

Time of Desperation: An Examination of Criminal Defendants' Experiences of Allocuting at Sentencing

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For criminal defendants, allocution is the last time they may address the court before sentencing is pronounced. For many defendants, whether because they pled guilty or did not testify at trial, it is their only such opportunity. According to a recent survey of federal judges, allocution at sentencing can, for better or worse, significantly affect sentencing decisions. Other researchers have suggested that, beyond such effects, allocution is also important in creating opportunities for defendant expression that go beyond the presentation of mitigating information.

Despite the impact of sentencing, little research has been done into defendants' perspectives on their own allocutions. This Note draws on interviews to explore the ways in which defendants prepare for and experience their allocutions, and situates their rationales for allocution within the existing literature. Part II provides background information on how allocution has been treated in the courts. Part III discusses the Note's interview methodology. Parts IV and V respectively examine the humanization and mitigation rationales for allocution from the perspective of defendants, and conclude that it is the mitigation rationale that more accurately reflects the accounts given by defendants.

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What do you want to say? I think that's really all you can say, is speak from the heart, I mean. But it is desperation too. . . . I do feel like I said things from the heart, but I do also feel like it was a lot of desperation.¹

I expressed myself the best way I could, with the best vocabulary I could, with the best way I knew how at that time. I wasn't coached, I wasn't prepped. . . . So you really don't know what to say. You know you've got to say "sorry."²

I. INTRODUCTION

Allocution — the right of a defendant in a criminal case to speak at her or his sentencing hearing before the sentence is pronounced — has been recognized in English common law since 1689³ and has been enshrined in some form in the Federal Rules of Criminal Procedure since 1944.⁴ Most of the United States also recognize the right to allocute in some form.⁵ Though many have argued that allocution is no longer necessary due to advances in criminal procedure that protect defendants' rights and better ensure fair sentencing,⁶ many judges⁷ and defendants⁸ believe

1. Interview C (Feb. 14, 2017), at 9.

2. Interview B (Jan. 26, 2017), at 4.

3. *Green v. United States*, 365 U.S. 301, 304 (1961). For a more detailed history of the common law origins of the right of allocution, see Paul W. Barrett, *Allocution*, 9 MO. L. REV. 115, 115–24 (1944).

4. FED. R. CRIM. P. 32(i)(4)(A)(ii) (originally enacted in 1944).

5. *People v. McClain*, 323 N.E.2d 685, 688 (N.Y. 1974).

6. See, e.g., *id.* (“It is not open to dispute that all the early common law justifications or uses for the allocution have long since disappeared. . . . [I]n this State prisoners always have been allowed counsel and the right to appeal has long been recognized.”); 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.”); Jonathan Scofield Marshall, Comment, *Lights, Camera, Allocution: Contemporary Relevance or Director’s Dream?*, 62 TUL. L. REV. 207, 212 (1987) (“Modern criminal procedure has rendered allocution virtually obsolete.”).

7. See, e.g., Mark W. Bennett, *Heartstrings or Heartburn: A Federal Judge’s Musings on Defendants’ Right and Rite of Allocution*, 35-MAR CHAMPION 26 (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.”); Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges’ Views on Allocution in Sentencing*, 65 ALA. L. REV. 735, 747–48, 802 (2014) (finding that 99% of the judges who responded to a survey sent to all federal judges replied “no” when asked if they favor eliminating the defendants’ right to allocute, and that 80.3% consider the allocution at least “somewhat important” in determining a final sentence); D. Brock Hornby, *Speaking In Sentences*, 14 GREEN BAG 2D 147, 154 (2011) (“Permitting a defendant to speak reaffirms human dignity in the face of severe punishment.”).

that the right has continued relevance and importance in the present day. After all, there are only four true opportunities for defendant speech during the legal process: “trial, guilty pleas, sentencing, and behind them all, conversations with counsel.”⁹ In a system where so few people go to trial, let alone testify,¹⁰ sentencing is often the only opportunity for defendants to speak during the legal process in a way that is even nominally unconstrained.

The practical value of allocution — the benefit it actually provides for defendants and judges — remains, however, an open question. The traditional rationale for allocution is mitigation, defined by Professor Kimberly Thomas as “reasons why the trial court should view the offender as less responsible for his acts or view the offense as less severe.”¹¹ These statements “may also, but do not need to, accept responsibility for the offense.”¹² By this view, the value of allocution is its ability to influence judges.

Yet the procedural protections that have developed for defendants have, in the view of some, rendered allocution obsolete.¹³ Because of these changes, in the last fifteen years several articles have been published suggesting a second rationale for allocution: “humanization.”¹⁴ Humanization is a purposefully expansive rationale, meant to allow for “a broader scope of defendant speech,” and to “accommodate the defendant’s unique perspective.”¹⁵ Under a humanization rationale, whether the act of allocuting has

8. Interview E (Jan. 27, 2017), at 1 (“[S]peaking at your sentencing can sometimes be the difference between getting, you know, I don’t want to say a lot of time and a little time, but it could be that in certain situations. . . .”); Interview B, *supra* note 2, at 2 (“So, I found it you know, quite healing to be honest with you. You know after, it’s like {lets out breath}, like a load has been, you know, let off my shoulders and so forth, so, you know, I felt good afterwards.”).

9. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1458 (2005).

10. *Id.* at 1450.

11. Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2655 (2007).

12. *Id.* at 2655.

13. *See supra* note 6.

14. Thomas, *supra* note 11, at 2666. *See also* Mary Margaret Giannini, *Equal Rights for Equal Rites?*, 26 YALE L. & POL’Y REV. 431, 478 (2008) (“Being acknowledged by the court and having the opportunity to ‘have his say’ may therapeutically benefit the defendant in a manner valued by courts and commentators.”); Natapoff, *supra* note 9, at 1465 (“The traditional function of the defendant’s speech is to convince the judge to render a lower sentence. But the personal aims of the defendant may diverge from this goal. . . . His expressive opportunities are so infrequent that it may be unrealistic to expect him to slip into traditional sentencing mode when this is his first opportunity to be heard by anyone other than his lawyer.”).

15. Thomas, *supra* note 11, at 2666.

an impact on the eventual sentence is immaterial to the importance of the right to allocute — leading to an environment in which it is permissible for defendants to touch on subjects or stories that may be difficult for a court to hear or otherwise unwelcome. Thus, denial of the right of allocution under such a rationale could never be considered harmless error, as the right being denied is not just the right to present information that would mitigate one's sentence (a role that may be filled by counsel), but the opportunity to speak more generally and individualistically.

Considered from the perspective of defendants' experiences of allocution, both of these rationales have their virtues and their issues. A rationale for allocution that focuses purely on mitigation presupposes a narrow window of acceptable speech while ignoring the reality that the presentation of mitigating evidence does not usually result in a lower sentence. And a rationale based solely on humanization does not take into account the intense pressure that is often felt by a defendant facing a period of incarceration.

While the humanization rationale is certainly a noble understanding of the right of allocution from an academic perspective, it does not seem to comport with the actual experiences of defendants who have allocuted. While a survey of federal judges' attitudes towards allocution¹⁶ and a linguistic analysis of federal allocutions¹⁷ have been conducted, as of yet no one has formally interviewed defendants who have allocuted to discover their reasons for allocuting and to ask what they found valuable in the process. In researching this Note, I spoke to six formerly incarcerated males, ranging in age from thirty-three to sixty-four. Five of these individuals spoke at their sentencing hearings, while the sixth declined to do so. Though the stories of these men do not begin to encapsulate the totality of reactions to and feelings about the fraught experience of speaking at sentencing, sharing their experiences is a step toward an understanding of allocution that is both defendant-centric and takes into account the practical constraints of the sentencing hearing.

The purpose of this Note is to situate defendants' actual experiences within the literature on allocution. It is also, more broadly, to establish based on these interviews that while true oppor-

16. Bennet & Robbins, *supra* note 7.

17. M. CATHERINE GRUBER, "I'M SORRY FOR WHAT I'VE DONE": THE LANGUAGE OF COURTROOM APOLOGIES (2014).

tunities for a defendant to humanize him or herself in the eyes of a court are often unavailable during allocution, a mitigation rationale is, on its own, enough of a justification for the continuation of allocution. Part II offers background on the manner in which federal and state court systems have viewed allocution. Part III discusses the methodology for the interviews conducted. Part IV examines and critiques the rationale of humanization through the lens of defendants' experiences. Part V does the same with the mitigation rationale. The Note concludes with recommendations for allocution practice going forward and for future research based on defendants' experiences, including further interviews of formerly incarcerated individuals and quantitative analysis of the effects of allocution.

II. BACKGROUND ON FEDERAL AND STATE COURTS' VIEWS OF ALLOCUTION

Explanations for allocution in case law and in statutes tend to use mitigation as the practice's rationale. The application of this mitigation rationale is frequently centered on what is helpful to or desired by the judge: there are, in other words, things that cannot or should not be said by defendants. While denial of the right of allocution is usually considered a very serious error requiring remand for resentencing, there is a line of cases in which judges appear to go out of their way to avoid such a remand. This contradictory approach to allocution — in which the denial of this right is regarded as important, but at the same time does not necessitate correction — is exemplified in the 1961 case of *Green v. United States*, where the Supreme Court first laid out the contours of the modern right of allocution.¹⁸ The Court ruled that under Federal Rule of Criminal Procedure 32, a defendant must “be personally afforded the opportunity to speak before imposition of sentence.”¹⁹ In an oft-cited passage of Justice Frankfurter's opinion, joined by three other Justices, Frankfurter stated his reason: “[t]he most persuasive counsel may not be able to

18. *Green v. United States*, 365 U.S. 301 (1961).

