical values, as calculated by adding them together and dividing by the number of terms in the set . . . ." OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/115436#eid37450626 (last visited Jan. 13, 2014). The mean is a measure of central tendency, which is "a single value that attempts to describe a set of data by identifying the central position within that set of data." *Measures of Central Tendency*, LAERD STATISTICS, https://statistics.laerd.com/statistical-guides/measures-central-tendency-mean-mode-median.php (last visited Jan. 13, 2014).

57. *See infra* Appendix A, Question 29.

58. *See infra* Appendix A, Question 31.

59. *See infra* Appendix A, Table 1.

60. *See infra* Appendix A, Table 1.

61. Because the judges estimated their time on the bench, there may be small inaccuracies in the appointing-president data.

judges and Democratic presidents appointed 45.3% (234) of the responding judges.[62] The breakdown of appointing presidents is displayed in Table A.

Table A. Presidential Appointments of Responding Judges[63]

Appointing President	*Frequency*	*Percent*
Obama (D)	62	12.0%
George W. Bush (R)	143	27.7%
Clinton (D)	148	28.6%
George H.W. Bush (R)	60	11.6%
Reagan (R)	71	13.7%
Carter (D)	22	4.3%
Ford (R)	2	0.4%
Nixon (R)	7	1.4%
Johnson (D)	1	0.2%
Kennedy (D)	1	0.2%
Total	*517*	*100.0%*

III. SURVEY RESULTS

The results of the survey fall into four categories: considerations on allocution, preparedness for allocution, contents of allocution, and impacts of allocution on sentencing. The first category includes judges' views of the Federal Rule of Criminal Procedure governing allocution, proceedings in which judges permit allocution, whether judges warn defendants that allocutions can raise or lower sentences, and non-sentencing purposes of allocution. The second category encompasses the level of preparation for allocution and situations in which defendants should not allocute. The third category, concerning contents of allocution, comprises what impresses the judges most and least, including behavioral, educational, and other factors. The final category consists of the frequency and extent to which allocution raises or lowers sentences.

A. Judges' Views on Allocution

1. Judges' Views of Federal Rule of Criminal Procedure 32(i)(4)(A)

The judges' responses indicate an overall satisfaction with Rule 32 as it relates to a defendant's right to allocute. Significantly, 99.0% (513) of the

62. *See infra* Appendix A, Table 29b.
63. *See infra* Appendix A, Table 29a.

judges replied "no"[64] when asked if they "favor eliminating the defendant's right to allocute, granted by" Rule 32.[65] Of the 518 responding judges,[66] only 3 (0.6%) favored eliminating the right to allocute and 2 (0.4%) had "no opinion."[67] Further, only 27 judges (5.2%)[68] "favor having the discretion to decide whether to allow a defendant to allocute."[69] Finally, only 23 judges (4.4%)[70] "favor having the discretion to hold it against the defendant when the defendant does not allocute."[71] Based on these responses, the judges generally seemed satisfied with the current rule granting defendants the right to allocute.

2. Proceedings in Which Judges Allow Allocution

Although Rule 32 requires an opportunity to allocute only in sentencing proceedings, the survey reveals that judges typically allow allocution in other proceedings as well. A significant majority of judges always allow a defendant to allocute in proceedings for resentencing (89.8% or 458 judges), revocation of probation (96.5% or 493), and revocation of supervised release (96.3% or 495).[72] More specifically, in resentencing proceedings, 49 judges (9.6%) sometimes allow allocution and only 3 judges (0.6%) never allow it.[73] In revocation of probation proceedings, 16 judges (3.1%) sometimes allow allocution and 2 (0.4%) never allow it.[74] In revocation of supervised release proceedings, 18 judges (3.5%) allow allocution sometimes, and only 1 judge (0.2%) never allows it.[75] Thus, defendants can allocute not only in sentencing proceedings, but typically in these other proceedings as well.

3. Warning Defendants

The majority of responding judges do not advise defendants that allocution may either increase or decrease their sentences, as demonstrated in Table B.

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64. *See infra* Appendix A, Table 4.
65. *See infra* Appendix A, Question 4.
66. Throughout this Article, "judges" and "responding judges" refer only to the judges who responded to the question being discussed, not to all of the judges who responded to the survey overall.
67. *See infra* Appendix A, Table 4.
68. *See infra* Appendix A, Table 5.
69. *See infra* Appendix A, Question 5.
70. *See infra* Appendix A, Table 6.
71. *See infra* Appendix A, Question 6.
72. *See infra* Appendix A, Question 7 and Table 7.
73. *See infra* Appendix A, Table 7.
74. *See infra* Appendix A, Table 7.
75. *See infra* Appendix A, Table 7.

Table B. Frequency with Which Judges Advise Defendants That Allocution May Alter Their Sentences[76]

	Never 1	*2*	*3*	*4*	*5*	*6*	*Always 7*
How Frequently Judges Advise Defendants That the Allocution May Lower the Sentence (N = 518)	481 (92.9%)	20 (3.9%)	1 (0.2%)	2 (0.4%)	1 (0.2%)	2 (0.4%)	11 (2.1%)
How Frequently Judges Advise Defendants That the Allocution May Raise the Sentence (N = 515)	497 (96.5%)	11 (2.1%)	0 (0.0%)	1 (0.2%)	1 (0.2%)	2 (0.4%)	3 (0.6%)

More than 92% of the respondents (481 judges) never advise defendants that allocution may be used to lower the sentence, while only 2.1% (11) always do so.[77] More than 96% (497) never warn defendants that the allocution may result in an increased sentence, while only 0.6% (3) always do so.[78]

4. Non-Sentencing Purposes of Allocution

Even when allocution does not affect the sentence, the judges overwhelmingly agreed that it serves "other important purposes"[79] and identified those purposes in open-ended responses.[80] While 85.7% (442 judges) of the respondents agreed that allocution serves other important purposes, 4.3% (22) of the judges disagreed and 10.1% (52) had "no opinion."[81] Of the 442 judges who indicated that allocution serves important purposes other than sentencing, 407 specified what those other purposes are.[82] These judges most often (40.8% or 166 judges) stated that allocution enables the defendant to participate in the process and affords the defendant an opportunity to speak.[83] Next, 17.4% (71) of the judges

76. This table was derived from Appendix A, Tables 21 and 22, *infra*.
77. *See infra* Appendix A, Question 21 and Table 21.
78. *See infra* Appendix A, Question 22 and Table 22.
79. *See infra* Appendix A, Question 23.
80. Open-Ended Responses to Question 24 (on file with authors); *see infra* Appendix A, Table 24 (providing a break-down of the open-ended responses).
81. *See infra* Appendix A, Question 23 and Table 23.
82. *See infra* Appendix A, Table 24.
83. *See infra* Appendix A, Table 24.

observed that allocution benefits the victim, the victim's family, and the defendant's family;[84] 14.3% (58) indicated that allocution provides the sentencing judge and others in the courtroom with a better understanding of the defendant;[85] and 9.6% (39) indicated that allocution helps defendants accept responsibility for their actions.[86] As one judge wrote, allocution "allows the court to recognize . . . the humanity of the person before the court."[87] Another judge aptly summarized other purposes served by allocution:

> It gives the defendant the sense that he is a meaningful part of the sentencing process and that his statements will be considered by the court in determining the sentence. It is a forum to apologize to those who have been affected by the defendant's actions. It gives the defendant an opportunity to fill in gaps within the [pre-sentencing report (PSR)] or answer questions that the PSR left unanswered. Often the defendant will touch on an area or topic that the defense attorney failed to raise. Frequently, allocution allows the court to have a meaningful dialogue with the defendant on both sentencing issues and post-imprisonment issues.[88]

B. Allocution Preparation

1. Defendants' and Defense Attorneys' Preparation

Although most judges indicated that defendants are often prepared to allocute, almost as many judges believed that defense attorneys could have done more to prepare their clients. When surveyed about whether "the defendant is prepared to allocute,"[89] a significant minority of judges, more than one in five (20.4%), believed that defendants are frequently unprepared to allocute, while 58.5% of the judges found that defendants are generally prepared to allocute.[90]

Defense attorneys play a crucial role in preparing defendants for allocution, particularly because defendants are often addressing the judge for the first or second time.[91] The judges were asked, "How frequently do

84. *See infra* Appendix A, Table 24.
85. *See infra* Appendix A, Table 24.
86. *See infra* Appendix A, Table 24.
87. Open-Ended Responses to Question 24 (on file with authors).
88. *Id*.
89. *See infra* Appendix A, Question 9.
90. *See infra* Appendix A, Table 9.
91. A growing number of federal district judges have U.S. magistrate judges take guilty pleas. *See* Durwood Edwards, *Can a U.S. District Judge Accept a Felony Plea with a Magistrate Judge's*

you believe that the defense lawyer should have done more to prepare the defendant to allocute?"[92] Nearly 40% of participating judges are frequently dissatisfied with the defense lawyers' level of preparation, while 44.0% are generally not dissatisfied.[93]

2. *Situations in Which Defendants Should Not Allocute*

When asked whether there are situations in which they recommend that defendants not allocute,[94] only 182 judges (35%) responded with examples.[95] Of those judges, 52 (28.6%) indicated that defendants should not allocute if they intend to deny guilt or responsibility for their crimes.[96] Twenty-three judges (12.6%) also indicated that defendants should not allocute if they are not remorseful or are planning to appeal and allocution could compromise their position on appeal.[97] Other responses garnering support from increasingly fewer judges include situations where defendants will lie;[98] will further incriminate themselves;[99] will only express anger towards victims, the court, or others;[100] or will cause harm to or threaten others.[101] Six judges (3.3%) indicated that a defendant should not allocute in child sexual abuse or child pornography cases.[102] Three judges (1.7%) indicated that defendants should not allocute in cases where it is highly

Recommendation?, 46 S. TEX. L. REV. 99, 99–100 (2004) (stating that an increasing number of "[c]ircuit [c]ourts have found statutory authority for magistrate judges to take felony pleas under the 'additional duties' section of the Magistrate's Act"). Every court of appeals that has analyzed this issue has found that magistrate judges are able to conduct pleas at the direction of the district court with the consent of the parties. *See, e.g.*, United States v. Osborne, 345 F.3d 281, 285 (4th Cir. 2003) (citing United States v. Reyna-Tapia, 328 F.3d 1114, 1119 (9th Cir. 2003); United States v. Torres, 258 F.3d 791, 795–97 (8th Cir. 2001); United States v. Dees, 125 F.3d 261, 264–67 (5th Cir. 1997); United States v. Ciapponi, 77 F.3d 1247, 1250–52 (10th Cir. 1996); United States v. Williams, 23 F.3d 629, 632–35 (2d Cir. 1994)). Accordingly, if a U.S. magistrate judge, rather than the sentencing judge, has taken the defendant's plea, allocution is often the only time that the sentencing judge sees and hears from the defendant. Even if the defendant has gone to trial, which is rare, the defendant may not have testified; thus, allocution may still be the first time the sentencing judge hears directly from the defendant. *See* Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal* Cases, 59 VAND. L. REV. 349, 391 n.118 (2006) (noting that in 2003, only slightly more than 4% of criminal defendants went to trial).

92. *See infra* Appendix A, Question 10.

93. This number is the sum of the judges who selected 1 through 3. *See infra* Appendix A, Table 10.

94. *See infra* Appendix A, Question 25.

95. *See infra* Appendix A, Table 25.

96. *See infra* Appendix A, Table 25.

97. *See infra* Appendix A, Table 25.

98. *See infra* Appendix A, Table 25 (20 judges or 11.0%).

99. *See infra* Appendix A, Table 25 (17 judges or 9.3%).

100. *See infra* Appendix A, Table 25 (12 judges or 6.6%).

101. *See infra* Appendix A, Table 25 (7 judges or 3.8%).

102. *See infra* Appendix A, Table 25.

likely they will receive a mandatory minimum sentence.[103] Finally, 6 judges (3.3%) commented that it is not their role to make this recommendation.[104]

C. *Contents of an Allocution*

1. *What Impresses Judges Most and Least?*

The survey asked the judges to rank from a list[105] the top five characteristics of defendants' allocutions that most impress them. The five top-rated responses[106] were "genuine remorse," "sincerity," "realistic and concrete plans for the future," "acknowledgement of and sincere apology to the victims," and "understanding of the seriousness of the offense."[107] The responses reveal that the most important thing a defendant can do in an allocution is to demonstrate remorse: 178 judges ranked "genuine remorse" as the most important factor, while only 74 judges ranked "sincerity" first.[108] Additionally, "genuine remorse" earned a total point value almost twice that of "sincerity," which had the second-highest total point value.[109] "Realistic and concrete plans for the future" placed third in both first-ranked responses and total point value.[110]

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103. *See infra* Appendix A, Table 25.

104. *See infra* Appendix A, Table 25.

105. This question asked the judges to rank their top five selections from twenty options supplied by the survey. These potential responses, in rank order, were: "genuine remorse"; "sincerity"; "realistic and concrete plans for the future"; "acknowledgement of and sincere apology to the victims"; "understanding of the seriousness of the offense"; "'I accept full responsibility for my actions' or similar statements"; "acknowledgement of and sincere apology to the defendant's family"; "explanation of the defendant's life leading up to the offense"; "participation in drug treatment"; "request for a specific vocational or educational program in BOP"; "thanking the prosecutor and agent for arresting and prosecuting the defendant"; "other (please specify in space below)"; "request for Residential Drug Abuse Program (RDAP)"; "promising to become a productive citizen"; "explanation of how the defendant was the victim of circumstance"; "desire to speak to others about the evils of drugs"; "finding religion"; "promising never to commit another crime"; "'I can't change the past' or similar statements"; and "desire to become a drug counselor." *See infra* Appendix A, Table 16b.

106. *See infra* Appendix A, Question 16. When analyzing a rank-order question, we assigned each rank a point value. This point value is based on the number of ranks and the order in which an item is selected. For this question, there were five ranks. Therefore, selecting an item first resulted in five points being applied to that item, selecting an item second resulted in four points, selecting an item third resulted in three points, selecting an item fourth resulted in two points, and selecting an item fifth resulted in one point. For example, "genuine remorse" received a total of 1564 points: 178 judges ranked it first (890 points), 94 judges ranked it second (376 points), 65 judges ranked it third (195 points), 43 judges ranked it fourth (86 points), and 17 judges ranked it fifth (17 points). *See infra* Appendix A, Table 16b.