19. *Id.* at 304. While Justice Frankfurter's opinion is only joined by three of the other Justices, Justice Black's dissent, also joined by three Justices, reaches this same conclusion, stating that “Federal Criminal Rule 32(a) makes it mandatory for a federal judge before imposing sentence to afford every convicted defendant an opportunity to make, in person and not merely through counsel, a statement in his own behalf.” *Id.* at 307 (Black, J., dissenting).

speak for a defendant as the defendant might, with halting eloquence, speak for himself.”²⁰

Still, the Court found that there had been no denial of the right of allocution in *Green*: the trial judge had asked “Did you want to say something?,” and the record did not clearly state whether this was aimed at the defendant or his attorney.²¹ This one ambiguously directed sentence was found to be a sufficient nod to the defendant’s right, even though it was the attorney who responded and the government admitted in its brief that the question was aimed at the defendant’s counsel.²² Justice Frankfurter wrote that “[a] record, . . . unlike a play, is unaccompanied with stage directions,” and proceeded to interpret this supposed vagueness against *Green*. However, Justice Frankfurter wrote additionally that “trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant,” and “leave no room for doubt that the defendant has been issued a *personal invitation* to speak prior to sentencing.”²³

While the “personal invitation” requirement of the ruling in *Green* received eight votes, four of the justices felt that *Green* had been denied his opportunity to allocute and therefore the sentence pronounced was unlawful.²⁴ Justice Black wrote in dissent that the high burden the Court placed on a defendant to show that the trial judge “neither pointed his finger, cast his eye, nor nodded his head in the defendant’s direction” was a “harsh result” that was “calculated to soften the blow of nonenforcement.”²⁵

The Supreme Court revisited allocution at sentencing the following year in *Hill v. United States*. In *Hill*, the Court addressed whether denial of the right of allocution could be a basis for relief in a habeas petition.²⁶ While reaffirming *Green*’s central holding, Justice Stewart’s majority opinion stated that the denial of allocution “is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure.”²⁷ Failure to offer a

20. *Id.* at 304 (plurality opinion).

21. *Id.*

22. *Id.* at 304–05; *id.* at 309 (Black, J., dissenting).

23. *Id.* at 305 (plurality opinion) (emphasis added).

24. *Id.* at 307–08 (Black, J., dissenting).

25. *Id.* at 310–11.

26. *Hill v. United States*, 368 U.S. 424 (1962).

27. *Id.* at 428.

defendant an opportunity to allocute is thus not an issue that can be brought up on collateral attack.²⁸ However, the ruling in *Hill*, following in the footsteps of *Green*, put forward a mitigation rationale for the right of allocution by suggesting that if the trial judge “was either misinformed or uninformed as to any relevant circumstance,” habeas relief might be possible.²⁹

The Supreme Court’s rulings, and the 1966 reformulation of Rule 32 that incorporated them, seem to have inspired some amount of formalism in the interpretation of the right by the lower courts. When the trial judge does not make a personal invitation to the defendant to allocute, reversal is typically required.³⁰ However, what is important is merely the fact that a personal address has been made by the judge and not the particular manner of the address. For example, in *United States v. Pacheco*, the trial judge, immediately after telling Pacheco’s counsel to “shut up,” asked Pacheco if she wished to say anything, to which Pacheco shook her head.³¹ In denying a remand, the First Circuit did not address the potential effect that a judge telling a defendant’s lawyer to “shut up” might have on the defendant, focusing instead on the fact that Pacheco was “addressed personally.”³² In *Gordon v. United States*, the defendant was not given an opportunity to allocute until the sentence had already been pronounced.³³ According to the Fifth Circuit, the fact that the proceeding had not yet concluded and the trial judge could theoretically have changed the sentence upon hearing Gordon’s allocution was enough to meet the strictures of Rule 32,³⁴ whether or not

28. *Id.* at 426. A collateral attack is “[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective.” *Collateral Attack*, BLACK’S LAW DICTIONARY (10th ed. 2014).

29. *Hill*, 368 U.S. at 429.

30. *United States v. Noel*, 581 F.3d 490, 502 (7th Cir. 2009) (holding that failure to address defendant personally constituted plain error requiring a remand for resentencing despite the fact that, in addressing defendant’s counsel, the judge pointed out that the defendant had the right to speak).

31. *United States v. Pacheco*, 727 F.3d 41, 48 (1st Cir. 2013).

32. *Id.* at 50. Writing in dissent, Judge Lipez does raise this exchange as being a functional denial of the right to allocute. *Id.* at 52 (Lipez, J., dissenting).

33. *United States v. Gordon*, 438 F.2d 858, 882 (5th Cir. 1971).

34. *Id.*; see also *United States v. Williams*, 109 F.3d 502 (8th Cir. 1997); *United States v. Matute*, 631 F. App’x 676 (11th Cir. 2015); *United States v. Sparks*, 629 F. App’x. 493 (4th Cir. 2015); but see *United States v. Luepke*, 495 F.3d 443 (7th Cir. 2007) (suggesting that, while an opportunity for allocution after sentence has been pronounced could be sufficient, it would require that the trial judge reopen the proceeding and truly consider the allocution).

such a change was plausible. Furthermore, in *United States v. Covington*, the district court's interruption of the defendant during his allocution to "refocus the defendant's statements on mitigation" did not lead to a remand,³⁵ despite the fact that such an interruption did not give the defendant the ability to express himself fully on his own terms. These functional denials of the right to allocute are illustrative of a line of cases where the essence of the right is treated as unimportant so long as the formal requirements of the rule are met.

Judge Wood addressed this point in her dissent in *Covington*, stating that "the district court defeated both the broader purpose and the practical utility of allocution by refusing to let Covington speak for himself and instead confining Covington's contribution to a brief question-and-answer session."³⁶ Judge Wood called allocution "the defendant's *own* chance to tell his story,"³⁷ and pointed out that aside from its "practical utility," there is a "broader purpose" to allocution that is missed when a court does not take the time to listen.³⁸ *Covington*, and particularly Judge Wood's dissent, demonstrates that there are practical consequences to a judge- or mitigation-centric view of allocution where such a view leads to a functional denial of the right.

While a minority of Courts of Appeals treat the denial of the allocution right as error requiring automatic reversal,³⁹ the majority of circuits proceed under either a harmless or plain error analysis, subject to Federal Rule of Criminal Procedure 52.⁴⁰ Under harmless error review, courts look to whether the error "affects substantial rights."⁴¹ Before the Supreme Court made federal sentencing guidelines advisory in *Booker*,⁴² several of the

35. *United States v. Covington*, 681 F.3d 908 (7th Cir. 2012); *see also* *United States v. Kellogg*, 955 F.2d 1244, 1250 (9th Cir. 1992) (holding that a cutting short of defendant's allocution was not a denial of the right where the defendant had used his allocution to discuss issues the Court believed to be irrelevant); *see also* *United States v. Mack*, 200 F.3d 653, 658 (9th Cir. 2000) (holding that the defendants had not been denied the right of allocution where the judge had asked them to "stick to issues pertaining to mitigation."); *but see* *United States v. Li*, 115 F.3d 125 (2d Cir. 1997) (holding that remand for resentencing was appropriate where the defendant was interrupted early and often during her allocution).

36. *Covington*, 681 F.3d at 912 (Wood, J., dissenting).

37. *Id.*

38. *Id.*

39. Giannini, *supra* note 14, at 476.

40. *Id.* at 467–8.

41. FED. R. CRIM. P. 52(a).

42. *United States v. Booker*, 543 U.S. 220 (2005).

circuits held that the lack of opportunity to allocute did not affect substantial rights when the sentence fell at the bottom of the applicable range.⁴³ Though the ruling in *Booker* casts some doubt on the continued applicability of this line of reasoning, the thinking behind it is nonetheless revealing. If denial of the right of allocution is considered harmless error only when the sentence could not have been reduced further,⁴⁴ then it follows that these courts regard allocution as important only insofar as it may bear on their sentencing decisions.⁴⁵ This thinking represents an application of the mitigation rationale, which does not consider the ways in which defendants might find allocution valuable outside of the potential to shorten their sentences.

This line of thinking is also evident in many cases that apply a plain error analysis to the right of allocution. Under plain error review, a court must undertake further analysis than under a harmless error standard, reversing or vacating when the error impairs the defendant's substantial rights and "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."⁴⁶ Many courts applying this standard view the denial of allocution as a serious error requiring correction because "the right has value in terms of 'maximizing the perceived equity of the process.'"⁴⁷ Such reasoning suggests "that there is something inherently important about the practice"⁴⁸ to judges beyond mitigation. However, emphasizing such legitimation is still judge-centric, as the legitimacy of a court rests on the "perceived equity of the process."⁴⁹ Furthermore, there are a variety of cases where a remand was avoided for ostensibly the same reason as the pre-*Booker* string of harmless error cases: that the sentence was already so low (or special circumstances existed) so that there could

43. See, e.g., *United States v. Mejia*, 953 F.2d 461 (9th Cir. 1991); *United States v. Lewis*, 10 F.3d 1086 (4th Cir. 1993); *United States v. Wilson*, 87 F. App'x 553, 558 (6th Cir. 2004).

44. See *United States v. Riascos-Suarez*, 73 F.3d 616, 627–28 (6th Cir. 1996) (holding that denial of allocution required resentencing when trial judge imposed upward adjustments such that the defendant did not receive the lowest possible sentence allowed by statute).

45. *Giannini*, *supra* note 14, at 467–68.

46. *United States v. Olano*, 507 U.S. 725 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

47. *United States v. Barnes*, 948 F.2d 325, 329 (7th Cir. 1991) (citation omitted).

48. *Giannini*, *supra* note 14, at 470.

49. *Barnes*, 948 F.2d at 328.

not have been any prejudice.⁵⁰ All in all, remands for denial of the right of allocution in the federal courts under plain error review are far from automatic, though they do seem to be the norm.

In state court systems, allocution is protected to differing degrees by state constitutions, case law, statute or rule.⁵¹ The statute or rule model is most popular, used by at least thirty-two states.⁵² New York's statute is typical, and grants defendants "the right to make a statement personally in his or her own behalf," and before a court pronounces sentence it "must ask the defendant whether he or she wishes to make such a statement."⁵³ In other states, the right is granted but expressly limited. In Maine, for instance, the statute grants the right "to be heard," but states that "[f]ailure of the court to so address the defendant shall not affect the legality of the sentence unless the defendant shows that he or she has been prejudiced thereby."⁵⁴ And even in states that explicitly afford the right to allocute, the right is often applied in the way that most promotes the efficiency of the court, especially where the defendant cannot show that he or she would have had anything to say if the opportunity to allocute had been granted more fully.⁵⁵

While it is the distinct minority of cases that deny a remand where there has been a denial of allocution, functional or otherwise, those occasions where remand is not granted, as well as state statutes such as Maine's and Maryland's, are revealing of many judges' and legislatures' views on the purpose and im-

50. See, e.g., *United States v. Beckett*, 208 F.3d 140 (3d Cir. 2000); *United States v. Reyna*, 358 F.3d 344 (5th Cir. 2004); *United States v. Rauch*, 638 F.3d 1296 (10th Cir. 2011), *overruled by* *United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017) (en banc).

51. Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 *FORDHAM L. REV.* 2641, 2649–51 (2007).

52. Celine Chan, Note, *A Defendant's Word On Its Face Or Under Oath*, 75 *Brook. L. Rev.* 579, 607 n.160 (2009).

53. N.Y. CRIM. PROC. LAW § 380.50(1) (McKinney 2016). Other statutes, such as Maryland's, speak explicitly of mitigation. MD. R. 4-342(f) ("Before imposing sentence, the court shall afford the defendant the opportunity . . . to make a statement and to present information in mitigation of punishment").

54. ME. R. CRIM. P. 32(2).

55. See, e.g., *People v. McClain*, 323 N.E.2d 685, 689 (N.Y. 1974) ("In the cases before us, concededly there was not literal compliance with the statute. . . . None of the defendants expressed a wish to speak and none was deprived of the opportunity to be heard because counsel had already, or was about to address the court on his behalf. In sum there is here no proof that any defendant was denied the opportunity to say anything that he chose to say."); *Nicholas v. State*, 183 N.W.2d 8, 11 (Wis. 1971) ("We conclude that the failure to propound the question referred to does not constitute reversible error.").

portance of the right. Cases when remand is not required because a sentence could not be lower, or when a defendant is consistently interrupted, or when the opportunity for allocution comes after sentence has been pronounced, are all suggestive of a system that values allocution more for how it affects the “perceived equity of the process”⁵⁶ than its “practical utility.”⁵⁷ The focus of allocution in both the state and federal court systems seems to be on the prospect of reducing sentences, with other considerations, such as the value of an opportunity for a defendant to participate on her or his own terms, often receiving short shrift in those jurisdictions where denial of allocution does not require an automatic remand for resentencing.

III. INTERVIEW METHODOLOGY

For this Note, I conducted six interviews with formerly incarcerated individuals. I received approval for this research through the Columbia University Morningside Campus Institutional Review Board. I found subjects through the efforts of the Columbia University Center for Justice and the Fortune Society. Finding subjects willing to discuss their sentencing proved difficult, which was reflective of what I perceived as apprehension at the prospect of discussing such a personal and emotional topic. Interviewees were all men between the ages of thirty-three and sixty-four. I chose to focus on males because the overwhelming majority of the prison population is male.⁵⁸ All of these individuals were sentenced in state court. Five were sentenced in New York, while a sixth was sentenced in Wisconsin. Five of these subjects chose to speak at their sentencing hearing or hearings, while the sixth chose not to do so.⁵⁹

Interviews were twenty to sixty minutes and were tape-recorded. In order to provide structure and ensure that inter-

56. *United States v. Barnes*, 948 F.2d 325, 329 (7th Cir. 1991).

57. *United States v. Covington*, 681 F.3d 908, 912 (7th Cir. 2012) (Wood, J., dissenting).

58. In 2010, the United States prison population was 91.5% male. Peter Wagner, *Incarceration is not an equal opportunity punishment*, PRISON POLY INITIATIVE (Aug. 8, 2012), <https://www.prisonpolicy.org/articles/notequal.html> [<https://perma.cc/X684-LXQZ>].

59. Aside from the small sample size and associated problems (such as an inability to break out respondents by race or other variables), an additional issue with this dataset is that it suffers from some degree of source measurement bias, in the sense that I am dependent on the veracity of my interview subjects for their motivations and how judges and defense attorneys interacted with them.

viewees were responding to many of the same questions, interviews were grounded in a predetermined protocol, based off of anticipated areas of interest gleaned from the allocution literature. However, the discussions often deviated significantly from the protocol, both because of the natural conversational flow of the interview and because — due to the sensitive and sometimes upsetting nature of these interviews — interview subjects at times had difficulty discussing a particular question. Furthermore, as mentioned above, several interview subjects seemed somewhat nervous to discuss the topic of sentencing, such that different interviews required more time spent building trust.

To protect confidentiality, I refer to interview subjects in this Note by letters of the alphabet in an order chosen at random. Anonymized transcripts of interviews are on file with the *Columbia Journal of Law & Social Problems* and with me. The process of anonymization required that, in some instances, I delete large portions of the interview transcripts where they discussed specific conduct that might make it possible to connect the transcript with the interview subject.

IV. THE PRACTICAL LIMITATIONS OF A HUMANIZATION RATIONALE FOR ALLOCUTION

Despite the prevalence of the mitigation rationale in court opinions dealing with allocution, courts do often acknowledge that the right has broader dignitary implications.⁶⁰ While the concept of dignity is somewhat resistant to definition, it can perhaps best be thought of for the purposes of this Note as “the freedom of each individual to write the story of his or her life” and to be free “from humiliation and degradation.”⁶¹ It is, in other

60. Giannini, *supra* note 14, at 475 (“Indeed, some courts have stated that defendants should have the ‘broad-ranging’ opportunity to speak on ‘any subject of [their] choosing prior to the imposition of sentence.’” (quoting *United States v. Myers*, 150 F.3d 459, 462 (2d Cir. 1998)); *see also* Bennett & Robbins, *supra* note 7, at 749–50 (discussing the “overwhelming agree[ment]” among judges that allocution serves “important other purposes” beyond mitigation).

61. Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, in UNDERSTANDING HUMAN DIGNITY 361, 363 (Christopher McCrudden ed., 2013). This Note is concerned with the concept of dignity only insofar as it bears on the value of allocution. For a broader look at the concept of dignity, and its recent history in international law, *see* Samuel Moyn, *The Secret History of Constitutional Dignity*, in UNDERSTANDING HUMAN DIGNITY 95 (Christopher McCrudden ed., 2013); *see also* Catherine Dupré, *Constructing the Meaning of Human Dignity: Four Questions*, in UNDERSTANDING HUMAN DIGNITY 113 (Christopher McCrudden ed., 2013).

words, the ability of the defendant to assert her or his equality of personhood with the other actors in the courtroom.

It is these broader implications that are stressed in the developing literature regarding the humanizing power of allocution.⁶² The benefits of allocutions rooted in humanization include that they “allow for a broader scope of defendant speech, accommodate the defendant’s unique perspective, and dovetail with the participatory sentencing advanced in the context of victims’ rights.”⁶³ The idea that there is value in allocution, both for the defendant and for the court, beyond the mere determination of sentence length, was also attractive to several of the individuals interviewed for this Note:

So I felt that to me it was one, relieving, and very empowering for me to be able to say that I was remorseful. And I genuinely was, and I wasn’t looking for a reduction in the sentence. . . . It had been a really tough time for me. . . .⁶⁴

The interview subject who declined to speak at allocution expressed similar feelings:

It may not be the wisest thing to do, but I’m always going to say speak, you know? Even if you’re speaking to say thank you, you know, for not giving me the maximum, I think opening your mouth just shows them that you’re a human being who does consider things, who has a well-functioning brain. So pretty much, do I see any value in speaking at sentencing even when there’s no leverage for mitigation?