107. *See infra* Appendix A, Table 16a.

108. *See infra* Appendix A, Table 16b.

109. *See infra* Appendix A, Table 16a.

110. *See infra* Appendix A, Tables 16a and 16b.

Genuine remorse, however, was *not* the most frequent response to an open-ended question regarding the most helpful characteristics of a defendant's allocution.[111] Instead, 141 judges (40.3%) suggested that defendants explain their plans for the future and for lessening the likelihood of recidivism, while 98 (28%) mentioned genuine remorse.[112] Other responses to this open-ended question, in descending frequency, were acceptance of responsibility (21.4% or 75 judges), offer apologies to victims and their families (13.4% or 47), sincerity (12.3% or 43), explanation of conduct (8.3% or 29), acknowledgement of the crime's effect on others (8.3% or 29), and demonstration that the defendant understands the seriousness of the offense (8.0% or 28).[113]

The following sample of the judges' narrative responses is representative of the 350 responses regarding statements that may help reduce the sentence.[114] One judge wrote, "The defendant can give an honest explanation of any mitigating circumstances, show an understanding of the wrongfulness of the conduct, and show honest remorse and an intention to do better."[115] Another judge stated that "[s]howing credible remorse, determination to change, or demonstration that change has already occurred"[116] may positively influence sentencing. Echoing familiar parental advice, one judge wrote, "It isn't what they say, it's how it is said. Honesty, sincerity and genuine remorse count for a lot . . . ."[117] Another judge's response reflected many of the other comments:

> What they say about themselves is important and, even more important, is how they say it. A judge would like to understand what kind of person stands before the court particularly those defendants who understand what they have done and why and have some reasonable notion of where they might go from here . . . [.] [This demonstrates] understanding of themselves, their own realistic assessment of strength and weakness and what might be done about it. An example is the drug case where the defendant talks about his desire to counsel others against drugs. I try to tell them that their job is not to prevent others from using [drugs], it is

111. *See infra* Appendix A, Question 27.
112. *See infra* Appendix A, Table 27.
113. *See infra* Appendix A, Table 27.
114. *See infra* Appendix A, Table 27.
115. Open-Ended Responses to Question 27 (on file with authors).
116. *Id*.
117. *Id*.

> to prevent themselves from using drugs and this is going to take all their efforts for a long time.[118]

In addition to inquiring about what most impresses judges in defendants' allocutions, the survey also asked judges to rank what impresses them the *least*.[119] The top five responses based on total point value were: explaining "how the defendant was the victim of circumstance," "finding religion," "promising never to commit another crime," saying "'I can't change the past' or similar statements," and "thanking the prosecutor and agent for arresting and prosecuting the defendant."[120] In open-ended responses, many judges also stated that defendants should not shift blame to others or try to minimize their involvement in the crime. For example, defendants should not "simply express or imply sorrow for getting caught,"[121] "blame others or try to make [themselves] a victim of society," "make excuses," or "seek a lesser sentence."[122]

2. Judges' Advice to Defense Attorneys Preparing Clients to Allocute

The open-ended responses by the judges to the question, "What is your best advice for defense lawyers preparing their clients to allocute?" suggest that defense attorneys play an important role in allocution preparation.[123] Many of the 425 judges who responded to this question offered sage advice.[124] The most frequent response, given by slightly more than 30% (128) of the judges, advised defense attorneys to recommend their clients to convey genuine sincerity in their allocutions.[125] More than 18% (78) of the

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118. *Id*.

119. *See infra* Appendix A, Question 18. The twenty potential responses were "explanation of how the defendant was the victim of circumstance"; "finding religion"; "promising never to commit another crime"; "'I can't change the past' or similar statements"; "thanking the prosecutor and agent for arresting and prosecuting the defendant"; "promising to become a productive citizen"; "desire to become a drug counselor"; "explanation of the defendant's life leading up to the offense"; "'I accept full responsibility for my actions' or similar statements"; "desire to speak to others about the evils of drugs"; "request for the Residential Drug Abuse Program (RDAP)"; "request for a specific vocational or educational program in BOP"; "other (please specify in space below)"; "acknowledgement of and sincere apology to the defendant's family"; "understanding of the seriousness of the offense"; "participation in drug treatment"; "sincerity"; "acknowledgement of and sincere apology to the victims"; "genuine remorse"; and "realistic and concrete plans for the future." *See infra* Appendix A, Table 18a.

120. *See infra* Appendix A, Table 18a. These five responses were also the five responses that most often were ranked number one. *See infra* Appendix A, Tables 18a and 18b.

121. Open-Ended Responses to Question 26 (on file with authors).

122. Open-Ended Responses to Question 27 (on file with authors).

123. *See infra* Appendix A, Question 26.

124. *See infra* Appendix A, Table 26.

125. *See infra* Appendix A, Table 26.

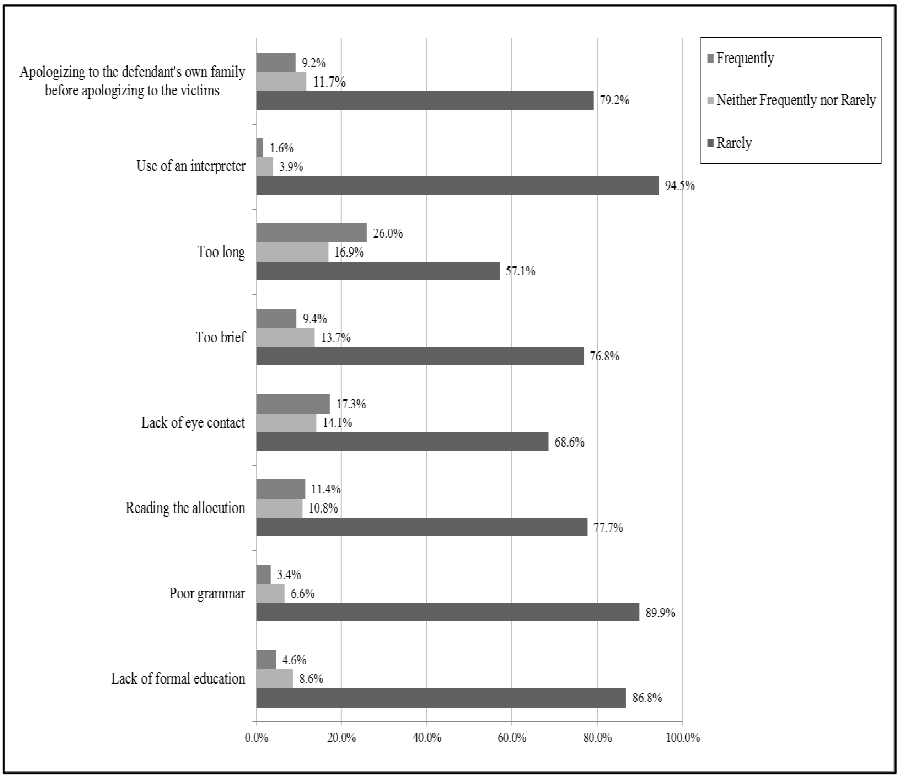
judges recommended counseling clients to prepare and think carefully about what to say.[126] The next most frequent types of comments advised defense counsel to encourage defendants to be honest, to rehearse the speech ahead of time, to use their own words, to show genuine remorse, to accept responsibility, and to be brief.[127] Many judges also emphasized that defense lawyers should explain the significance of allocution to defendants;[128] one judge underscored this point by writing, "Allocution should not be some sort of afterthought."[129]

3. Factors Affecting Allocution

The survey asked the judges whether each of the following eight factors negatively impacts the effectiveness of allocution[130]: "lack of formal education," "poor grammar," "reading the allocution," "lack of eye contact," "too brief," "too long," "use of an interpreter," and "apologizing to the defendant's own family before apologizing to the victims."[131] Figure A contains the judges' responses.

126. *See infra* Appendix A, Table 26.
127. *See infra* Appendix A, Table 26.
128. *See infra* Appendix A, Table 26.
129. Open-Ended Responses to Question 26 (on file with authors).
130. *See infra* Appendix A, Question 20.
131. *See infra* Appendix A, Table 20.

Figure A. Frequency with Which Factors Detract From an Allocution's Effectiveness[132]



For some judges, a defendant's demeanor may negatively impact an allocution's efficacy. For 17.3% (86) of the judges, lack of eye contact frequently detracts from the success of an allocution.[133] In addition, 11.4% (57) of the judges responded that an allocution is frequently less effective when the defendant reads directly from a prepared statement.[134] Further, apologizing to the defendant's own family before apologizing to the victims was frequently problematic for 9.2% (45) of the judges.[135] Many judges, however, responded that these factors *never* negatively impact sentencing. Specifically, 48.1% (235) indicated that apologizing to the defendant's own family before apologizing to the victims is never problematic, 38.2% (190) stated that reading an allocution never negatively

132. This figure was derived from Appendix A, Table 20, *infra*.
133. *See infra* Appendix A, Table 20.
134. *See infra* Appendix A, Table 20.
135. *See infra* Appendix A, Table 20.

affects allocution, and 26.2% (130) specified that lack of eye contact never worsens an allocution's effectiveness.[136]

Educational factors rarely detract from the effectiveness of an allocution. Fewer than 5% (23) of the judges believed that lack of formal education or poor grammar frequently has an adverse effect on allocution.[137] Conversely, 62.8% (312) stated that poor grammar *never* negatively impacts an allocution, and 60.8% (304) responded that a defendant's lack of a formal education never has a negative effect on allocution.[138]

Of the factors listed, the judges indicated that a defendant's use of an interpreter is least likely to thwart an allocution's effectiveness. Specifically, 81.2% (397) of the judges indicated that using an interpreter *never* hinders the success of an allocution, and less than 2% (8) of the judges conceded that it frequently negatively affects a defendant's allocution.[139]

In contrast, the length of an allocution frequently does impede its effectiveness. Unequivocally, verbose allocutions have more of a negative impact than any of the other factors, as signified by the 26.0% (129) of the judges who stated that loquacious allocutions frequently detract from an allocution's effectiveness.[140] By contrast, overly brief allocutions are less likely to hinder the success of an allocution. Only 9.4% (47) of the judges indicated that an overly brief allocution frequently has an adverse impact, while 31.9% (158) responded that overly brief allocutions *never* have a negative effect.[141]

D. Impact on Sentencing

When asked how important allocution is in arriving at the final sentence,[142] more than 80% (408) of the judges indicated that it is important to some degree, as indicated in Table C.[143] A majority (53.0% or 269) indicated that allocution is "somewhat important," and 5.3% (27) responded that it is "extremely important."[144] Only 9 judges (1.8%) responded that allocution is not at all important.[145]

136. *See infra* Appendix A, Table 20.
137. *See infra* Appendix A, Table 20.
138. *See infra* Appendix A, Table 20.
139. *See infra* Appendix A, Table 20.
140. *See infra* Appendix A, Table 20.
141. *See infra* Appendix A, Table 20.
142. *See infra* Appendix A, Question 28.
143. *See infra* Appendix A, Table 28.
144. *See infra* Appendix A, Table 28.
145. *See infra* Appendix A, Table 28.

Table C. Importance of Allocution in Final Sentence[146]

	Judges (Number)	*Judges (Percent)*
Extremely important	27	5.3%
Very important	112	22.0%
Somewhat important	269	53.0%
Not very important	91	17.9%
Not at all important	9	1.8%

1. Frequency with Which Allocution Impacts Sentencing Overall

While a significant portion of the judges indicated that allocution is often an important consideration in sentencing, their responses suggest that allocution, in fact, only modestly impacts sentencing at all.[147] The survey asked how frequently allocution results in either a higher or lower sentence and whether that sentence is above or below the range recommended in the U.S. Sentencing Commission Federal Sentencing Guidelines Manual (the Guideline range).[148] The judges' responses, shown in Figure B, indicate that allocution sometimes results in a modified sentence.[149] And perhaps not surprisingly, not a single judge indicated that an allocution *always* results in a different sentence.[150]

146. *See infra* Appendix A, Table 28.

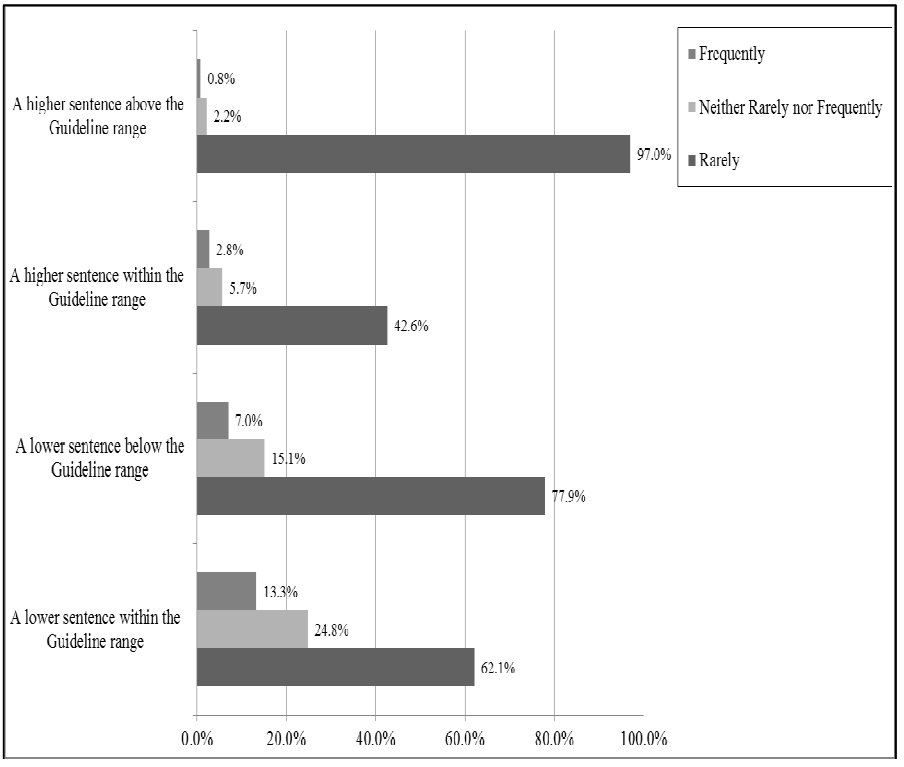
147. *Compare infra* Appendix A, Table 28 (demonstrating that the vast majority of judges believe that allocution is important in arriving at a final sentence), *with infra* Appendix A, Table 11 (revealing that allocution rarely results in a different sentence).