62. Giannini, *supra* note 14, at 474–78.

63. Thomas, *supra* note 11, at 2666.

64. Interview F (Jan. 25, 2017), at 5; *see also* Interview B, *supra* note 2, at 2; Interview D (Feb. 8, 2017), at 5 (“I guess, after a while, it really gave me an opportunity to, I guess, internalize some of the things that I was saying about myself. And yeah, I guess I began to think a little bit more serious about, you know, what, this has to end, at some point.”). The idea that there is value in apology also finds support in the literature. *See, e.g.*, Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180, 189 (2000) (“Although limited, the available theoretical, anecdotal, and empirical evidence all point[s] to the therapeutic potential of apology. Our consistent experience is that apologies are often an important part of the healing process.”). Additionally, literature around therapeutic jurisprudence suggests that a process that encourages defendants (specifically, sex offenders) to make “a detailed admission of guilt should work, therefore, against denial and cognitive distortion and toward cognitive restructuring,” which may encourage acceptance of responsibility and meaningful participation in “institutional therapy programs.” David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 287–88 (1993).

Yes, again, I would say open your mouth, yes. Because even if you're getting the minimum, say thank you, because I think that will bring some humanity back to you. I think the judge and the people in the court who see hundreds of bodies a day need to be reminded that these are people and not, like, inventory coming through, you know? I think that that can be lost whenever you do something too much. . . .⁶⁵

But while these broader interests were important, interview subjects seemed to find them more significant in the abstract than in actual practice. Interview subjects did not seem eager to gamble with their allocution by expressing themselves beyond the unspoken prescribed range of mitigation, and seemed to feel that humanization was, in some important ways, unavailable to them. This is especially true when it comes to expressions of anger or grievance, which are theoretically welcome under a humanization rationale,⁶⁶ but are not particularly welcome in a courtroom.

A. DEFENDANTS ARE LARGELY UNWILLING TO TAKE RISKS AT ALLOCUTION

As discussed above, the humanization rationale may “allow[] for a wider variety of stories and voices and legitimize[] and value[] a broader range of speech,”⁶⁷ but it does so by extracting a cost from the defendant that may be significant. There are significant risks to speaking outside the confines of speech typically deemed acceptable in an allocution. While one issue with the mitigation rationale is that it does not allow for stories of anger, excuses, or pity,⁶⁸ the humanization rationale poses the mirror-image of this problem: a wider spectrum of speech is acceptable, but only if a defendant is willing to accept the possibility of a longer sentence.

65. Interview E, *supra* note 8, at 3.

66. Thomas, *supra* note 11, at 2666–67 (“Allocutions based in humanization can also focus on themes of innocence, mercy, or defiance.”). Such stories are welcome under a humanization rationale because a defendant may feel that these emotions are important to their understanding of how they have come to be in the criminal-justice system, and how they have been treated once there. Under the humanization rationale, allocution is best thought of as a “broad-ranging’ opportunity.” Giannini, *supra* note 14, at 475 (quoting *United States v. Myers*, 150 F.3d 459, 462 (2d Cir. 1998)).

67. Thomas, *supra* note 11, at 2667.

68. *Infra* Part V.B.

This creates a difficult choice for defendants, but for most of the people interviewed for this Note, the answer was ultimately clear. Though most interviewees were, to varying degrees, angry about the way that they had been treated in the criminal justice system,⁶⁹ only one chose to incorporate speech into his allocution that went beyond areas typically thought of as acceptable.⁷⁰ And for this interview subject, that gamble did not pay off:

So being that I was arrogant, being that I challenged [the judge], being that I told him that this whole thing was like an illusion, okay, that this happened, dah, dah, dah, dah. . . . [S]o he actually says it . . . that he increased [the sentence] because of my arrogance, because he felt that I wasn't taking responsibility. But I'm like, you offered me a misdemeanor, how serious could this be, right? But again, that's why I say it's theater.⁷¹

For him, raising issues about what actually happened versus what he was charged with “was a point of fairness;”⁷² it did not mean that he did not take responsibility for his actions.⁷³ But at

69. See Interview B, *supra* note 2, at 7 (“It wore me down mentally, emotionally, physically. I mean, you're in the bullpen all day, you're going to trial, I mean, you're getting back to the dormitory, or the cells late at night. Noisy environment. And then you've got to wake up at 4:00 in the morning to go through a search and strip procedure to jump on a bus to go back to court. It will physically, mentally drain you, until you just want the ordeal over.”); Interview C, *supra* note 1, at 12 (“[T]aking responsibility for crimes only applies to like, these poor people, these black people, these brown people, these poor white people. And just a select few other people. It's very rare that some upper class person gets charged, you know, tried and put in prison, you know? That's rare, you know. We have like, you know, war crimes, and we have, like, you know, it's like the law only applies to like, a certain demographic of people, you know?”).

70. Interview A (Feb. 13, 2017), at 2 (Q: “So were you told that you would have the opportunity to speak?” A: “Sure. I believe I was, I'm not positive. But I knew I could, and as you'll see in that, I spoke crazy. I said a lot of stuff, because again, it wasn't fair. . . . It was actually, it honestly felt like theater in many ways, because of the way they'd orchestrated it, and because of what they did, and what they allowed, and what they didn't allow.”).

71. *Id.* at 6.

72. *Id.* at 4. Therapeutic jurisprudence research suggests that the defendant's sense of the fairness of the process is important to “his or her acceptance of and compliance with even adverse judgments.” David B. Wexler, *Therapeutic Jurisprudence and Readiness for Rehabilitation*, 8 FLA. COASTAL L. REV. 11, 113 (2006). Where “the offender feels he or she was mistreated, ignored, or got a raw deal—the rehabilitative prospects may be dramatically lessened. Indeed, for the latter group, criminologists have even posited a ‘defiance’ effect of persistent, more frequent, or even more serious violations.” *Id.* at 114.

73. Interview A, *supra* note 70 (“Again, there wasn't a point that I wasn't really responsible for what I did. You know what I mean?”).

least in his view, because his expression did not comport with the judge's expectation or desires for the allocution, his sentence was increased.

This risk of increased punishment results, purposefully or not, in the truncating of defendants' stories to fit within the accepted range of expression.⁷⁴ Defendants largely know what they are expected to say, and stay within these limits:

I was more, so like, accepting, and taking personal responsibility for my, for my actions at the sentencing. One, because . . . I figured, like, that is probably what they want to hear, but then also, like I said, like, I didn't have a very good education at that time. So I really thought that like, I was a bad person.⁷⁵

This need to accept responsibility and apologize was a common theme for the interviewees who spoke at sentencing, as was the need to subsume anger in order to avoid a potential sentencing increase:

So now that the trial is behind us and I've accepted a plea bargain, you know, I'm supposed to pretty much apologize to all parties involved. Which I did, I had no problem doing, you know, but at that time it was a difficult decision to make. You know, because you're still kind of angry, you know?⁷⁶

These interview subjects knew that while they might not receive a lesser sentence for an allocution in which they stuck to the

74. Natapoff, *supra* note 9, at 1469 ("Sentencing is the last stage of silencing: Between hostile judges, instrumentalist lawyers, and the threat of heightened punishment, the defendant's final day in court is one in which he will be told in numerous ways to be quiet. If he does speak outside the expected script of acquiescence and remorse, he will be punished more severely.")

75. Interview C, *supra* note 1, at 10.

76. Interview B, *supra* note 2, at 1-2; *see also id.* at 2 ("Because some of the things you want to say, but being in the structure of a court environment, you have to wait your turn. You know, certain things you may want to say, 'no, that's not true,' or whatever the case, 'that's false,' no, but you can't."); Interview C, *supra* note 1, at 10 ("So I don't think that I came off as like, it's not my problem, or it's not my fault, it's the system. I don't even think I understood how that system worked at all. . . . I definitely, when I talked it was like a personal responsibility, like, I knew that this is my . . . You know, I messed up.").

script of personal responsibility and remorse,⁷⁷ the risk of an increased sentence for speech beyond this script was real.

The responses of federal judges asked about allocution suggest that judges do have archetypes of ideal allocutions in mind. They want the allocution to express “genuine remorse,” “sincerity,” “realistic and concrete plans for the future,” “apology to the victims,” and an “understanding of the seriousness of the offense.”⁷⁸ They do not want to hear about “how the defendant was the victim of circumstances,” how he or she has found religion, promises to never “commit another crime,” or statements that the defendant cannot “change the past.”⁷⁹ With such clear goals for what should and should not be said in an allocution, continuously reinforced as judges gain more experience with allocutions and sentencing, it stands to reason that the further a defendant ventures from these archetypes, the angrier and less sympathetic that judge is likely to become. This may not be unreasonable or even undesirable under a mitigation rationale, if we accept the idea that there is speech that does not belong at the sentencing stage. But for a humanization rationale, judges’ archetypes, and their potential anger when those archetypes are rejected by defendants, present a practical obstacle that makes expressions of anger or grievance an unreasonable gamble for defendants. So long as judges punish grievance stories in allocutions — or other stories that do not comport with their expectations — through longer sentences, such stories will not be truly welcome.