148. *See infra* Appendix A, Question 11 ("How frequently does the defendant's allocution result in a sentence that is different than if the defendant had not allocuted . . . [?]").

149. *See infra* Appendix A, Table 11.

150. *See infra* Appendix A, Table 11.

Figure B. Frequency with Which Defendant's Allocution Results in a Different Sentence[151]



When allocution does affect sentencing, judges appear substantially more likely to lower rather than to raise a sentence, but the new sentence will likely fall within the advisory United States Federal Sentencing Guideline range. While 13.3% (67) of the judges frequently reduce a sentence within the Guideline range, only 7.0% (35) frequently reduce a sentence lower than the Guideline range.[152] On the other hand, 2.8% (14) of the judges indicated that allocution frequently results in a higher sentence within the Guideline range, and only 0.8% (4) responded that allocution frequently raises a sentence beyond the Guideline range.[153] Finally, 4.6% (23) of the judges *never* reduce a sentence within the Guideline range based on an allocution, and 9.6% (48) *never* lower a sentence below the Guideline range.[154] In contrast, 31.2% (153) of the judges *never* increase a

151. This figure was derived from Appendix A, Table 11, *infra*.
152. *See infra* Appendix A, Table 11.
153. *See infra* Appendix A, Table 11.
154. *See infra* Appendix A, Table 11.

sentence within the Guideline range based on an allocution, and 63.0% (313) *never* vary upwards beyond the Guideline range.[155]

2. *Frequency with Which Allocution Impacts Sentencing Based on Crime Type*

To determine the situations in which allocution most frequently results in an altered sentence, the survey inquired about the frequency with which allocution results in a higher or lower sentence based on eighteen types of crimes.[156] More specifically, the survey listed three types of immigration crimes,[157] five types of drug trafficking crimes,[158] three types of firearms crimes,[159] five types of child pornography crimes,[160] and two types of white-collar crimes.[161]

Judges seemed hesitant to *lower* sentences based on allocution, regardless of the type of crime. For twelve of the eighteen crimes surveyed, fewer than 5% of the judges indicated that they frequently lower the sentence.[162] The only six crimes that received more than 5% were possession of child pornography (10.2% or 46 judges), illegal immigrant reentry (7.8% or 37), receipt of child pornography (7.2% or 31), marijuana trafficking (6.5% or 30), non-fraud white-collar crime (6.1% or 28), and crack cocaine trafficking (5.2% or 24).[163] Not a single judge responded that allocution *always* results in a lower sentence for any of the eighteen crimes.[164]

Judges appear most resistant to lowering the sentences of defendants accused of certain child pornography crimes and least resistant to lowering sentences for marijuana trafficking and white-collar crimes.[165] Almost half of the judges (48.1% or 215) responded that they *never* decrease a sentence based on allocution in production of child pornography crimes.[166] This

155. *See infra* Appendix A, Table 11.

156. *See infra* Appendix A, Questions 12 and 13.

157. *See infra* Appendix A, Tables 12 and 13 ("illegal reentry," "fraudulent documents," and "other").

158. *See infra* Appendix A, Tables 12 and 13 ("powder cocaine," "crack cocaine," "heroin," "marijuana," and "methamphetamine").

159. *See infra* Appendix A, Tables 12 and 13 ("felon in possession," "other prohibited person," and "other").

160. *See infra* Appendix A, Tables 12 and 13 ("exploitation of a minor," "production," "distribution," "receipt," and "possession").

161. *See infra* Appendix A, Tables 12 and 13 ("fraud" and "non-fraud white collar").

162. *See infra* Appendix A, Table 12.

163. *See infra* Appendix A, Table 12.

164. *See infra* Appendix A, Table 12.

165. *See infra* Appendix A, Table 12.

166. *See infra* Appendix A, Table 12.

percentage declines rapidly for other child pornography crimes: 41.0% (186) of the judges never lower a sentence for child exploitation, 33.6% (151) for distribution, 15.0% (67) for receipt, and 12.1% (54) for possession.[167] Judges were least resistant to lowering sentences for white-collar crimes and marijuana trafficking, as demonstrated by the mere 7.2% (33) who never reduce sentences for non-fraud white-collar crime, 8.5% (38) for fraud, and 10.4% (48) for marijuana trafficking.[168]

Judges were also reluctant to *increase* sentences based on allocution, regardless of the type of crime. The following crime types garnered the highest percentages—while still very low—of judges who frequently increase sentences based on allocution: exploitation of a minor through child pornography (5.3% or 24 judges), production of child pornography (4.6% or 21), non-fraud white-collar crime (4.0% or 18), and fraud (3.7% or 17).[169] Allocutions for immigration crimes were most likely to *never* increase a sentence,[170] as nearly 65% of the judges indicated they never increase a sentence based on such allocutions—64.4% (302) for illegal reentry, 64.0% (297) for fraudulent documents, and 64.3% (294) for "other" immigration crimes.[171]

Sentences for white-collar crimes seem likely to fluctuate as a result of allocution. On the one hand, out of the eighteen listed crime types, these crimes garnered the lowest percentages of judges who stated they never *increase* a sentence—39.7% (182) for fraud crimes and 41.9% (188) for non-fraud white-collar crimes.[172] On the other hand, these crimes garnered the lowest percentages of judges who never *lower* the sentence—8.5% (38) for fraud crimes and 7.2% (33) for non-fraud white-collar crimes.[173]

3. Extent to Which Allocution Affects Sentences

To gauge the extent to which allocution affects sentences, the survey asked the judges to provide the average percentage by which they reduce or increase a sentence when they alter it at all.[174] For those cases in which the sentences are reduced, the mean percentage of reduction is 14.7%, with a range of 4% to 50%, as indicated by the 350 responding judges.[175] For those cases in which the sentences are increased, the mean percentage of

167. *See infra* Appendix A, Table 12.
168. *See infra* Appendix A, Table 12.
169. *See infra* Appendix A, Table 13.
170. *See infra* Appendix A, Table 13.
171. *See infra* Appendix A, Table 13.
172. *See infra* Appendix A, Table 13.
173. *See infra* Appendix A, Table 12.
174. *See infra* Appendix A, Questions 14 and 15.
175. *See infra* Appendix A, Question 14.

increase was 9.7%, with a range of 0% to 50%, as indicated by the 285 responding judges.[176]

4. Who Most Affects Sentencing: Defendants, Defense Attorneys, or Prosecutors?

Federal Rule of Criminal Procedure 32(i)(4)(A) states that the sentencing judge must provide the defense attorney, the defendant, and the prosecutor an opportunity to speak at sentencing.[177] While all three actors play an important role in shaping the ultimate sentence, the judges indicated that defendants' allocutions are least influential, but not significantly so, especially compared with prosecutors' statements at sentencing.

The survey asked the judges to compare the effectiveness of defense attorneys' sentencing arguments to that of defendants' allocutions.[178] A total of 328 judges (64.2%) rarely find the defendant's allocution more effective than the defense lawyer's argument, including 19 judges (3.7%) who responded that a defendant's allocution is *never* more effective than the defense counsel's sentencing arguments.[179] On the other hand, 96 judges (18.8%) frequently find that the defendant's allocution is more effective than the defense lawyer's sentencing argument, with only 1 judge (0.2%) *always* finding the defendant's allocution more effective.[180]

The survey also asked, "In those cases in which all three [actors] address you [at sentencing], who generally most influences your sentencing decision?"[181] The survey instructed the judges to rank the prosecutor, defense lawyer, and defendant from most to least influential.[182] These rankings are displayed in Table D.

176. *See infra* Appendix A, Question 15.
177. FED. R. CRIM. P. 32(i)(4)(A).
178. *See infra* Appendix A, Question 8.
179. *See infra* Appendix A, Table 8.
180. *See infra* Appendix A, Table 8.
181. *See infra* Appendix A, Question 3.
182. *See infra* Appendix A, Question 3 and Table 3b.

Table D. Speaker Most Influential to Judges' Sentencing Decision (Raw Data)[183]

Speaker	*First Rank (x3)*	*Second Rank (x2)*	*Third Rank (x1)*	*Total Rank*
Defense lawyer	221	151	74	1039
Prosecutor	103	187	147	830
Defendant	137	96	211	814

Based on total point value, the judges ranked defense lawyers as most effective, prosecutors second, and defendants last.[184] However, when the first rank order is isolated, the defendant's allocution significantly outranks the prosecutor's argument in terms of influencing the judge's sentencing decision.[185] While 137 judges (29.7%) indicated the defendant was most effective and 103 (22.3%) ranked the prosecutor as the most effective, an overwhelming number of judges (47.9% or 221) indicated that defense lawyers are the most effective.[186]

IV. DISCUSSION

A. Analysis and Recommendations

1. No Political Difference

The most striking finding of the survey is the lack of significant differences between the responses of judges appointed by Republican presidents and those appointed by Democratic presidents.[187] Correlations between appointees' political affiliation and responses to various questions revealed only a few minor differences between the two groups of judges.[188] The most notable of these small differences is that the percentage of Republican-appointed judges who would prefer to have discretion to decide whether to allow defendants to allocute (7.1 % or 20 judges) is more than

183. *See infra* Appendix A, Table 3b.

184. *See infra* Appendix A, Table 3a. When analyzing a rank-order question, each of the ranks selected is assigned a point value based on the number of ranks available and the order in which an item is selected. For this question, selecting an item first resulted in three points being applied to that item, selecting an item second resulted in two points applied to that item, and the third item selected was assigned one point.

185. *See infra* Appendix A, Table 3b.

186. *See infra* Appendix A, Table 3b.

187. *See supra* Part II.A (discussing our expectations for the survey); *infra* Appendix B, Tables 33, 34, 35, 37, 38, and 39.

188. *See infra* Appendix B, Tables 33, 34, 35, 37, 38, and 39.

twice that of judges appointed by Democrats (3.0% or 7).[189] Also, almost twice as many Republican-appointed judges would prefer to have the discretion to hold defendants' decisions not to allocute against them.[190] However, a few Democratic-appointed judges indicated that they would favor eliminating the Rule 32 right to allocute, while no Republican-appointed judges would favor doing so.[191] Given our expectations,[192] we were pleasantly surprised by the overall lack of differences in sentencing behavior and views.[193]

2. No Warning

Our expectation that most judges give defendants *Miranda*-type warnings before allocution was similarly unsupported.[194] In fact, providing such warnings was the rare exception, rather than the norm: 96.5% (497) of the judges *never* warn defendants that allocution can be used to increase a sentence, and only 0.6% (3) of the judges *always* provide this warning.[195] Before interrogation, suspects are given *Miranda* warnings to ensure they are on notice that anything they say can be used against them.[196] Although not currently required by Rule 32 or by case law,[197] arguably an analogous

189. *See infra* Appendix B, Table 34.

190. *See infra* Appendix B, Table 35 (5.3% or fifteen Republican-appointed judges versus 3.4% or eight Democratic-appointed judges).

191. *See infra* Appendix B, Table 33. Three (1.3%) Democratic-appointed judges indicated that they would favor eliminating the right, and two (0.4%) had no opinion. *Id*.

192. *See supra* Part II.A.

193. A recent empirical study on federal judicial behavior supports these findings:

> [T]here is evidence of ideological influence, with judges appointed by Republican Presidents generally imposing heavier sentences when other influences on sentencing are corrected for. The ideological influence is modest, however, consistent with the overall result . . . that ideology plays only a small role at the district court level, even though district judges have considerable discretionary authority.

LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 253 (2013).

194. *See supra* Part II.A.

195. *See supra* Part III.A.3. Interestingly, more than three times as many judges (2.1% or 11 judges) always explain to defendants that allocution may be used to *decrease* their sentence. *See infra* Appendix A, Tables 21 and 22.

196. *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

197. Whether the Fifth Amendment privilege against self-incrimination or due process requires judges to notify defendants of the potential effect their statements during allocution may have on their sentences is beyond the scope of this Article. Nevertheless, as a matter of good practice, we recommend that judges provide the following allocution warning:

> Mr./Ms._____, you now have the right to give your allocution, which is a fancy legal term meaning you can say anything you would like me to consider before I sentence you. You have a right to remain silent and not speak. If you decide to say nothing, I cannot and will not hold your silence against you in any way. If you would like to say something, you need to understand that I can consider what you say in deciding what sentence to impose. Your statement may increase, decrease, or have no impact on the sentence I am thinking

warning should be given at sentencing prior to allocution because, just as a suspect's statements during interrogation "can be used against him in a court of law,"[198] so too can a defendant's statements during allocution be used against him in sentencing or in future proceedings.[199]

Overwhelmingly, however, the responding judges do not inform defendants that their statements may be used against them. Of course, astute defense attorneys can easily cure this deficiency by *always* providing their clients with such a warning. Long before entering the courtroom for a sentencing hearing, attorneys should discuss the possible advantages and disadvantages of allocuting with the defendant. Together, they can decide whether it would be in the client's best interest to allocute. In child pornography cases involving exploitation of a minor or production, for example, defense attorneys may want to recommend that a client not allocute, as statements in these cases have a lesser chance of decreasing the sentence and a greater chance of increasing it compared to other crime types.[200] Defense attorneys may also want to advise their clients not to allocute if the defendant will receive a mandatory minimum sentence.[201] In addition, when defendants maintain their innocence or hope to appeal a conviction, defense attorneys should advise them against saying anything incriminating during an allocution, such as admitting guilt. This attorney-client discussion, however, should only be the beginning of the defense attorney's role in preparing a defendant to allocute.

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about giving you. Also, if I ask you any questions during or following your statement, you have the right not to answer any or all of them and I cannot and will not hold that against you either. If there is anything you would like to say now, I would be pleased to hear it!