B. WHAT IS SAID AT ALLOCUTION MAY HAVE CONSEQUENCES BEYOND THE SENTENCING HEARING

Beyond the possibility that a judge may raise a defendant’s sentence based on her or his allocution, there may be other potential consequences to an allocution that strays outside the bounds of accepted speech. These consequences may be lasting, and beyond the knowledge of an individual defendant at the time he or she allocutes. After all, the allocution “will be memorialized and

77. See *infra* Part V.D.

78. Bennett & Robbins, *supra* note 7, at 752.

79. *Id.* at 754.

transcribed with the rest of the sentencing transcript,”⁸⁰ and thus will accompany the defendant throughout her or his future involvement with the justice system. For one interviewee, this was made quite clear at his first parole hearing, years after he was sentenced:

[W]hen I went to my initial parole board, a large part of your parole hearing is based upon that plea allocution. You know, what did the judge say, what did you have to say? Did you demonstrate remorse? Or did you demonstrate any lack of remorse? And they would use that against you. And it’s funny that even when I apologized to the family, and expressed remorse and accepted responsibility, there’s a line that the judge said, “even though you’re apologizing, you’re not apologizing with the remorse that I would like to see.” And the parole board now, twelve years later pretty much, used that line as justification to deny me parole. They said, “Well, the judge said that you didn’t demonstrate the remorse that he would like to see.” And as a result, I was denied parole. I actually went to five parole boards before I was released, so even though I was sentenced to eleven and a half years, my minimum, I subsequently ended up serving twenty years in prison, you know?⁸¹

While no other person interviewed for this Note was directly affected by his statement at sentencing during parole (at least to his knowledge), one other interviewee did mention knowing of this possibility, despite not having been warned by his lawyer:

I knew what it meant to say something at sentencing. To say something about being remorseful. Because I knew ultimately that the parole board would look at it, so I knew. I think that if people know, if people know that that’s something that’s going to be examined when they go to parole board, they probably would say something or probably

80. Thomas, *supra* note 11, at 2674. See also N.Y. EXEC. LAW § 259-c(3) (McKinney 2011) (stating that “the complete criminal record” of an inmate shall be before the parole board “when the parole of such inmate is being considered.”).

81. Interview B, *supra* note 2, at 2.

wouldn't say the stuff that they say, you know, let their lawyer say it.⁸²

Furthermore, this same interview subject, who was thinking of parole when he spoke at his re-sentencing, had declined to speak at his original sentencing hearing because he was pursuing an appeal.⁸³

Because what a defendant says at allocution follows him or her through the appeals and parole processes, the already-significant risks faced by a defendant who wishes to speak of something outside of the mitigation framework at sentencing are increased. One might argue, however, that defendants are unlikely to know in advance of the potential harm that can be done by an allocution statement beyond the possibility of an increased sentence, given the limited advice from their attorneys,⁸⁴ and so will not be deterred from speaking their minds by these additional risks. But even if these future consequences do not deter, they suggest that we should be careful about adopting a rationale that might inspire defendants to take more risk upon themselves — especially when they may be taking that risk at least partially blindly. Put another way, the adoption of a humanization rationale allows judges to have it both ways: to present themselves as accepting of a wide range of defendant speech while simultaneously proscribing speech through their actual sentencing deci-

82. Interview F, *supra* note 64, at 3; *see also id.* at 4. (Q: “Did anyone tell you that this was going to be used at parole?” A: “So, I’ve worked in the law library . . . and so I pretty much knew at that time.” Q: “But your lawyer didn’t tell you?” A: “Yes, my lawyer didn’t tell me.”).

83. *Id.* at 4 (A: “My lawyer didn’t tell me the first time, because there wasn’t no way I was going to say anything. When I got convicted . . . there was no way I was going to say anything.” Q: “Because of the appeal?” A: “Yes. So because of the appeal, and so, that’s because of the loss at trial.”).

84. Interview B, *supra* note 2, at 3 (Q: “And your lawyer didn’t spend any time, you know, talking about — other than just to say, ‘this is a time to express remorse’ — didn’t spend any time going over what. . . .” A: “Not at all. Not at all. . . . And the irony is, I had a paid attorney. So I could imagine all the individuals who just have a legal aid who’s overworked and overwhelmed and so forth, and rarely have time — rarely have time — to explain the details and the significance. . . .”); Interview C, *supra* note 1, at 1 (“Yeah, so I had a public defender, so they don’t . . . He’s just like, “What are you going to say?” They just ask what you’re going to say, make sure you don’t say anything stupid. That’s it.”); Interview E, *supra* note 8, at 3 (“If you ask them, they’ll tell you, but they’re very short with you, and very, like, they have a huge caseload, they have you and about 50 other guys to see that day. So you don’t really get, you know, one on one time with a lawyer to really get clear on things.”).

sions. As one interview subject said about the advice he received from his lawyer regarding allocution:

He didn't explain the significance of it. I mean, if I understood the significance of it, I probably would have given a hell of an apology. I probably would have still been apologizing, if I knew the words that I'm going to say here is going to determine my future ten years down the line, or whatever the case.⁸⁵

A humanization rationale that encourages defendants to engage in a broader range of speech during their allocution irresponsibly ignores the continuing harm a defendant may face for making such a statement at sentencing.

C. DEFENDANTS MAY FEEL THAT THEY ARE CLOSED OFF FROM HUMANIZATION

That a humanization rationale creates space for a defendant to "describe who he is, how he came to this place in his life, and what he hopes for his future"⁸⁶ may be true in theory, but it is hard to imagine how such a rationale could translate to practice. Two of the people interviewed for this Note said that their sentencing judge called them a "menace to society."⁸⁷ Another interview subject stated that because he decided to go to trial, he felt that his sentence was already set at the maximum possible before he had the opportunity to speak:

And so I went to trial. So, it was a big expense for them, it was about a 3 week trial, and because you cost them that money, they give you the maximum sentence. That's their punishment. Get all the people who are going to trial, so whoever goes to trial gets the maximum sentence, and rec-

85. Interview B, *supra* note 2, at 3.

86. Thomas, *supra* note 11, at 2666.

87. Interview C, *supra* note 1 at 5 ("Yeah, so he was like, 'You're a menace to society.' He called me that! I remember, he called me a menace to society. And then he gave me my, he gave me my prison sentence, which I didn't think I was going to get."); Interview D, *supra* note 64, at 7 ("The judge, I remember he said to me, he said, 'You are a menace to society, and you are incorrigible.' The judge told me this, he said 'You are a menace to society, you are incorrigible. Hopefully, when you go away this time, you'll be better when you come back.' . . . I couldn't believe it. That's what they told me. And I say that, even to today I carry that. I will never forget, he told me that I was a menace to society.").

ommendations to be kept there. It's ironic; if you take the plea bargain, you're not as big of a threat, but if you don't take the plea bargain, then you're a major threat.⁸⁸

And it was the minority of interviewees who felt that the judge cared (or, in the case of the one interview subject who did not take his opportunity to allocute, would have cared) what they had to say. The view of this interviewee was more typical:

I had . . . a few pieces of paper, and they were like . . . “Are you going to say something?” And I was like, “I’ve got this written up.” And they were like . . . “No, no, no, no, no.” They had to go to lunch or something. So they didn’t want to sit there and hear me read all that stuff.⁸⁹

This suggests that judges are particularly eager to hear from defendants who may have some history with the criminal justice system or who have exercised their right to a trial.⁹⁰ As one interview subject said:

And like I say, each time I went, I think they were less lenient to hear my story, because they heard it before. . . . So I think that the repetitiveness of my coming back to court, the

88. Interview A, *supra* note 70, at 1. There is at least some evidence that this sort of “jury tariff” actually does take place. A study in Chicago in 1985 found that the penalty for people accused of felonies who take their case before a jury was around 33 months compared with those who did not, with the degree of disparity growing greater with the severity of the crime. Joseph R. Tybor & Mark Eissman, *Judges Penalize the Guilty for Exercising Right to Jury Trial*, CHI. TRIB. (Oct. 13, 1985), http://articles.chicagotribune.com/1985-10-13/news/8503090729_1_jury-trial-sentencing-harsher [<https://perma.cc/6C92-XHQC>].

89. Interview C, *supra* note 1 at 6; *see also* Interview D, *supra* note 64, at 8–9 (“[A]fter a while of this, they didn’t care. It was just procedural — okay, let him talk; we’re going to give him this anyway.”); Interview E, *supra* note 8, at 1 (“One of my codefendants tried to do that [speak in mitigation of sentence], and it didn’t work, but he gave it a shot. The judge didn’t care. But sometimes they do. I didn’t.”); *compare with* Interview B, *supra* note 2, at 4 (“I eventually got a letter of recommendation from my sentencing judge, who himself said that, you know, he never expected me to do so much time, to have to go to 5 parole boards, you know, and so forth, so even writing a letter on my behalf, so I think he listened to me.”) and Interview F, *supra* note 64, at 9 (“So, I think for the most part, they see, I think judges see all types of people come before them. And to hear someone say that they’re remorseful goes a long way.”).

90. *See* Natapoff, *supra* note 9, at 1466 (“Particularly for defendants with prior criminal convictions, there is likely to be significant mutual distrust on both sides of the bench so that defendants may hedge their speech even as judges are predisposed to discount whatever the defendant says on his own behalf.”).

judge became less concerned, because I . . . Listen, so you've been here before, we've seen you been here before, but you said this the last time you were here. What happened this time? What's your story? So I think that after a while of this, they didn't care.⁹¹

This conclusion is supported by a study that undertook linguistic analysis of allocutions at federal sentencing hearings, which suggested that judges may infer meaning beyond what defendants said, hearing, for example, "I'm sorry I got caught" rather than "I'm sorry."⁹² This may be especially likely where defendants have lost at trial or pled guilty, which may prime judges who think of such defendants as less believable to make a moral judgment about their character.

Furthermore, defendants with past criminal histories may face conscious or unconscious bias that make their attempts at humanization less likely to be heard. As Professors Eisenberg and Hans explain:

[A] decision maker might use a defendant's criminal record to categorize the defendant as a bad person, a person of poor character. In other words, a negative halo effect might operate. Indeed, studies of social perception and cognition show that observers who learn that an individual has one negative characteristic or trait are apt to generalize and assume that the person has other bad characteristics or traits.⁹³

91. Interview D, *supra* note 64, at 8; *see also* Interview A, *supra* note 70, at 3 ("But as far as sentencing, again, you know, there's extenuating circumstances, you know, but very few judges are sympathetic, you know what I mean? They're saying, hey, this is the second time you're in front of me. The first time you got a smack on the wrist; you didn't learn, you're drinking, you're whatever, you know?").

92. GRUBER, *supra* note 17, at 150 ("The fact that all of the defendants who produced bare 'I'm sorry' statements referred to the offense in some way during their allocution, thereby providing a contextual referent for a deleted 'for' clause, suggests that judges' ideas about defendants might be doing a good deal of the work of attributing the meaning of 'I'm sorry I got caught' to the surface form of a bare 'I'm sorry.'"). *See also* United States v. Purchase, 107 F.3d 1261, 1269 (7th Cir. 1997) (denying a remand for resentencing when the defendant did not receive a sentence reduction for acceptance of responsibility because the district court found that his apology "was motivated by a desire to receive a lower level of sentencing without actually accepting responsibility for his actions.").

93. Theodore Eisenberg & Valerie P. Hans, *Taking a Stand On Taking the Stand: The Effect of a Prior Criminal Record On the Decision to Testify and On Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357-58 (2009).

There is reason to believe that judges are susceptible to such bias. Experiments examining the impact of limiting instructions on the incorporation of inadmissible evidence in decision-making have found that judges respond negatively to such evidence, even when told to ignore it.⁹⁴ This research is borne out by individuals' decisions to testify: defendants with prior records testified at a rate of 45.4% in the Eisenberg and Hans study, compared to 62% of those without a criminal record⁹⁵ — suggesting that self-interested defendants with criminal histories recognize that this information will be damaging to them. If judges' prejudice about factors such as criminal history affects their perceptions of defendants when they are explicitly told to disregard this history, it is easy to imagine that this prejudice is even more damaging in the context of sentencing, when, at least in the federal system, criminal history is explicitly a factor used in judges' determination.⁹⁶

The idea that humanization is in practice unavailable to defendants is contradicted somewhat by the survey responses of federal judges asked about the purposes served by allocution other than affecting the length of the sentence. The first and third most popular responses to this open-ended question, given by 40.8% and 14.3% of judges, respectively, were that allocution “[a]llows the defendant to participate in the process and have a chance to speak” and that it “[g]ives the court and others a better understanding of the defendant.”⁹⁷ And Judge Hornby stated that “[p]ermitting a defendant to speak reaffirms human dignity in the face of severe punishment.”⁹⁸ But recognizing these dignitary values in the abstract is different than applying them in practice, and at least in the views of those people interviewed for

94. *See id.* at 1362 (“Another study had 88 Ohio judges and 104 jurors participate in parallel experiments testing the effect of limiting instructions and inadmissible evidence. Some of the judges and jurors were provided with facts that could not legally be considered in deciding the case, while others, in a control condition, did not hear the objectionable facts. Half of the judges and jurors who heard the inadmissible evidence received a limiting instruction directing that the evidence should be set aside, but the others did not receive this instruction. Both judges and jurors responded similarly. Those who heard the inadmissible evidence--even if told to disregard the information--responded more negatively, compared to judges and jurors in the control condition.”).

95. *See id.* at 1371.

96. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S. SENTENCING COMM’N 2012).

97. Bennett & Robbins, *supra* note 7, at 799.

98. Hornby, *supra* note 7, at 154 (2011).

this Note, the judges that they dealt with were not, for the most part, particularly interested in humanization for its own sake.

D. APPRECIATION OF THE HUMANIZATION RATIONALE MAY
REQUIRE TIME FOR REFLECTION NOT TYPICALLY AVAILABLE TO
A DEFENDANT

The idea that allocution is not about reducing the sentence — but is rather a personal opportunity for reflection and self-expression — appears to have been an important but secondary understanding of the right for most of the people interviewed for this Note. Notably, however, the interview subject who expressed the most interest in the humanization rationale was also the individual for whom the most time elapsed between the beginning of his incarceration and the sentencing hearing at which he spoke. For him, speaking at sentencing was still primarily about getting “the agreed upon sentence”⁹⁹ and because he knew that “it goes a long way with parole.”¹⁰⁰ Yet it was also important to him that allocution be “a chance for me to go on record and state what I am now, six years after the trial, and the way I hoped to be, you know, ultimately in the future.”¹⁰¹ And for this approach to allocution, he credited the distance in time that he had from his initial incarceration:

And I was ready to receive the words that he had, you know? So, I think me being present, me being six years removed from when I first started fighting the case, and the growth that I'd done really made a difference in how I wanted to come across, number one, and two, it kind of felt like I didn't need to lie to nobody about nothing anymore, you know? Because anything I've ever done is done, you know. . . .¹⁰²

Two other interview subjects also credited allocution with ultimately being a factor in their realization that they needed to make a change:

99. Interview F, *supra* note 64, at 1.

100. *Id.* at 5.

101. *Id.* at 1.

102. *Id.* at 6.

But like I say, a lot of that stuff . . . doesn't come home until you begin to get older, and you begin to take a little bit more serious look, and it becomes a little more humanistic. . . . And you start to, I guess, internalize, and really think about what you're doing, even what you're saying, if you're going to be speaking for yourself at your sentencing.¹⁰³

This lack of time is compounded by the fact that the sentencing allocution takes place at the end of a process that is often emotionally and mentally draining. And this context may make it more difficult for defendants to apologize in a way the court finds sincere, as “[b]y the time of sentencing, criminal procedures have done little to encourage repentance, apology to victims, or coming to terms with one’s guilt.”¹⁰⁴ Even in the case of defendants who have pled guilty, there are “significant psychological and contextual barriers” to true expressions of remorse,¹⁰⁵ including the “quasi-public setting[]” of the courtroom¹⁰⁶ and the fact that allocution is often the first chance a defendant has had “to apologize for their crime to victims or the community.”¹⁰⁷

From this, it appears that the value of the humanization rationale (with a goal of expressing oneself for reasons other than lessening one’s sentence) may be more obvious to those defendants who have had more time to reflect, whether because they have had more time to wait between incarceration and sentencing or because they have allocuted before. This dovetails with Thomas’ idea that humanization stories “have transformative potential for the defendant,” who is “forced to think about the key moments in his life and to choose how to present himself.”¹⁰⁸ The interviews I conducted suggest the intuitive idea that for the subjects of this Note, at least, this sort of reflection takes significant time, which will not be available to every defendant before they have allocuted.

103. Interview D, *supra* note 64, at 8; *see also* Interview C, *supra* note 1, at 5 (“[I]t’s just like, by this time, I’m just getting sick of this shit, and I’m just look, I think I was just like, ‘I’m really getting sick of this shit. Like, I’m just . . . I don’t, I think, look, I have a girlfriend, you know, like, I think I have a good place to go when I get out, if I don’t get a lot of time.’”).

104. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology Into Criminal Procedure*, 114 YALE L.J. 85, 98 (2004).

105. *Id.*

106. *Id.*

107. *Id.*

108. Thomas, *supra* note 11 at 2673–74.

This Part makes clear that while those interviewed for this Note do view humanization as a meaningful and important goal of allocution, this importance mostly comes to the extent that humanizing oneself or expressing remorse may help to mitigate one's sentence. Additionally, a humanization rationale that strives to encompass a broader range of defendant speech, such as grievance stories, is not consonant with the needs of defendants. Nor is the decision to tell a story of grievance at allocution always an informed choice, as defendants may not know the full extent of the consequences of doing so. Humanization has value in its potential capacity to focus reflection by a defendant, but it should not be regarded as the primary rationale for the continued relevance of allocution because that does not seem to be how it is viewed by defendants.

V. THE CONTINUING IMPORTANCE OF A DEFENDANT-CENTRIC MITIGATION RATIONALE FOR ALLOCUTION

The mitigation rationale is often framed in court opinions as revolving around the judge and her or his decisions regarding sentencing. Even Justice Black, who in his dissents in *Green* and *Hill* sought stronger protections for the right of allocution, focused on the potential for defendants to bring forward information that could mitigate their sentences.¹⁰⁹ For most of the subjects interviewed for this Note, there was a similar focus. Several of them talked about what they thought their sentencing judge wanted or expected them to say.¹¹⁰ Two subjects said ex-

109. *Green v. United States*, 365 U.S. 301, 307 (1961) (Black, J., dissenting); *Hill v. United States*, 368 U.S. 424, 431–32 (1962) (Black, J., dissenting).