198. *Miranda*, 384 U.S. at 479.

199. *See* Thomas, *supra* note 10, at 2663 & n.129, 2674 (explaining that a defendant's statements during a sentencing hearing will "accompany the defendant on appeal" and may be used during parole hearings as well). *Compare* McGautha v. Ohio, 402 U.S. 183, 217 (1971) (concluding that the Fifth Amendment protection against self-incrimination does not prevent the defendant from choosing between remaining silent and testifying at sentencing), *vacated in part on other grounds in* Crampton v. Ohio, 408 U.S 941 (1972), *and* Harvey v. Shillinger, 76 F.3d 1528, 1535 (10th Cir. 1996) (finding that protection from self-incrimination is not controverted when a defendant chooses to allocute in the hope of leniency, and that just as the defendant may choose to testify at trial, he may choose to speak at sentencing), *with* State v. Maestas, 63 P.3d 621, 629–30 (Utah 2002) (ruling that allocution is not admissible at a subsequent trial because admission would render allocution meaningless, as a defendant would likely not seek mercy and implicate himself if his statements could later be used against him). It is beyond the scope of this Article to analyze whether allocution statements may be used in a subsequent trial (either a retrial for the same crime or a trial for a different crime).

200. *See supra* text accompanying notes 166–167, 169.

201. *See* Bennett, *supra* note 11, at 27 ("When a defendant's allocution can only lengthen the sentence, I often send a not-so-subtle message to defense counsel and the defendant that silence is golden.").

3. The Goldilocks Problem: Making the Allocution "Just Right"

Just as Goldilocks liked things to be "just so"—porridge that is not too hot or too cold and a bed that is not too hard or too soft—sentencing judges also prefer allocution a certain way.

For defendants to allocute their way to a lower sentence, they must carefully balance several factors and tailor their allocutions to the predilections of the judges whom they face. First, defendants and defense attorneys should recognize the potential importance of allocution in judges' sentencing decisions. Second, defendants should prepare their allocutions in just the right way—prepare but do not over-prepare; think extensively about what to say but do not merely recite what they think the judge wants to hear. Third, allocuting defendants should mind their body language and present themselves as genuinely remorseful, without appearing overly apologetic, which can seem insincere.

Because allocution affords defendants a possible opportunity to mitigate their sentences,[202] defendants who wish to avail themselves of this opportunity must understand the proceeding's significance and carefully prepare. The primary information regarding allocution should come from the defendant's attorney.[203] Just as the defense attorney guides a defendant through the trial, the defense attorney, despite losing or pleading the case, should see representation through to the end and prepare the client for this final phase. The allocution should never appear to be a spontaneous afterthought. When it does, both the defense lawyer and the defendant seem like they did not take the allocution seriously, which reflects negatively on both. Rather, allocution should be a thoughtful and realistic plea to impress upon the judge that the defendant has seriously thought about his criminal behavior, its impact on others, and his motivation for change with concrete future plans.

Once defendants appreciate the significance of allocution, they should prepare for it, preferably under the watchful eyes of their defense attorneys. This preparation stage is where Goldilocks begins to rear her head, however. The judges proffered a wide range of advice on the matter.[204] Two judges, focusing on pragmatism, wrote, "[R]emind [defendants] of the

202. FED. R. CRIM. P. 32(i)(4)(A)(ii).

203. After advising defendants of their right to allocute at the sentencing hearing, one judge is frequently shocked by the look on defendants' faces when they turn to their defense attorneys with a puzzled expression, as if the defendants had never even heard of allocution. *See* Bennett, *supra* note 11, at 27.

204. *See supra* Part III.C.2 (summarizing judges' best advice for how defense attorneys should prepare defendants to allocute).

[Section] 3553(a) factors"[205] and "[P]repare defendant[s] with a full understand[ing] of [the] judge's approach and attitude regarding sentencing."[206] Another judge suggested a more personal approach, writing that "defense counsel [should] . . . help their client(s) think through what they personally want and need to say about their lives and the crimes at issue."[207] Finally, one judge mentioned, "Counsel should prepare a defendant for the possibility that the judge may ask follow-up questions based on the allocution."[208]

The responding judges agreed that defense counsel should participate actively in allocution preparation. Some even advocated rehearsing with the defendant. Many judges suggested, for example, that defense counsel "[d]o a practice session and offer coaching in response" and "listen to the allocution and help the defendant avoid saying things that can hurt him or her."[209] Many judges also suggested that defense counsel should encourage the defendant to write out a statement so the defense lawyer can preview the message.[210]

Defense attorneys should not be *too* involved, however—the allocution should be in the defendant's own words. One judge aptly harmonized the various "dos and don'ts" of allocution preparation:

> Defense counsel should advise about the kinds of things the judge might want to hear but defense counsel should never put words in the client's mouth because few are able to disguise the fact that [neither] the words nor the meaning comes from the defendant. Few defendants are evil beings and those who are not will do better speaking their mind rather than their lawyer's mind. Defense counsel should ask the client to practice his or her allocution. It is appropriate for defense counsel to advise "Don't say that" as opposed to defense counsel saying "You must say this."[211]

While preparing, defendants must think carefully about what to include—and what not to include—in their allocutions. There are things

205. Open-Ended Responses to Question 26 (on file with authors). These sentencing factors include, *inter alia*, "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1) (2006).

206. Open-Ended Responses to Question 26 (on file with authors).

207. *Id*.

208. *Id*. While defense attorneys should advise their clients to respond thoughtfully to anticipated follow-up questions, they should also explain that defendants can opt not to answer. *See supra* note 197.

209. Open-Ended Responses to Question 26 (on file with authors).

210. *Id*.

211. *Id*.

judges want to hear[212] and things they do not.[213] In their open-ended responses, some judges commented on the value of hearing defendants' plans for the future, with one judge noting, "Some suggestion that the defendant has a concrete game plan for turning his life around would be helpful."[214] Many judges commented on the value of hearing the defendant reflect on his or her victims.[215] But as one judge observed, defendants should "resist the powerful urge to whine and blame others."[216] Also, although defendants might think it wise to ask the court for *forgiveness*, at least for one judge, it is actually better to ask for *leniency* instead: It is not a "judge[']s role to grant forgiveness. Asking for leniency and providing reasons why [a] certain sentence is appropriate works much better."[217] As this semantic difference demonstrates, defendants must forever be on their toes, navigating the bear-filled woods of each sentencing judge's preferences—and defense counsel should be their guide.

As part of this role, defense counsel should encourage their clients to be concise while allocuting. Verbose allocutions more frequently detract from an allocution's effectiveness than any other factor.[218] Indeed, as one judge advised: "Don't let them read these long, prison-written letters. They tend to become maudlin, self-indulgent, and annoying . . . . Some defendants get carried away and start to whine that it wasn't their fault, etc. That hurts any good that the attorney may have done."[219] Overly brief allocutions, however, are less likely to have a negative impact.[220] Thus, defendants should prepare what they want to include in their allocutions beforehand to ensure they are not unnecessarily long.

After preparation, defendants must come to court and deliver the allocution in a style that connects with the presiding judge. Overwhelmingly, judges in the survey indicated that they want defendants to show genuine remorse and sincerity.[221] One judge bluntly recommended to defense counsel, "If your client cannot be sincere, and that is frequently

212. Three of the top five factors that impress judges the *most* are content-related: "realistic and concrete plans for the future," "acknowledgement of and sincere apology to the victims," and "understanding of the seriousness of the offense." *See supra* Part III.C.1.

213. The five aspects that impress the judges the *least* are also content-related: saying "how the defendant was the victim of circumstance[s]," "finding religion," "promising never to commit another crime," saying "'I can't change the past' or similar statements," and "thanking the prosecutor and agent for arresting and prosecuting the defendant." *See supra* Part III.C.1.

214. Open-Ended Responses to Question 26 (on file with authors).

215. *Id*.

216. *Id*.

217. *Id*.

218. *See supra* text accompanying note 140.

219. Open-Ended Responses to Question 26 (on file with authors).

220. *See supra* text accompanying note 141.

221. *See supra* text accompanying notes 107–109.

the case, tell them to shut up."[222] Although defendants should prepare by thinking about and writing out in advance what they want to say, they must still deliver the allocution from the heart.[223] Reading from a piece of paper and not making eye contact with the judge can hamper the effectiveness of an allocution;[224] a newspaper reporter covering a sentencing hearing witnessed this experience firsthand:

> "Don't worry about reading anything," [U.S. District Judge Ricardo Urbina] said, a scowl flashing across his hawklike face as the defendant dipped her head to recite a carefully prepared statement. "I want you to talk to me." The woman cringed; so did her attorney. They had not anticipated this. But Urbina knew that this would be his final chance to hear directly from the defendant before imposing sentence, and he wanted to gauge her remorse and get a sense of her as a person beyond the stick-figure rendered in court papers.[225]

Similarly, one responding judge wrote that defendants should "[p]roject genuine remorse and sincerity" and "not smirk or act like it's B.S."[226] Defendants should also be wary of spontaneous professions of religious conversion, as judges will generally not be persuaded that such proclamations are sincere.[227] One judge noted that defendants should

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222. Open-Ended Responses to Question 26 (on file with authors).

223. One can imagine a defense attorney preparing the defendant before delivering allocution much the same way as Beast's entourage prepares him to woo Belle in the animated Disney classic *Beauty and the Beast*:

> MRS. POTTS: Oh, you must help her to see past all that.
>
> BEAST: I don't know how.
>
> MRS. POTTS: Well, you can start by making yourself more presentable. Straighten up, try to act like a gentleman.
>
> (BEAST sits up, then straightens his face very formally.)
>
> LUMIERE: (adding in) Ah yes, when she comes in, give her a dashing, debonair smile. Come, come. Show me the smile.
>
> (BEAST bears his ragged fangs in a scary, and yet funny grin.)
>
> MRS. POTTS: But don't frighten the poor girl.
>
> LUMIERE: Impress her with your rapier wit.
>
> MRS. POTTS: But be gentle.
>
> LUMIERE: Shower her with compliments.
>
> MRS. POTTS: But be sincere.
>
> LUMIERE: And above all . . .
>
> BOTH: You must control your temper!

BEAUTY AND THE BEAST (Walt Disney Pictures 1992).

224. *See supra* text accompanying notes 133–134.

225. Wilber, *supra* note 4.

226. Open-Ended Responses to Question 26 (on file with authors).

227. *See supra* text accompanying note 120 (listing "finding religion" as one of the top five factors that *least* impress judges). Despite what defendants may think, judges are skeptical of these

"avoid invocation of the Higher Powers which usually comes off as situational at best and disingenuous at worst."[228]

If defendants recognize the importance of the proceeding, prepare well, and deliver the allocution in the right manner, they will maximize the opportunity to convince the judge to lower the sentence. But in order to accomplish an effective allocution, defendants must be guided by savvy defense attorneys who know the tastes and preferences of the judges before whom they appear. Without detailed information from counsel, a defendant can easily stray and give the sentencing judge a bowl of porridge that is too hot or a bed that is too soft.

4. Can Judges Really Tell When Remorse Is Genuine?

In addition to walking the fine line between over-preparation and under-preparation for allocution, defendants must also consider the "proper" amount of remorse to convey. Given the importance that judges assign to sincerity and genuine remorse,[229] judges presumably believe that they are adept at recognizing deceit and feigned remorse in their courtrooms.[230] But are they really? Numerous studies have indicated that humans, in general, are not as adept as they think they are at detecting sincerity[231] and, more specifically, that judges are able to identify deceit at a rate only slightly better than chance.[232] The inability to reliably perceive sincerity may call into question the integrity of the allocution process: if

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claims due to their prevalence immediately before sentencing. Defendants and defense lawyers must understand the difference between a defendant claiming to have found a higher being and actual evidence in a pre-sentence report or at sentencing of how the defendant's new or renewed interest in faith has actually changed his or her life for the better. For example, testimony at a sentencing hearing from a cleric who has extensively ministered to a defendant while in prison and who can provide specific evidence of positive changes in the defendant may carry much more weight than mere proclamations that the defendant suddenly "has found God."

The same is likely true for most of the other top ten statements judges found to be least impressive. Defendants generally do not appreciate how often federal district judges hear defendants claim, for example, that they want to be drug counselors when they are released from prison. *See supra* text accompanying note 118.

228. Open-Ended Responses to Question 27 (on file with authors).

229. *See, e.g.*, *id.* ("[Defendants should demonstrate] sincere contrition, if that is possible. As Samuel Goldwyn said, 'The key to good acting is sincerity, and if you can fake that, you have it knocked.'").

230. *See, e.g.*, Open-Ended Responses to Question 26 (on file with authors) ("[T]rue sincerity and remorse cannot be easily feigned.").

231. *See* Bella M. DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346, 354 (1997) (concluding that there is no correlation between accuracy and confidence and that confidence sometimes is "substantially greater than accuracy").

232. Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913, 914, 916 (1991) (finding that various California and Oregon judges enrolled in a fact-finding course were able to accurately detect deceit on average only 56.73% of the time).

judges cannot accurately detect genuine remorse in allocution, how can they properly weigh it in sentencing?

A possible indication that judges overestimate their sincerity-detection abilities is their response to whether the use of an interpreter alters the effectiveness of allocution. More than 80% of the responding judges indicated that using an interpreter *never* detracts from the effectiveness of an allocution.[233] In order for this to be true, the judges must presume that they are able to detect sincerity and genuine remorse, even over a language barrier. Otherwise, the use of an interpreter would certainly detract from the allocution by making the key determinations on sincerity and genuine remorse more difficult. Or, perhaps the judges meant that they never *consciously* take the use of an interpreter into account when gauging the effectiveness of an allocution. Even so, this question reveals that judges are likely unaware of their own limitations in making determinations on sincerity and genuine remorse.[234]

Psychologists have established that the ability to detect deceit can be enhanced through training.[235] To maintain the integrity of the sentencing process, and perhaps the judicial criminal process as a whole, judges should seek out training to bolster their abilities to evaluate sincerity and remorse.

5. *Additional Observations: Allocutions in Other Proceedings, Child Pornography Crimes, and Defense Attorneys' Sentencing Arguments*

In addition to the foregoing findings, three additional observations are worth noting. First, the judges permit allocution in resentencing proceedings slightly less often than in proceedings for revocation of

233. *See supra* text accompanying note 139.