110. Interview B, *supra* note 2, at 4 (“You know you gotta say ‘sorry.’”); Interview C, *supra* note 1, at 7 (“Because I know they really want you, I think they really want you to take responsibility. You can’t get up there and be like, ‘I didn’t do this,’ you know what I mean? Or at least, I don’t think it’s a good idea to, especially if you plead guilty.”); *id.* at 10 (“I was more, so like, accepting, and taking personal responsibility for my, for my actions at the sentencing. One, because, like, okay, well, like, I figured, like, that is probably what they want to hear. . . .”); Interview F, *supra* note 64, at 3 (“But for the most part, people should shut up at sentencing unless they are saying, ‘I’m remorseful, and I’m so sorry.’ And unless they are saying that, or that ‘I need help,’ or you know . . . they’re still just saying ‘I didn’t do it.’”).

plicitly that their motivation was to mitigate their sentences.¹¹¹ And for the subject who did not speak at his sentencing hearing, perhaps the most significant reason that he chose not to speak was that he felt that he already knew how much time he would ultimately be sentenced to:

The big reason why I didn't speak is because I didn't see a need to speak. I was already getting my time. I already had my time. I mean, once I copped out to it, I knew how much time I was getting, I knew when I was going home, based on like, just doing the math.¹¹²

Thus, it does seem that mitigation is at the forefront of defendants' minds before and during allocution, at least for the people I interviewed. Still, there are clear problems with adopting a purely mitigation-centered approach towards allocution, including that such a rationale may depress the attention paid to allocution by counsel, that it may proscribe the language or subjects of defendant speech, that defendants fear a potential backfire effect from presenting mitigating evidence, and the perception on the part of defendants that sentences are predetermined. However, this Part concludes that it is the possibility of mitigation, rather than its likelihood, that is important to most defendants. In other words, even though most defendants recognize that their allocution has a low possibility of successfully mitigating their sentence, defendants still deem this possibility — and the opportunity it provides them to directly influence their own fate — valuable. So long as this intuitive truth is central to the mitigation rationale, it is highly reflective of the lived experiences of many defendants.

111. Interview D, *supra* note 64, at 5, 6 (“My ulterior motive was not to get the maximum amount of sentence. That’s what always, to me, was the underlying purpose of me being able to speak.”) (Q: “And did you apologize to anyone, during the . . .” A: “Oh, of course! I was sorry. Just don’t send me to jail for this long period of time.”); Interview C, *supra* note 1, at 9 (Q: “Were you, when you went in to speaking, were you sort of feeling hope that this would be, that you would be able to change your sentence, or influence the judge?” A: “I mean, that was the hope. I mean, that was *the* hope.”); Interview F, *supra* note 64, at 1 (“Principally about my remorse for the person who was deceased, and my respect for the law, and how I really appreciate the opportunity I’m getting here, and man, just hope that I get the agreed upon sentence is what I really wanted to happen. . . .”).

112. Interview E, *supra* note 8, at 2.

A. DEFENDANTS DO NOT TYPICALLY RECEIVE SIGNIFICANT HELP FROM COUNSEL IN PREPARING FOR ALLOCUTION

Assuming defense attorneys are largely rational actors, if they generally believed that the purpose of defendants' allocutions was mitigating her or his sentence, and that the allocution was likely to be successful in doing so, they would spend time and resources preparing their client for allocution. And yet, while most interview subjects did prepare to speak,¹¹³ none felt like they were well prepared by their attorney. One interviewee said that the extent of the advice given by his attorney before sentencing was "Dress nice."¹¹⁴ Another said:

So the explanation of the sentencing process never really came into play except for the fact that "you're going to get sentenced today, you'll have an opportunity to speak for yourself if you want to." That was it. So they never gave you, like, a blueprint of what happens. . . . So no, they did not really explain the sentencing process in itself, where you could understand it.¹¹⁵

A third interviewee had similar recollections:

I mean, I don't know if it's a lawyer's role to tell you or to coach you on what to say. Maybe some lawyers do, but my lawyer didn't. But I really wish I would have had the law-

113. Interview B, *supra* note 2, at 1 (Q: "And did you prepare for that at all?" A: "Um, pretty much the night before, I kinda figured out, well, rather, thought about well, what am I gonna say? You know, so I kinda planned it in my head, well, I might have to explain my situation, but I didn't want it to be like I'm pointing fingers or blaming anyone, because I do want to accept responsibility. So that's what I did."); Interview C, *supra* note 1, at 2-3 (Q: "And so your lawyer, your lawyer didn't really give you much advice about what to say, but did you think about it?" A: "Yeah, hell yeah. Shit, you just like, sitting there, sitting in a cell all night thinking about what you're going to say. I wrote things before. I've been in there with, like, I've written letters to the judge and stuff. So yeah, I just think about it all day, all night, what I'm going to say to the judge in the morning. It's definitely, definitely heavy on my mind, what I would say to the judge"); Interview D, *supra* note 64, at 4 (Q: "And, so did you prepare to speak? Was that something, you thought about what you were going to say?" A: "Yeah. Sometimes. I mean, sometimes I did, and sometimes I didn't. I guess it would depend on what I was facing. And I think, the most time I faced was like, 15 years. That scared me, right? And I think for that particular one, I prepared, very well.").

114. Interview A, *supra* note 70, at 2.

115. Interview D, *supra* note 64, at 4.

yer at least outline, “Well, these are a few things that I would like for you to touch upon.”¹¹⁶

By not providing significant information or advice to their clients during the sentencing process (perhaps because they do not believe allocution likely to be successful at mitigation), defense lawyers make it less likely that these same clients — most of whom have not spoken in court before¹¹⁷ — will be able to prepare an allocution that will effectively lessen their sentence. This difficulty is exacerbated by the “linguistic and experiential gap” that may exist between the judge and the defendant.¹¹⁸ That “‘allocution practice’ is the most underdeveloped and least sharpened arrow in the defense lawyers’ quiver”¹¹⁹ suggests that many defense lawyers do not view allocution as being generally helpful enough to their clients to warrant spending much time on preparation.

Furthermore, at least one interview subject felt that his lawyer did not want him to speak at sentencing:

You see, the thing is that they don’t want you to speak, so there’s — I mean, not that they don’t want you to speak, your lawyer doesn’t really want you to speak. I think in some cases because they feel they can represent you better than you can represent yourself, so what good are you doing to speak up for yourself. And then, you know, you also have lawyers who discourage it, and say, “Well, he’s [the judge] not going to care.” Or “You’re going to make it worse for yourself. Just take the time and go,” as if they’re doing the time for you.¹²⁰

116. Interview B, *supra* note 2, at 10; *see also* Interview E, *supra* note 8 at 3 (“If you ask them, they’ll tell you, but they’re very short with you, and very, like, they have a huge caseload, they have you and about 50 other guys to see that day. So you don’t really get, you know, one on one time with a lawyer to really get clear on things.”).

117. Natapoff, *supra* note 9, at 1465 (stating that allocution “will often be the first time [the defendant] has ever had an opportunity to address the court and the public.”).

118. *Id.*; *see also* Interview F, *supra* note 64, at 8 (“So, I can’t imagine being an attorney, faced with trying to help someone who can’t necessarily help themselves, right? So they may not have a proper education, they may not be able to speak correctly, they may not be able to write subject-verb sentences or speak, you know, that way. But it’s very difficult, you know, so, you know, lawyers are dealing with what they’re working with, you know?”).

119. Bennett, *supra* note 7, at 27.

120. Interview E, *supra* note 8, at 3.

This discouragement by attorneys is particularly likely where attorneys “anticipate that their clients will not sway the judge favorably, or worse, might offend the judge. . . .”¹²¹ That attorneys both ignore and, on some occasions, discourage allocution suggests that it is generally viewed as unlikely to lead to positive outcomes for a defendant. However, in such an account of the value of allocution, a negative or neutral outcome takes the form of an increased sentence or wasted time on preparation, and ignores the potential dignitary value of a well prepared and thoughtful allocution, even one that does not lead to a lower sentence. Defense attorneys who valued allocution for the opportunity it presented to their client to humanize her- or himself and to participate in the process would not be likely to view time spent preparing for allocution as “wasted,” regardless of its impact on the actual sentence. We can discern a circular problem developing here: defense counsel may not believe that judges will be influenced by their clients’ sentencing allocutions, so they will not adequately prepare their clients to allocute. In turn, this leads to underprepared clients giving allocutions that do not positively influence judges, which reinforces the initial beliefs of defense counsel. Thus, the mitigation rationale generally contributes to the lack of emphasis attorneys place on helping clients prepare for allocution or even to encourage it in the first place.

B. A MITIGATION RATIONALE DOES NOT ALLOW FOR STORIES OF ANGER OR MISTREATMENT

Mitigation as a rationale for allocution falls particularly short when it comes to defendants with anger or grievances against the manner in which they have been treated by the criminal justice system.¹²² All but one interviewee expressed some degree of frustration or resentment at some aspect of their experience. Often, this was directed against police or prosecutors, who several subjects felt stretched the truth, filled in facts, or even lied to create a narrative:

121. Natapoff, *supra* note 9, at 1466.

122. Bennett & Robbins, *supra* note 7, at 774 (“These broader purposes [of allocution] 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.”).