234. *Cf.* Jeffery J. Rachlinsky et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009):

> In recently collected data, we asked a group of judges attending an educational conference to rate their ability to "avoid racial prejudice in decisionmaking" relative to other judges who were attending the same conference. Ninety-seven percent (thirty-five out of thirty-six) of the judges placed themselves in the top half and fifty percent (eighteen out of thirty-six) placed themselves in the top quartile, even though by definition, only fifty percent can be above the median, and only twenty-five percent can be in the top quartile. We worry that this result means that judges are overconfident about their ability to avoid the influence of race and hence fail to engage in corrective processes on all occasions.

Id. at 1225–26.

235. *See* Danielle Blanch-Hartigan, Susan A. Andrejewski & Krista M. Hill, *The Effectiveness of Training to Improve Person Perception Accuracy: A Meta-Analysis*, 34 BASIC & APPLIED SOC. PSYCHOL. 483, 492 (2012) (stating that training can increase "person perception accuracy," which includes the ability to judge the emotions and intentions of others).

probation or supervised release.[236] One possible explanation for this discrepancy is that the defendant already had an opportunity to allocute at the first sentencing hearing, so the resentencing judge may assume that a second allocution will be merely duplicative. For revocation of probation or supervised release proceedings, however, allocution provides defendants an opportunity to explain the actions that warranted their revocation proceedings. Because such proceedings deal with events that transpired after the defendant's initial sentencing, the defendant did not have the opportunity to address them in the initial allocution.

Second, judges seem to find possession of child pornography notably less egregious than production of child pornography, as there is a stark difference between an allocution's impact on sentencing for these two crimes. Specifically, child pornography possession received the highest percentage of judges who frequently lower the sentence for this type of crime.[237] While this was a relatively small percentage (10.2% or 46 judges), the next closest percentage (7.8% or 37) was for illegal reentry of an immigrant. Production of child pornography, on the other hand, received one of the lowest percentages (2.5% or 11) of judges who frequently lower the sentence.[238] While crimes involving child pornography as a whole strike the conscience as deplorable, the foregoing percentages seem to indicate a general inclination among judges—and perhaps society—that possession of child pornography stands at the lower end of a spectrum of child pornography crimes arranged in order of relative culpability. In contrast, production of such material is a much more reprehensible offense and thus

236. *See supra* Part III.A.2. It is beyond the scope of this Article to discuss whether there is a right to allocute in other proceedings, such as in resentencing, *see, e.g.*, United States v. Bryant, 643 F.3d 28, 32–33 (1st Cir. 2011) (holding that it is reversible error to deny a defendant the right of allocution at a resentencing hearing); United States v. Garcia-Robles, 640 F.3d 159, 165 (6th Cir. 2011) ("[T]he right to allocute [in resentencing], despite a defendant's previous opportunity to allocute, is essential."), or at sentencing following a violation of probation or supervised release, *see* United States v. Nanez, 419 F. App'x 880, 881–83 (10th Cir. 2011) (noting the ambiguity surrounding whether Federal Rule of Criminal Procedure 32.1 requires an opportunity to allocute in proceedings for revoking or modifying probation or supervised release, just as Rule 32 does in sentencing hearings). *Compare* United States v. Reyna, 358 F.3d 344, 351 (5th Cir. 2004) (en banc) (finding that allocution was not required where the sentencing court had informed the defendant after a previous violation of supervised release that any additional violation would result in an immediate twelve-month sentence), *with* United States v. Carruth, 528 F.3d 845, 846–47 (11th Cir. 2008) (requiring allocution for sentencing after revocation), *and* United States v. Pitre, 504 F.3d 657, 661–62 (7th Cir. 2007) (same). *See generally* United States v. Rausch, 638 F.3d 1296, 1300 (10th Cir. 2011) (recounting the history of Rule 32 and Rule 32.1).

237. *See infra* Appendix A, Table 12.

238. Comparing the percentages on the opposite end of this scale, child pornography production received the highest percentage (92.9% or 415 judges) of respondents who rarely lower the sentence, while possession of child pornography received the lowest percentage (77.1% or 345) of judges who rarely lower the sentence. *See infra* Appendix A, Table 12.

stands at the higher end of the culpability spectrum.[239] The judges' presumed view that possessors of child pornography are less culpable may be attributed to the perception that possession is a more passive crime.[240] Another reason that judges seem more inclined to reduce sentences for child pornography possession as opposed to production may be due to a general consensus that the recommended Guideline range for possession is too harsh, while the range for production is appropriately severe.[241]

Finally, although most judges were in agreement about maintaining the status quo regarding allocution,[242] judges found the defendant's allocution to be less influential than either the defense lawyer's or the prosecutor's arguments.[243] It seems odd that judges find genuine remorse and sincerity to be the most important factors in allocution, yet it is the defense lawyer's argument—not the allocution—that ultimately has a greater impact on sentencing.[244] This anomaly supports the argument that the main purpose of allocution is not actually to affect the length of the sentence,[245] but rather to fulfill other goals of allocution, such as providing the defendant an opportunity to participate in the criminal-justice system.[246] It also

239. *See infra* Appendix A, Table 12. The only two types of crimes for which judges were equally disinclined to reduce sentences are heroin trafficking and child-pornography distribution crimes. *See infra* Appendix A, Table 12.

240. *See, e.g.*, *Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n*, ¶ 3 (Nov. 2009) (statement of Robin J. Cauthron, Judge, W.D. Okla.) [hereinafter *Cauthron Testimony*], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091119-20/Cauthron.pdf ("It is too often the case that a defendant appears to be a social misfit looking at dirty pictures in the privacy of his own home without any real prospect of touching or otherwise acting out as to any person. As foul as child pornography is, I am unpersuaded by the suggestion that a direct link has been proven between viewing child porn and molesting children."). *See generally* Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847 (2008) (attempting to dispel the general presumption that child pornography is a victimless crime).

241. *See* Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545, 545–46 & n.3 (2011) ("[A] recent survey by the Sentencing Commission showed that around seventy percent of federal judges consider the sentencing guidelines too severe for child pornography possession and receipt cases." (citing U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at 5 (2010), *available at* http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf)); Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U.L. REV. 853, 860 (2011) ("Current sentencing practices for possessors of child pornography appear quite severe when viewed in isolation. And they begin to look completely disproportionate when viewed in relation to sentences for sexual abuse of children."); *see, e.g.*, *Cauthron Testimony*, *supra* note 240, ¶ 3 ("The Guideline sentences for child pornography cases are often too harsh where the defendant's crime is solely possession unaccompanied by an indication of 'acting out' behavior on the part of the defendant.").

242. *See supra* Part III.A.1.

243. *See supra* Part III.D.4.

244. *See supra* Part III.D.4.

245. *See infra* Part IV.A.6 (expounding this argument).

246. *See supra* Part III.A.4. Judges may find defense attorneys' arguments most influential because defense attorneys tailor their arguments to the factors outlined in 18 U.S.C. § 3553(a) (2006),

illuminates the view that there is substantial future room for improved allocutions having a significantly greater effect on judges' sentencing reductions.

6. What's the Point?

Despite the origin of allocution as a means by which convicted defendants could influence sentencing,[247] many federal district judges view allocution as serving a broader function. More than 70% (369) of the judges indicated that allocution was only "somewhat important," "not very important," or "not at all important" in reaching a sentencing decision,[248] while more than 85% (442) think allocution serves other important purposes.[249] For example, more than 40% (166) of the judges noted that allocution serves the important function of affording defendants an opportunity to participate in the proceeding.[250] Because allocution is often the only time a defendant will directly speak to the sentencing judge,[251] judges overwhelmingly support defendants having this opportunity to participate.[252] Moreover, fundamental notions of fairness seem to require it.

These broader purposes may put defendants in a difficult position, however. If, for example, defendants felt "railroaded" during the process, at the allocution stage they must choose between expressing their feelings about the process—which likely would ensure no sentence reduction—and trying to convince the judge that they are genuinely remorseful and thus worthy of a reduced sentence. Assuming that defendants are more interested in reductions in their sentences than in feeling like they are a part of the process, defendants and their attorneys would be well-advised to focus on creating an effective allocution.[253]

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but empirical proof of this correlation is beyond the scope of this survey. Because judges seem to value defense attorneys' sentencing arguments, defense attorneys should make the most of this additional opportunity to serve their convicted clients.

247. *See supra* text accompanying note 21.

248. *See infra* Appendix A, Table 28.

249. *See infra* Appendix A, Table 23; *see also supra* Part III.A.4 (listing other important non-sentencing purposes of allocution).

250. *See supra* Part III.A.4.

251. *See supra* note 91 (ascribing this to the growing trend of allowing magistrate judges to preside over guilty pleas).

252. *See supra* text accompanying notes 64–65 (noting that 99.0% (513) of judges oppose eliminating a defendant's right to allocute).

253. Although Jerry Sandusky proclaimed that "[t]here is so much that I would want to say but I have been advised not to say [it]," he made certain assertions in his allocution that likely did not help to lower his sentence. Sandusky Sentencing Transcript, *supra* note 2, at 33. In response to Sandusky's allocution, the prosecutor noted, "My task has become somewhat more significant given that the defendant . . . defamed his victims once again, victimized them yet again, calling them liars and acknowledging that he is the victim of a conspiracy against him. . . . His statement is an insult to the true victims—his victims. It is an insult to the Court and to the jury. It is an insult to common sense and

B. Limitations and Future Survey Recommendations

This is the first survey of federal judges that focuses on allocution. While it yields interesting and important findings, future studies could further increase our understanding of this rarely studied stage of the criminal-justice process. If this survey were to be repeated, several modifications could increase the breadth and accuracy of the results. For example, modifying the question regarding prior positions held would likely yield more valuable insights. In the current survey, judges were asked to select all previously held positions. The number of judges who had held each position was then correlated with the responses to other questions. Because of overlapping responses and the small number of judges who selected certain positions, however, we were unable to obtain any significant findings from these correlations.[254] Instead, it may be useful to ask judges which position was their most recent prior to becoming a federal district judge, as well as which position they held the longest. If a correlation exists between a previously held position and a specific opinion on allocution, it is more likely a result of the judge's greater connection with the position (e.g., because it was the judge's longest held position) than simply from having held a position, however briefly, at some point in a long career.

Along the same lines, the survey inquired about the respondent's status as an active or senior judge. It also inquired about the number of defendants the respondent had sentenced. But it did not ask how many of those sentences the judge had imposed while on active versus senior status. Perhaps such a breakdown would yield interesting and more nuanced results. While all of our correlations compared only two variables at a time—e.g., the affiliation of the appointing president with the frequency with which judges believe the defendant is prepared to allocute—we could then have correlated with a third variable, for example, the (immediately) previous position. Of course, there are many other possible triple-correlations.

The results of this survey derive from the judges' best estimations of their experiences with allocution—a methodology that is inherently subject to some margin of error. Judges' conscious perceptions of allocution may differ from allocution's actual impact on sentencing. In addressing the survey questions, the judges may have had difficulty precisely quantifying these effects, especially considering the significant length of time many of

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to human decency but that is to be expected. This defendant, this convicted pedophile, this violator of children has behaved for years in a manner that is an insult to decency." *Id.* at 10 (statement of Prosecutor Joseph E. McGettigan).

254. *See, e.g.*, *infra* Appendix A, Table 32; Appendix B, Table 36.

the respondents have sat on the bench and the large number of defendants they have sentenced. Accordingly, a future study that analyzes allocution in a more objective manner may be a useful counterpart to the instant study. Rather than asking judges to estimate the impact of allocution on sentencing, for example, a study observing these effects firsthand might produce more accurate results. A sample of federal district judges could be selected to track their sentencing practices. Each judge could note the anticipated sentence before allocution, the actual sentence imposed, and an explanation of any deviation between these. If repeated for every allocution over a certain period of time, more objective statistics regarding how often allocution raises or lowers a sentence could be obtained.

To gain a more complete understanding of allocution, future studies should also explore defendants' views on the allocution process. Scholars have theorized about the many important purposes allocution serves, even if its effect on sentencing is minimal.[255] But do defendants actually feel this way? If defendants know beforehand that allocution has only a small chance of lowering the sentence, would they still think having the chance to allocute is important? And if so, why? Incorporating defendants' views—as well as the views of defense attorneys and prosecutors—would complement the judges' perspectives discussed in the current survey. It would also be valuable to explore both the effect of allocution on crime victims and the role of victim impact statements[256] on judges' sentencing.

Scholars in future studies may also want to explore allocution in state courts, as this survey was limited to federal district judges. Because the vast majority of criminal prosecutions take place in state court,[257] analyzing state allocutions would provide a larger data pool to review. If a study analyzed each state's information separately, state-specific or regional patterns of allocution practices may emerge. Also, a comparison of various state criminal procedure rules on allocution with federal Rule 32 may yield interesting results.

Finally, anyone endeavoring to further quantify the effects of allocution should keep in mind an important caveat: allocution appears to be very case-specific. Predicting an allocution's efficacy may not be a simple matter of calculating statistical correlations of how the allocution is performed (e.g., its length), the type of crime at issue, or the characteristics

255. *See generally* Thomas, *supra* note 10, at 265–67 (summarizing the theories of mitigation, retribution, and humanization).

256. *See* FED. R. CRIM. P. 32(i)(4)(b) (requiring that judges provide victims with an opportunity to give a statement at the defendant's sentencing hearing).

257. *See* SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 9, Table 1.1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (indicating that 94% of felony convictions occur in state courts compared with only 6% in federal court).

of the sentencing judge (e.g., number of defendants sentenced). Instead, judges genuinely seem to approach each sentencing on a purely individualized basis. If some aspect of a defendant's allocution resonates with the particular judge, the defendant may have a chance at receiving a reduced sentence.

CONCLUSION

Although allocution has "been around for centuries, 'allocution practice' is the most underdeveloped and least sharpened arrow in the defense lawyers' quiver."[258] By compiling and distilling the views of more than 500 federal district judges and summarizing their advice to defendants and defense attorneys, this Article provides significant insights to help fill the gap between the reality of modern-day allocution practice and its theoretical importance in sentencing.

Despite differences among judges on many of our questions, judges overwhelmingly favor maintaining allocution as it stands today. Rather than view allocution purely as a tool for affecting sentencing, the respondents confirmed scholars' long-held beliefs that allocution serves other important purposes, such as allowing defendants to participate in the criminal-justice system, humanizing defendants, and enabling them to take responsibility for their crimes.

When defendants aim to lower their sentences through effective allocution, however, first and foremost they must convince the judge that they are genuinely remorseful and sincere. Defendants should also take responsibility for their actions, instead of making excuses or blaming others; apologize to the victims and the victims' families; and make a credible showing of future change. Defense attorneys should not only ensure that allocution is in their clients' best interest, but also warn clients that allocution may be used to increase their sentences or that it could compromise any hope of a successful appeal. (Judges, too, should consider warning defendants of the potentially adverse consequences of allocuting.) If allocution is in the defendant's best interest, the defense attorney should seize this opportunity by ensuring that the defendant is well-prepared. As part of this preparation, defense attorneys should screen their client's message, confirming that it is both on point and not overly lengthy. Finally, just as judges should tailor their sentences to the individual defendant, defense counsel should, to the extent possible, help the defendant tailor the allocution to the individual judge.

258. Bennett, *supra* note 11, at 27.

While this Article provides invaluable advice for defendants and defense counsel on how to craft an effective allocution, the comments of one respondent neatly summarize our conclusion: "There are no magic words. There is no formulaic correct allocution. Every case is different and the suggestion that there is some type of 'best' way takes away from the individualistic nature of sentencing."[259]

APPENDIX A: SURVEY QUESTIONS AND RESULTS

Federal District Court Judge Allocution Survey

Questions and Responses

This questionnaire is designed to gather information about judges' experiences with defendants' allocutions. Your answers will be submitted when you click the "Submit Survey" button at the end of the questionnaire.

If you have any technical problems with the questionnaire, please contact [omitted].

We very much appreciate your help.

Response Rate: The survey was sent to 953 Federal District Court Judges, of which 609 were active district judges and 344 were senior judges. We received 519 completed surveys, for a response rate of 54.5%. Not all judges answered all of the questions; the total responses for each question are listed below.

259. Open-Ended Responses to Question 27 (on file with authors). Many judges had similar views: "[D]epends on circumstances"; "It depends on the situation"; "[d]epends on the case"; "It will depend on the individual circumstances"; "Too case specific to make a meaningful response to this." *Id*.

Question 1. As a federal district court judge, approximately how many defendants have you sentenced?

Table 1. Number of Defendants Sentenced by Responding Judges

Defendants Sentenced	*Judges (Number)*	*Judges (Percent)*
More than 3000	73	14.3%
2000–3000	81	15.8%
1000–2000	121	23.6%
500–1000	92	18.0%
250–500	62	12.1%
100–250	34	6.6%
50–100	20	3.9%
0–50	29	5.7%

(N = 512)

Question 2. What percentage of defendants appearing before you exercise the right to allocute?

Mean percentage: 84.9%, with a range of 0 to 100%.
(N = 504)

Question 3. Federal Rule of Criminal Procedure 32(i)(4)(A) provides that the court must grant the defense lawyer, the defendant, and the prosecutor the opportunity to speak at sentencing. In those cases in which all three address you, who generally most influences your sentencing decision? Please rank in order, with (1) as the most influential.

Table 3a. Speaker Most Influential to Judges' Sentencing Decision

Speaker	*Rank Order*	*Total Point Value*
Defense lawyer	1	1039
Prosecutor	2	830
Defendant	3	814

Table 3b. Speaker Most Influential to Judges' Sentencing Decision (Raw Data)

Speaker	*First Ranking (x3)*	*Second Ranking (x2)*	*Third Ranking (x1)*	*Total Point Value*
Defense lawyer	221	151	74	1039
Prosecutor	103	187	147	830
Defendant	137	96	211	814

Question 4. Would you favor eliminating the defendant's right to allocute, granted by Federal Rule of Criminal Procedure 32(i)(4)(A)(ii)?

Table 4. Number of Judges Who Favor Eliminating the Defendant's Right to Allocute Granted by Federal Rule of Criminal Procedure 32(i)(4)(A)(ii)

Response Options	*Judges (Number)*	*Judges (Percent)*
Yes	3	0.6%
No	513	99%
No Opinion	2	0.4%

(N = 518)

Question 5. As an alternative to Federal Rule of Criminal Procedure 32(i)(4)(A)(ii), would you favor having the discretion to decide whether to allow a defendant to allocute?

Table 5. Number of Judges Who Favor Having the Discretion to Decide Whether to Allow a Defendant to Allocute

Response Options	*Judges (Number)*	*Judges (Percent)*
Yes	27	5.2%
No	474	91.7%
No Opinion	17	3.3%

(N = 518)

Question 6. If the law permitted, would you favor having the discretion to hold it against the defendant when the defendant does not allocute?

Table 6. Number of Judges Who Favor Having the Discretion to Hold it Against the Defendant When the Defendant Does Not Allocute

Response Options	*Judges (Number)*	*Judges (Percent)*
Yes	23	4.4%
No	478	92.1%
No Opinion	18	3.5%

(N = 519)

Question 7. Is it your practice to permit allocution in the following situations?

Table 7. Situations in Which Judges Permit Allocution

	Always	*Sometimes*	*Never*
Resentencing (N = 510)	458 (89.8%)	49 (9.6%)	3 (0.6%)
Revocation of Probation (N = 511)	493 (96.5%)	16 (3.1%)	2 (0.4%)
Revocation of Supervised Release (N = 514)	495 (96.3%)	18 (3.5%)	1 (0.2%)

Question 8. How frequently do you find the defendant's allocution more effective than the defense lawyer's argument?

Table 8. Frequency with Which Defendant's Allocution Is More Effective than the Defense Lawyer's Argument

Never 1	*2*	*3*	*4*	*5*	*6*	*Always 7*
19 (3.7%)	192 (37.6%)	117 (22.9%)	87 (17.0%)	73 (14.3%)	22 (4.3%)	1 (0.2%)

(N = 511; Mean = 3.14)

Question 9. How frequently do you believe that the defendant is prepared to allocute?

Table 9. Frequency with Which Judges Believe the Defendant Is Prepared to Allocute

Never *1*	*2*	*3*	*4*	*5*	*6*	*Always* *7*
0 (0%)	28 (5.4%)	77 (15.0%)	109 (21.2%)	140 (27.2%)	139 (27.0%)	22 (4.3%)

(N = 515; Mean 4.68)

Question 10. How frequently do you believe that the defense lawyer should have done more to prepare the defendant to allocute?

Table 10. Frequency with Which Judges Believe the Defense Lawyer Should Have Done More to Prepare the Defendant to Allocute

Never *1*	*2*	*3*	*4*	*5*	*6*	*Always* *7*
20 (3.9%)	115 (22.4%)	91 (17.7%)	88 (17.2%)	94 (18.3%)	96 (18.7%)	9 (1.8%)

(N = 513; Mean = 3.87)

Question 11. How frequently does the defendant's allocution result in a sentence that is different than if the defendant had not allocuted, with the following outcomes:

Table 11. Frequency with Which Defendant's Allocution Results in a Different Sentence

	Never 1	*2*	*3*	*4*	*5*	*6*	*Always 7*
A lower sentence within the Guideline range (N = 505; Mean = 3.12)	23 (4.6%)	167 (33.1%)	123 (24.4%)	125 (24.8%)	54 (10.7%)	13 (2.6%)	0 (0.0%)
A lower sentence below the Guideline range (N = 498; Mean = 2.62)	48 (9.6%)	241 (48.4%)	99 (19.9%)	75 (15.1%)	30 (6.0%)	5 (1.0%)	0 (0.0%)
A higher sentence within the Guideline range (N = 491; Mean = 2.01)	153 (31.2%)	240 (48.9%)	56 (11.4%)	28 (5.7%)	12 (2.4%)	2 (0.4%)	0 (0.0%)
A higher sentence above the Guideline range (N = 497; Mean = 1.47)	313 (63.0%)	155 (31.2%)	14 (2.8%)	11 (2.2%)	4 (0.8%)	0 (0.0%)	0 (0.0%)

Question 12. How frequently does the defendant's allocution result in a *lower* sentence in the following types of cases?

Table 12. Frequency with Which Defendant's Allocution Results in a Lower Sentence Based on Crime Type

Crime Type	*Never 1*	*2*	*3*	*4*	*5*	*6*	*Always 7*
Immigration—Illegal Reentry (N = 475; Mean = 2.52)	82 (17.3%)	213 (44.8%)	72 (15.2%)	71 (14.9%)	34 (7.2%)	3 (0.6%)	0 (0.0%)
Immigration—Fraudulent Documents (N = 464; Mean = 2.20)	109 (23.5%)	232 (50.0%)	63 (13.6%)	44 (9.5%)	14 (3.0%)	2 (0.4%)	0 (0.0%)
Immigration—Other (N = 455; Mean = 2.30)	102 (22.4%)	210 (46.2%)	69 (75.2%)	53 (11.6%)	20 (4.4%)	1 (0.2%)	0 (0.0%)
Drug Trafficking—Powder Cocaine (N = 459; Mean = 2.46)	64 (13.9%)	217 (47.3%)	99 (21.6%)	63 (13.7%)	16 (3.5%)	0 (0.0%)	0 (0.0%)
Drug Trafficking—Crack Cocaine (N = 464; Mean = 2.51)	66 (14.2%)	211 (45.5%)	97 (20.9%)	66 (14.2%)	24 (5.2%)	0 (0.0%)	0 (0.0%)
Drug Trafficking—Heroin (N = 461; Mean = 2.27)	95 (20.6%)	218 (47.3%)	86 (18.7%)	53 (11.5%)	9 (2.0%)	0 (0.0%)	0 (0.0%)
Drug Trafficking—Marijuana (N = 462; Mean = 2.67)	48 (10.4%)	200 (43.3%)	103 (22.3%)	81 (17.5%)	28 (6.1%)	2 (0.4%)	0 (0.0%)
Drug Trafficking—Methamphetamine (N = 468; Mean = 2.40)	77 (16.5%)	221 (47.2%)	94 (20.1%)	60 (12.8%)	14 (3.0%)	2 (0.4%)	0 (0.0%)

Crime Type	*Never 1*	*2*	*3*	*4*	*5*	*6*	*Always 7*
Firearms—Felon in Possession (N = 468; Mean = 2.42)	77 (16.5%)	220 (47.0%)	92 (19.7%)	56 (12.0%)	23 (4.9%)	0 (0.0%)	0 (0.0%)
Firearms—Other Prohibited Person (N = 455; Mean = 2.36)	83 (18.3%)	217 (47.7%)	77 (16.9%)	64 (14.1%)	13 (2.9%)	1 (0.2%)	0 (0.0%)
Firearms—Other (N = 436; Mean = 2.33)	81 (18.6%)	212 (48.6%)	73 (16.7%)	59 (13.5%)	11 (2.5%)	0 (0.0%)	0 (0.0%)
Child Pornography—Exploitation of a Minor (N = 454; Mean = 1.89)	186 (41.0%)	193 (42.5%)	34 (7.5%)	26 (5.7%)	11 (2.4%)	4 (0.9%)	0 (0.0%)
Child Pornography—Production (N = 447; Mean = 1.75)	215 (48.1%)	176 (39.4%)	24 (5.4%)	21 (4.7%)	8 (1.8%)	3 (0.7%)	0 (0.0%)
Child Pornography—Distribution (N = 449; Mean = 1.98)	151 (33.6%)	210 (46.8%)	47 (10.5%)	30 (6.7%)	8 (1.8%)	3 (0.7%)	0 (0.0%)
Child Pornography—Receipt (N = 448; Mean = 2.54)	67 (15.0%)	196 (43.8%)	99 (22.1%)	55 (12.3%)	25 (5.6%)	6 (1.6%)	0 (0.0%)
Child Pornography—Possession (N = 448; Mean = 2.69)	54 (12.1%)	189 (42.2%)	102 (22.8%)	57 (12.7%)	36 (8.0%)	10 (2.2%)	0 (0.0%)

Crime Type	*Never 1*	*2*	*3*	*4*	*5*	*6*	*Always 7*
Fraud (N = 448; Mean = 2.60)	38 (8.5%)	218 (48.7%)	102 (22.8%)	68 (15.2%)	20 (4.5%)	2 (0.4%)	0 (0.0%)
Non-Fraud White Collar (N = 461; Mean = 2.73)	33 (7.2%)	201 (43.6%)	116 (25.2%)	83 (18.0%)	25 (5.4%)	3 (0.7%)	0 (0.0%)

Question 13. How frequently does the defendant's allocution result in a *higher* sentence in the following types of cases?

Table 13. Frequency with Which Defendant's Allocution Results in a Higher Sentence Based on Crime Type

Crime Type	*Never 1*	*2*	*3*	*4*	*5*	*6*	*Always 7*
Immigration—Illegal Reentry (N = 469; Mean = 1.47)	302 (64.4%)	134 (28.6%)	18 (3.8%)	11 (2.3%)	4 (0.9%)	0 (0.0%)	0 (0.0%)
Immigration—Fraudulent Documents (N = 464; Mean = 1.47)	297 (64.0%)	135 (29.1%)	17 (3.7%)	12 (2.6%)	3 (0.6%)	0 (0.0%)	0 (0.0%)
Immigration—Other (N = 457; Mean = 1.48)	294 (64.3%)	126 (27.6%)	19 (4.2%)	15 (3.3%)	3 (0.7%)	0 (0.0%)	0 (0.0%)
Drug Trafficking—Powder Cocaine (N = 462; Mean = 1.64)	250 (54.1%)	157 (34.0%)	31 (6.7%)	21 (4.5%)	3 (0.6%)	0 (0.0%)	0 (0.0%)
Drug Trafficking—Crack Cocaine (N = 463; Mean = 1.66)	246 (53.1%)	161 (34.8%)	29 (6.3%)	22 (4.8%)	5 (1.1%)	0 (0.0%)	0 (0.0%)

Crime Type	*Never 1*	*2*	*3*	*4*	*5*	*6*	*Always 7*
Drug Trafficking—Heroin (N = 462; Mean = 1.66)	250 (54.1%)	153 (33.1%)	32 (6.9%)	21 (4.5%)	6 (1.3%)	0 (0.0%)	0 (0.0%)
Drug Trafficking—Marijuana (N = 461; Mean = 1.61)	259 (56.2%)	151 (32.8%)	29 (6.3%)	18 (3.9%)	4 (0.9%)	0 (0.0%)	0 (0.0%)
Drug Trafficking—Methamphetamine (N = 466; Mean = 1.69)	248 53.1%)	155 (33.2%)	31 (6.6%)	25 (5.4%)	6 (1.3%)	1 (0.2%)	0 (0.0%)
Firearms—Felon in Possession (N = 470; Mean = 1.71)	240 (51.1%)	166 (35.3%)	31 (6.6%)	26 (5.5%)	7 (1.5%)	0 (0.0%)	0 (0.0%)
Firearms—Other Prohibited Person (N = 463; Mean = 1.66)	246 (53.1%)	164 (35.4%)	25 (5.4%)	22 (4.8%)	6 (1.3%)	0 (0.0%)	0 (0.0%)
Firearms—Other (N = 454; Mean = 1.67)	239 (52.6%)	162 (35.7%)	25 (5.5%)	22 (4.8%)	6 (1.3%)	0 (0.0%)	0 (0.0%)
Child Pornography—Exploitation of a Minor (N = 457; Mean = 1.91)	216 (47.3%)	147 (32.2%)	43 (9.4%)	27 (5.9%)	16 (3.5%)	8 (1.8%)	0 (0.0%)
Child Pornography—Production (N = 454; Mean = 1.90)	215 (47.4%)	150 (33%)	34 (7.5%)	34 (7.5%)	15 (3.3%)	6 (1.3%)	0 (0.0%)
Child Pornography—Distribution (N = 458; Mean = 1.84)	219 (47.8%)	158 (34.5%)	35 (7.6%)	31 (6.8%)	10 (2.2%)	5 (1.1%)	0 (0.0%)

Crime Type	*Never 1*	*2*	*3*	*4*	*5*	*6*	*Always 7*
Child Pornography—Receipt (N = 458; Mean = 1.74)	232 (50.6%)	158 (34.5%)	34 (7.4%)	25 (5.5%)	5 (1.1%)	4 (0.9%)	0 (0.0%)
Child Pornography—Possession (N = 462; Mean = 1.72)	235 (50.9%)	163 (35.3%)	34 (7.4%)	22 (4.8%)	5 (1.1%)	3 (0.6%)	0 (0.0%)
Fraud (N = 458; Mean = 1.98)	182 (39.7%)	172 (37.6%)	54 (11.8%)	33 (7.2%)	16 (3.5%)	1 (0.2%)	0 (0.0%)
Non-Fraud White Collar (N = 449; Mean = 1.94)	188 (41.9%)	168 (37.4%)	47 (10.5%)	28 (6.2%)	16 (3.6%)	2 (0.4%)	0 (0.0%)

Question 14. In those cases in which you have *reduced* the defendant's sentence based on the defendant's allocution, what is the average percentage of the reduction?

Mean Percentage: 14.7% with a range of 4% to 50%.
(N = 350)

Question 15. In those cases in which you have *increased* the defendant's sentence based on the defendant's allocution, what is the average percentage of the increase?

Mean Percentage: 9.7% with a range of 0% to 50%.
(N = 285)

Question 16. What impresses you *most* during an allocution? Please rank your top five, in order, beginning with (1) as the most impressive.

Table 16a. Factors That Impress Judges Most During Allocution

Rank Item	*Overall Rank Order*	*Total Point Value*
Genuine remorse	1	1564
Sincerity	2	918
Realistic and concrete plans for the future	3	907
Acknowledgment of and sincere apology to the victims	4	865
Understanding of the seriousness of the offense	5	660
"I accept full responsibility for my actions" or similar statements	6	581
Acknowledgment of and sincere apology to the defendant's family	7	338
Explanation of the defendant's life leading up to the offense	8	293
Participation in drug treatment	9	230
Request for a specific vocational or educational program in BOP	10	155
Thanking the prosecutor and agent for arresting and prosecuting the defendant	11	124
Other (please specify in space below)	12	108
Request for the Residential Drug Abuse Program (RDAP)	13	104
Promising to become a productive citizen	14	83
Explanation of how the defendant was the victim of circumstance	15	66
Desire to speak to others about the evils of drugs	16	44
Finding religion	17	35
Promising never to commit another crime	18	27
"I can't change the past" or similar statements	19	25
Desire to become a drug counselor	20	6

Table 16b. Factors That Most Impress Judges During Allocution (Raw Frequencies)

Rank Item	*First Rank (x5)*	*Second Rank (x4)*	*Third Rank (x3)*	*Fourth Rank (x2)*	*Fifth Rank (x1)*	*Total Score*
Genuine remorse	178	94	65	43	17	1564
Sincerity	74	77	39	35	53	918
Realistic and concrete plans for the future	52	55	84	58	59	907
Acknowledgment of and sincere apology to the victims	49	77	58	55	28	865
Understanding of the seriousness of the offense	26	44	62	55	58	660
"I accept full responsibility for my actions" or similar statements	39	45	39	30	29	581
Acknowledgment of and sincere apology to the defendant's family	15	21	31	27	32	338
Explanation of the defendant's life leading up to the offense	17	16	17	32	29	293
Participation in drug treatment	7	15	19	25	28	230
Request for a specific vocational or educational program in BOP	4	6	15	19	28	155

Rank Item	*First Rank (x5)*	*Second Rank (x4)*	*Third Rank (x3)*	*Fourth Rank (x2)*	*Fifth Rank (x1)*	*Total Score*
Thanking the prosecutor and agent for arresting and prosecuting the defendant	6	7	11	11	11	124
Other (please specify in space below)	11	3	6	7	9	108
Request for the Residential Drug Abuse Program (RDAP)	2	7	9	19	7	104
Promising to become a productive citizen	1	4	7	11	19	83
Explanation of how the defendant was the victim of circumstance	5	4	2	7	5	66
Desire to speak to others about the evils of drugs	1	2	5	5	6	44
Finding religion	1	0	2	6	12	35
Promising never to commit another crime	0	2	2	2	9	27
"I can't change the past" or similar statements	0	1	3	4	4	25
Desire to become a drug counselor	1	0	0	0	1	6

Question 17. If you selected "other" for any of your top five in the previous question, please specify.

Table 17. Additional Factors That Impress Judges Most During Allocution (Synthesized from Open-Ended Responses)

Synthesized Responses	*Frequency*	*Percentage*
Defendant shows specific actions toward rehabilitation	12	25.5%
Defendant demonstrates understanding of crime and his/her behavior	9	19.1%
Can't generalize; it depends on specifics of the case	9	19.1%
Other	17	36.2%

(N = 47)

Question 18. What impresses you *least* during an allocution? Please rank your top five, in order, beginning with (1) as the least impressive.

Table 18a. Factors That Impress Judges Least During Allocution

Rank Item	*Overall Rank Order*	*Total Point Value*
Explanation of how the defendant was the victim of circumstance	1	1153
Finding religion	2	1088
Promising never to commit another crime	3	974
"I can't change the past" or similar statements	4	702
Thanking the prosecutor and agent for arresting and prosecuting the defendant	5	581
Promising to become a productive citizen	6	398
Desire to become a drug counselor	7	331
Explanation of the defendant's life leading up to the offense	8	308
"I accept full responsibility for my actions" or similar statements	9	284
Desire to speak to others about the evils of drugs	10	250
Request for the Residential Drug Abuse Program (RDAP)	11	181
Request for a specific vocational or educational program in BOP	12	125
Other (please specify in space below)	13	110
Acknowledgment of and sincere apology to the defendant's family	14	52
Understanding of the seriousness of the offense	15	48
Participation in drug treatment	16	47
Sincerity	17	21
Acknowledgment of and sincere apology to the victims	18	14
Genuine remorse	19	11
Realistic and concrete plans for the future	20	11

Table 18b. Factors That Impress Judges Least During Allocution (Raw Frequencies)

Rank Item	*First Rank (x5)*	*Second Rank (x4)*	*Third Rank (x3)*	*Fourth Rank (x2)*	*Fifth Rank (x1)*	*Total Score*
Explanation of how the defendant was the victim of circumstance	120	66	60	36	37	1153
Finding religion	108	73	37	52	41	1088
Promising never to commit another crime	68	76	64	42	54	974
"I can't change the past" or similar statements	47	45	54	45	35	702
Thanking the prosecutor and agent for arresting and prosecuting the defendant	35	38	50	36	32	581
Promising to become a productive citizen	9	30	35	48	32	398
Desire to become a drug counselor	14	22	30	27	29	331
Explanation of the defendant's life leading up to the offense	11	26	20	34	21	308
"I accept full responsibility for my actions" or similar statements	20	16	18	18	30	284

Rank Item	*First Rank (x5)*	*Second Rank (x4)*	*Third Rank (x3)*	*Fourth Rank (x2)*	*Fifth Rank (x1)*	*Total Score*
Desire to speak to others about the evils of drugs	7	15	23	29	28	250
Request for the Residential Drug Abuse Program (RDAP)	8	9	20	13	19	181
Request for a specific vocational or educational program in BOP	4	12	7	13	10	125
Other (please specify in space below)	12	5	3	5	11	110
Acknowledgment of and sincere apology to the defendant's family	0	4	7	5	5	52
Understanding of the seriousness of the offense	0	6	3	5	5	48
Participation in drug treatment	1	4	3	4	9	47
Sincerity	2	2	0	1	1	21
Acknowledgment of and sincere apology to the victims	0	0	2	2	4	14
Genuine remorse	0	1	1	2	0	11
Realistic and concrete plans for the future	0	0	2	2	1	11

Question 19. If you selected "other" for any of your top five in the previous question, please specify.

Table 19. Additional Factors That Impress Judges Least During Allocution (Synthesized from Open-Ended Responses)

Synthesized Responses	*Judges (Number)*	*Judges (Percent)*
Defendant blames others	12	25.5%
Defendant apologizes to court or others	7	17.1%
Can't generalize; It depends on the specifics of the case	4	9.8%
Invoking or involving the defendant's family to plead for leniency	4	9.8%
Other	17	36.2%

(N = 41)

Question 20. When any of the following factors are present, how frequently do they detract from the effectiveness of an allocution?

Table 20. Frequency with Which Factors Detract from Effectiveness of Allocution

	Never 1	*2*	*3*	*4*	*5*	*6*	*Always 7*
Lack of formal education (N = 500; Mean = 1.79)	304 (60.8%)	95 (19.0%)	35 (7.0%)	43 (8.6%)	16 (3.2%)	6 (1.2%)	1 (0.2%)
Poor grammar (N = 497; Mean = 1.70)	312 (62.8%)	96 (19.3%)	39 (7.8%)	33 (6.6%)	12 (2.4%)	4 (0.8%)	1 (0.2%)
Reading the allocution (N = 498; Mean = 2.37)	190 (38.2%)	136 (27.3%)	61 (12.2%)	54 (10.8%)	29 (5.8%)	20 (4.0%)	8 (1.6%)
Lack of eye contact (N = 497; Mean = 2.84)	130 (26.2%)	122 (24.5%)	89 (17.9%)	70 (14.1%)	43 (8.7%)	26 (5.2%)	17 (3.4%)

	Never 1	*2*	*3*	*4*	*5*	*6*	*Always 7*
Too brief (N = 496; Mean = 2.46)	158 (31.9%)	137 (27.6%)	86 (17.3%)	68 (13.7%)	30 (6.0%)	13 (2.6%)	4 (0.8%)
Too long (N = 497; Mean = 3.27)	95 (19.1%)	105 (21.1%)	84 (16.9%)	84 (16.9%)	63 (12.7%)	44 (8.9%)	22 (4.4%)
Use of an interpreter (N = 489; Mean = 1.35)	397 (81.2%)	52 (10.6%)	13 (2.7%)	19 (3.9%)	6 (1.2%)	1 (0.2%)	1 (0.2%)
Apologizing to the defendant's own family before apologizing to the victims (N = 489; Mean = 2.20)	235 (48.1%)	108 (22.1%)	44 (9.0%)	57 (11.7%)	18 (3.7%)	16 (3.3%)	11 (2.2%)

Question 21. Before an allocution, how frequently do you advise the defendant that the allocution may be used to *lower* the defendant's sentence?

Table 21. Frequency with Which Judges Advise Defendants That Allocution May Be Used to *Lower* Their Sentences

Never 1	*2*	*3*	*4*	*5*	*6*	*Always 7*
481 (92.9%)	20 (3.9%)	1 (0.2%)	2 (0.4%)	1 (0.2%)	2 (0.4%)	11 (2.1%)

(N = 518)

Question 22. Before an allocution, how frequently do you advise the defendant that the allocution may be used to *raise* the defendant's sentence?

Table 22. Frequency with Which Judges Advise Defendants That Allocution May Be Used to *Raise* Their Sentences

Never *1*	*2*	*3*	*4*	*5*	*6*	*Always* *7*
497 (96.5%)	11 (2.1%)	0 (0%)	1 (0.2%)	1 (0.2%)	2 (0.4%)	3 (0.6%)

(N = 515)

Question 23. Even when the defendant's allocution does not affect your sentence, do you believe it serves other important purposes?

Table 23. Frequency with Which Judges Believe Allocution Serves Other Important Purposes

Yes	*No*	*No Opinion*
442 (85.7%)	22 (4.3%)	52 (10.1%)

(N = 516)

Question 24. If yes, please identify those purposes.[260]

Table 24. Other Important Purposes Served by Allocution (Synthesized from Open-Ended Responses)

Synthesized Responses	*Judges (Number)*	*Judges (Percent)*
Allows the defendant to participate in the process and have a chance to speak	166	40.8%
It is helpful to the victims and families	71	17.4%
Gives the court and others a better understanding of the defendant	58	14.3%
Provides a chance for defendant to reflect on crime	42	10.3%
Helps the defendant accept responsibility for actions	39	9.6%
Allows the defendant to apologize	38	9.3%
Conveys a sense of fairness	31	7.6%
Aids in rehabilitation	30	7.4%
Makes the defendant feel better	30	7.4%
Is part of due process	23	5.7%
Informs or validates sentence	19	4.7%
Other	27	6.6%

(N = 407)

260. The full text responses to this open-ended question are on file with authors.

Question 25. Are there any situations in which you recommend that a defendant *not* allocute?[261]

Table 25. Situations in Which Judges Recommend a Defendant Not Allocute (Synthesized from Open-Ended Reponses)

Synthesized Responses	*Judges (Number)*	*Judges (Percent)*
Defendant will deny guilt or not accept responsibility	52	28.6%
Defendant is not remorseful	23	12.6%
Defendant is planning to appeal and allocution could compromise their position on appeal	23	12.6%
Defendant will lie	20	11.0%
Allocution will be counterproductive or will further incriminate defendant	17	9.3%
Defendant will only express anger toward victims, the court, or others	12	6.7%
There are no situations in which I would not recommend allocution	9	4.9%
Defendant will cause harm to or threaten others	7	3.8%
"It is not my role to make this recommendation"	6	3.3%
In child sexual abuse or child pornography cases	6	3.3%
In cases where the defendant has received a mandatory minimum sentence	3	1.7%
Other	30	16.5%

(N = 182)

261. The full text responses to this open-ended question are on file with authors.

Question 26. What is your best advice for defense lawyers preparing their clients to allocute?[262]

Table 26. Judges' Best Advice for Defense Lawyers Preparing Clients to Allocute (Synthesized from Open-Ended Responses)

Synthesized Responses	*Judges (Number)*	*Judges (Percent)*
Be sincere	128	30.1%
Be prepared/Prepare and think carefully about what to say	78	18.4%
Be honest	65	15.3%
Rehearse speech ahead of time	53	12.5%
Use defendant's own words/Don't speak from attorney's script	42	9.9%
Show genuine remorse	32	7.5%
Accept responsibility	32	7.5%
Be brief	26	6.1%
Lawyer should explain purpose of allocution and the defendant's right	22	5.2%
Have concrete plan for reform/rehabilitation	20	4.7%
Apologize to victims	16	3.8%
Don't make excuses for behavior	12	2.8%
"I don't advise lawyers on this matter"	5	1.2%
Other	55	12.9%

(N = 425)

262. The full text responses to this open-ended question are on file with authors.

Question 27. What are the most helpful things a defendant can say during an allocution?[263]

Table 27. Most Helpful Things a Defendant Can Say During Allocution (Synthesized from Open-Ended Responses)

Synthesized Responses	*Judges (Number)*	*Judges (Percent)*
Explain plans for the future and plans for lessening the likelihood of recidivism	141	40.3%
Expression of remorse	98	28%
Acceptance of responsibility	75	21.4%
Offer an apology to victims and/or families	47	13.4%
Sincerity	43	12.3%
Explanation of conduct	29	8.3%
Acknowledgment of the crime's effect on others	29	8.3%
Demonstration that the defendant understands the seriousness of the offense	28	8.0%
Admission of guilt	21	6.0%
Depends on the circumstances	18	5.1%
Acceptance of sentence	9	2.6%
Other	35	10%

(N = 350)

Question 28. In general, how important is the allocution in arriving at your final sentence?

Table 28. Importance of Allocution in Final Sentence

Response Options	*Judges (Number)*	*Judges (Percent)*
Extremely important	27	5.3%
Very important	112	22.0%
Somewhat important	269	53.0%
Not very important	91	17.9%
Not at all important	9	1.8%

(N = 508)

263. The full text responses to this open-ended question are on file with authors.

Question 29. How many years have you been a federal district court judge?

Mean length of time: 15.2 years with a range of 3 months to 50 years.
(N = 517)

Presidential appointment was calculated from Question 29: To obtain the date at which the judge was appointed, the number of years served was subtracted from the current year (2012). The president serving on the appointment date was coded as the appointing president. Due to judges' estimates of their time on the bench, there may be some inaccuracies.

Table 29a. Presidential Appointments of Responding Judges (Derived from Years on Bench)

Appointing President	*Judges (Number)*	*Judges (Percent)*
Obama (D)	62	12.0%
George W. Bush (R)	143	27.7%
Clinton (D)	148	28.6%
George H.W. Bush (R)	60	11.6%
Reagan (R)	71	13.7%
Carter (D)	22	4.3%
Ford (R)	2	0.4%
Nixon (R)	7	1.4%
Johnson (D)	1	0.2%
Kennedy (D)	1	0.2%
Total	517	100.0%

Table 29b. Political Affiliations of Presidents Appointing Responding Judges

Appointing President Political Affiliation	*Judges (Number)*	*Judges (Percent)*
Democrat	234	45.3
Republican	283	54.7
Total	517	100.0

Question 30. Are you on senior status?

Table 30. Status of Responding Judges

Status	*Judges (Number)*	*Judges (Percent)*
Senior	169	32.6%
Active	350	67.4%

(N = 519)

Question 31. If so, how long have you been on senior status?

Mean length of time: 6.8 years, with a range of 1 month to 27 years.

Question 32. Have you ever held any of the following positions? Please check all that apply.

Table 32. Previously Held Positions of Responding Judges

Response Options	*Judges (Number)*	*Judges (Percent)*
U.S. Attorney	37	7.1%
Assistant U.S. Attorney	112	21.6%
State court prosecutor	114	22.0%
Federal Public Defender	5	1.0%
Assistant Federal Public Defender	8	1.5%
State court public defender or assistant public defender	30	5.8%
Criminal Justice Act (CJA) panel lawyer	54	10.4%
Criminal defense lawyer (private practice)	141	27.2%
State court trial judge	161	31.0%
State court appellate judge	40	7.7%
Full-time law professor	18	3.5%

(N = 519)

APPENDIX B: CORRELATION TABLES

Table 33. Number of Judges Who Favor Eliminating the Defendant's Right to Allocute Granted by Federal Rule of Criminal Procedure 32(i)(4)(A)(ii), Broken Down by Political Affiliation of Appointing President

Political Affiliation of Appointing President		*Would you favor eliminating the defendant's right to allocute? (Q4)*			
		No	*No opinion*	*Yes*	*Total*
Democrat	*Count*	229	2	3	234
	% within Political Affiliation	97.9%	0.9%	1.3%	100.0%
	% of Total	44.4%	0.4%	0.6%	45.3%
Republican	*Count*	282	0	0	282
	% within Political Affiliation	100.0%	0.0%	0.0%	100.0%
	% of Total	54.7%	0.0%	0.0%	54.7%
Total	*Count*	511	2	3	516
	% within Political Affiliation	99.0%	0.4%	0.6%	100.0%
	% of Total	99.0%	0.4%	0.6%	100.0%

Table 34. Number of Judges Who Favor Having the Discretion to Decide Whether to Allow a Defendant to Allocute, Broken Down by Political Affiliation of Appointing President

Political Affiliation of Appointing President		*Would you favor having the discretion to decide whether to allow a defendant to allocute? (Q5)*			
		No	*No opinion*	*Yes*	*Total*
Democrat	*Count*	221	5	7	233
	% within Political Affiliation	94.8%	2.1%	3.0%	100.0%
	% of Total	42.8%	1.0%	1.4%	45.2%
Republican	*Count*	251	12	20	283
	% within Political Affiliation	88.7%	4.2%	7.1%	100.0%
	% of Total	48.6%	2.3%	3.9%	54.8%
Total	*Count*	472	17	27	516
	% within Political Affiliation	91.5%	3.3%	5.2%	100%
	% of Total	91.5%	3.3%	5.2%	100%

Table 35. Number of Judges Who Favor Having the Discretion to Hold It Against the Defendant Who Does Not Allocute, Broken Down by Political Affiliation of Appointing President

Political Affiliation of Appointing President		*If the law permitted, would you favor having the discretion to hold it against the defendant who does not allocute? (Q6)*			
		No	*No opinion*	*Yes*	*Total*
Democrat	*Count*	220	6	8	234
	% within Political Affiliation	94.0%	2.6%	3.4%	100.0%
	% of Total	42.6%	1.2%	1.5%	45.3%
Republican	*Count*	256	12	15	283
	% within Political Affiliation	90.5%	4.2%	5.3%	100.0%
	% of Total	49.5%	2.3%	2.9%	54.7%
Total	*Count*	476	18	23	517
	% within Political Affiliation	92.1%	3.5%	4.4%	100.0%
	% of Total	92.1%	3.5%	4.4%	100.0%

Table 36. Previous Position of Judges Who Always Advise the Defendant That the Allocution May Be Used to Raise or Lower the Defendant's Sentence

Position Held	*Number of judges who "always" advise the defendant that allocution may be used to raise the defendant's sentence*	*Number of judges who "always" advise defendants that allocution can lower sentence*
U.S. Attorney	0	1
Assistant U.S. Attorney	1	2
State court prosecutor	1	3
Federal Public Defender	0	0
Assistant Federal Public Defender	0	0
State court public defender or assistant public defender	3	1
Criminal Justice Act (CJA) panel lawyer	2	2
Criminal defense lawyer (private practice)	0	7
State court trial judge	0	4
State court appellate judge	0	1
Full-time law professor	0	0

Table 37. Frequency with Which Judges Advise the Defendant That Allocution May Lower the Defendant's Sentence, Broken Down by Political Affiliation of Appointing President

Before an allocution, how frequently do you advise the defendant that the allocution may be used to lower the defendant's sentence? (Q21)		*Political Affiliation of Appointing President*		
		Democrat	*Republican*	*Total*
1 Never	*Count*	213	266	479
	% within Political Affiliation	91.4%	94.0%	92.8%
	% of Total	41.3%	51.6%	92.8%
2	*Count*	12	8	20
	% within Political Affiliation	5.2%	2.8%	3.9%
	% of Total	2.3%	1.6%	3.9%
3	*Count*	0	1	1
	% within Political Affiliation	0.0%	0.4%	0.2%
	% of Total	0.0%	0.2%	0.2%
4	*Count*	0	2	2
	% within Political Affiliation	0.0%	0.7%	0.4%
	% of Total	0.0%	0.4%	0.4%
5	*Count*	1	0	1
	% within Political Affiliation	0.4%	0.0%	0.2%
	% of Total	0.2%	0.0%	0.2%
6	*Count*	1	1	2
	% within Political Affiliation	0.4%	0.4%	0.4%
	% of Total	0.2%	0.2%	0.4%

Before an allocution, how frequently do you advise the defendant that the allocution may be used to lower the defendant's sentence? (Q21)		*Political Affiliation of Appointing President*		
		Democrat	*Republican*	*Total*
7 Always	*Count*	6	5	11
	% within Political Affiliation	2.6%	1.8%	2.1%
	% of Total	1.2%	1.0%	2.1%
Total	*Count*	233	283	516
	% within Political Affiliation	100.0%	100.0%	100.0%
	% of Total	45.2%	54.8%	100.0%
Mean		1.24	1.18	1.21

A means test shows no significant difference between Democrats (Mean = 1.24) and Republicans (Mean = 1.18), $F(1,514) = .567$, $p = .452$.

Table 38. Frequency with Which Judges Advise the Defendant That Allocution May Raise the Defendant's Sentence, Broken Down by Political Affiliation of Appointing President

How frequently judges advise the defendant that allocution may raise the defendant's sentence (Q22)		*Political Affiliation of Appointing President*		
		Democrat	*Republican*	*Total*
1 Never	*Count*	221	274	495
	% within Political Affiliation	95.3%	97.5%	96.5%
	% of Total	43.1%	53.4%	96.5%
2	*Count*	6	5	11
	% within Political Affiliation	2.6%	1.8%	2.1%
	% of Total	1.2%	1.0%	2.1%
3	*Count*	0	1	1
	% within Political Affiliation	0.0%	0.4%	0.2%
	% of Total	0.0%	0.2%	0.2%
4	*Count*	1	0	1
	% within Political Affiliation	0.4%	0.0%	0.2%
	% of Total	0.2%	0.0%	0.2%
5	*Count*	1	1	2
	% within Political Affiliation	0.4%	0.4%	0.4%
	% of Total	0.2%	0.2%	0.4%
6	*Count*	3	0	3
	% within Political Affiliation	1.3%	0.0%	0.6%
	% of Total	0.6%	0.0%	0.6%

How frequently judges advise the defendant that allocution may raise the defendant's sentence (Q22)		*Political Affiliation of Appointing President*		
		Democrat	*Republican*	*Total*
7 Always	*Count*	232	281	513
	% within Political Affiliation	100.0%	100.0%	100.0%
	% of Total	45.2%	54.8%	100.0%
Mean		1.14	1.05	1.09

A means test shows no significant difference between Democrats (Mean = 1.14) and Republicans (Mean = 1.05), $F(1,511) = 3.17$, $p = .08$.

Table 39. Importance of Allocution in Final Sentence, Broken Down by Political Affiliation of Appointing President

Importance of allocution in arriving at final sentence (Q28)		*Political Affiliation of Appointing President*		
		Democrat	*Republican*	*Total*
Extremely Important	*Count*	13	14	27
	% within Political Affiliation	5.6%	5.1%	5.3%
	% of Total	2.6%	2.8%	5.3%
Very Important	*Count*	48	64	112
	% within Political Affiliation	20.8%	23.3%	22.1%
	% of Total	9.5%	12.6%	22.1%
Somewhat Important	*Count*	125	143	268
	% within Political Affiliation	54.1%	52.0%	53.0%
	% of Total	24.7%	28.3%	53.0%
Not Very Important	*Count*	43	47	90
	% within Political Affiliation	18.6%	17.1%	17.8%
	% of Total	8.5%	9.3%	17.8%
Not at All Important	*Count*	2	7	9
	% within Political Affiliation	0.9%	2.5%	1.8%
	% of Total	0.4%	1.4%	1.8%
Total	*Count*	231	275	506
	% within Political Affiliation	100.0%	100.0%	100.0%
	% of Total	45.7%	54.3%	100.0%

A chi-square test of this table of counts shows there is no significant difference between the populations, χ^2 (4, N = 508) = 2.681, p = .62.