I mean, the district attorney has a job. I mean, bottom line, once you're in his courtroom, his whole purpose is to get a prosecution; that's what he gets paid for, that's what he do. So if he has to embellish, if he has to exaggerate, if he has to, you know, put the details, details that he don't understand, he's going to make up the details, but he has to paint a story.¹²³

Interviewees also expressed a more general sense of anger, some self-directed and some directed at the justice system writ large:

Who wouldn't feel angry? I mean, you're incarcerated, you're about to be separated from your family, you know you're going to be gone for a couple of years, and so forth. You're going to be angry with the judge, you're going to be angry with the district attorney. . . .¹²⁴

Certainly judges do not want to hear these stories.¹²⁵ And there is a strong argument that they do not belong in the courtroom, particularly during a sentencing after the defendant has

123. Interview B, *supra* note 2, at 6–7; *see also* Interview A, *supra* note 70, at 2 (“Listen, I did some crazy stuff and I had to be punished, alright, but in the end, you know, once again, for them it's all about winning. So they'll do whatever they have to do to win, and that's sad and true.”); Interview C, *supra* note 1, at 4 (“I never went to trial. I should have. I should have definitely for one of them. But I didn't. But I should have, because it was, it was, there was a lack of evidence, and the police lied, like, all in my report, because there was a lack of evidence. So it was just, pretty much a whole fabricated case of just, lies. Just, it was horrible. And like, but they lied so good, that it's like, what can you do? Like, they're not going to believe me.”); Interview F, *supra* note 64, at 6 (“Yeah, so my case said I was a drug kingpin of [PLACE]. And never had one arrest for drugs, they hadn't brought no proof that I sold drugs, none of that. My case, that was another reason why I felt that it was important for me to say something at sentencing. The narrative that they had built. . . .”).

124. Interview B, *supra* note 2, at 6; *see also* Interview A, *supra* note 70, at 2 (“You know, but again, I was angry. I was angry at myself, I was angry at the system. I was angry most at myself for putting myself in that predicament; for allowing them to basically sodomize me. Because that's the way it felt, because it was horrible.”).

125. Bennett, *supra* note 7, at 27 (“A really bad allocution can earn you a longer sentence, sometimes, with an upward variance, a *much* longer sentence!”). *See also* Bennett & Robbins, *supra* note 7, at 754–55 (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,’ ‘blame others or try to make [themselves] a victim of society,’ ‘make excuses,’ or ‘seek a lesser sentence.’”). This represents quite a broad and vague spectrum of speech. For instance, it is difficult to know the line between speech that “makes excuses” and speech necessary to present mitigating information, and easy to imagine that this line would vary considerably among judges.

pled guilty. But if these stories are not to be heard at sentencing, when are they to be heard? It is easy to imagine that for many defendants, being in front of a judge is one of the few times that that person will have such an influential audience for her or his views on the ways in which he or she has been treated unjustly. Under such circumstances, to tell a defendant that allocution is not available for her or his purposes unless those purposes fall into a narrow bucket of acceptable speech is, from a practical standpoint, to guarantee that many of these stories will not be told.

C. FEAR THAT PRESENTING MITIGATING INFORMATION COULD BACKFIRE

A further problem with a focus on mitigation is the risk that presenting mitigating information during allocution could backfire. Even if a defendant stays within the bounds of speech that judges find acceptable, “offering an explanation at sentencing is a risky move because it can be viewed as an attempt to reduce one’s responsibility for the offense.”¹²⁶ Soft factors beyond the actual content of the words, such as the judge’s perception of the defendant’s level of sincerity, may color the effectiveness of the allocution from a mitigation standpoint.¹²⁷ For one interviewee, the judge made this subjective determination explicit: “And it’s funny that even when I apologized to the family, and expressed remorse and accepted responsibility, there’s a line that the judge said, ‘even though you’re apologizing, you’re not apologizing with the remorse that I would like to see.’”¹²⁸

Certainly, some judges do try to be conscious of the prospect that they will perceive that a defendant is being insincere when that is not the case, as noted here by Judge Bennett:

Sincerity — or lack of it — is usually easy to spot. I don’t worry too much about being conned. If I did, I would likely

126. GRUBER, *supra* note 17, at 89.

127. Natapoff, *supra* note 9, at 1465 (“Many socially disadvantaged defendants, moreover, are ill-suited to address the bench in a way that judges are likely to embrace.”); see also Bennett & Robbins, *supra* note 7, at 770 (“Numerous studies have indicated that humans, in general, are not as adept as they think they are at detecting sincerity (citation omitted) and, more specifically, that judges are able to identify deceit at a rate only slightly better than chance.”) (citation omitted).

128. Interview B, *supra* note 2, at 2.

not assign much weight to allocutions in my sentencing deliberations. However, I like to give defendants the benefit of the doubt on sincerity. It is worth it to me to be conned on a rare occasion to be sure that truly sincere defendants are not lumped in with the insincere ones.¹²⁹

However, in Judge Bennett and Ira Robbins' survey of federal judges, the two most important characteristics of an allocution (according to judges) were the subjective perceptions of "genuine remorse" and "sincerity."¹³⁰ This suggests that judges are indeed making determinations of a defendant's internal feelings which, even if stated, would be difficult or impossible for a defendant to rebut. And these judgments may be based on an understanding of psychology that is incomplete or even wrong. In an examination of judges' reactions to children who have killed a person and been deemed, in some way, remorseless, Professor Martha Duncan found that judges were often unable to get beyond a single statement or act when evaluating "the child's lack of contrition," despite the fact that "mental health experts usually require a cluster of behavior" before making such judgments.¹³¹ In addition to extrapolating a personality trait from a limited set of actions or behaviors, Duncan argues that judges may not have the capacity to properly interpret those actions and behaviors:

Beyond the tendency to focus on a single indicator, the legal system often made conventional assumptions about the meaning of that indicator. For example, it assumed that playing a game or joking bespeaks lightheartedness; sleeping, a clear conscience. Confident of their ability to infer the inner state from the outer behavior, participants in the legal system showed little appreciation of the ambiguities that may attend a given act or statement.¹³²

Duncan's suggestion is that judges — not always, or even often, trained in psychology — may draw conclusions about a defend-

129. Bennett, *supra* note 7, at 28.

130. Bennett & Robbins, *supra* note 7, at 752.

131. Martha Grace Duncan, "So Young and So Untender": Remorseless Children and the Expectations of the Law, 102 COLUM. L. REV. 1469, 1491-92 (2002).

132. *Id.* at 1492.

ant's inner feelings based on faulty or overconfident assumptions about that defendant's behavior.

Where judges do make incorrect assumptions about the sincerity or quantum of remorse and acceptance of responsibility felt by the defendant, there may be real consequences. When asked how likely they were on a scale of 1–7 to increase a sentence within the guideline range based on a defendant's allocution, 8.5% of federal judges surveyed answered '4' or higher.¹³³ When asked about raising the sentence above the guideline range, the answer was lower, with only 3% answering '4' or higher.¹³⁴ While these numbers are low, the likelihood of an allocution raising a sentence based on subjective determinations of a particular defendant's inner feeling is non-zero, and thus concerning. Such subjective determinations by judges increase the risk posed by allocution for defendants, as a judge's capacity to read their true feelings is beyond any defendant's control.

D. THE PERCEPTION THAT SENTENCES ARE PREDETERMINED

Based on the interviews, the most frequently recurring issue posed by an approach to allocution that emphasizes mitigation is the perception — shared by several interview subjects — that their sentence was predetermined and that nothing they could say would change it. This perception poses a problem for a right of allocution grounded in the idea that an allocution can and should be used to mitigate sentences; such an impression makes it more likely that defendants will not take allocution seriously. This, in turn, may make allocution less likely to result in mitigated sentencings, leading ultimately to iterated erosion in the right's usefulness. As one subject said, "Would I say that it had any impact upon my sentencing? No, because it was already predetermined."¹³⁵ Another stated:

Like, maybe I should have took it a lot more serious. But I just wasn't really expecting that. So when I came into that, I did feel hope that I could change the judge's mind. I don't know. I mean, like, I, I'm thinking that maybe I could say something, you know, and maybe like, if the judge believed

133. Bennett & Robbins, *supra* note 7, at 783.

134. *Id.*

135. Interview B, *supra* note 2, at 2.

that I was sincere, then maybe they would show some leniency. But I think they already kind of got everything made up [before allocution]. I think they do.¹³⁶

There is evidence to suggest that this feeling of predetermination is not entirely misplaced, particularly where the defendant is a minority. Research suggests that the stereotypical “Blackness” of defendants’ facial features “correlate[s] with the actual sentencing decisions of judges.”¹³⁷ Even when differences in criminal histories were controlled for, “those defendants who possessed the most stereotypically Black facial features served up to 8 months longer in prison for felonies than defendants who possessed the least stereotypically Black features.”¹³⁸ When it comes to capital sentencing decisions, 57.5% of more stereotypically Black defendants received the death sentence, compared to 24.4% of those who are seen as less stereotypically Black.¹³⁹ As these statistics demonstrate, it is not unreasonable for minority defendants to feel that the deck is stacked against them at sentencing.

There is also the distinct possibility that judges, particularly those with relatively little experience, may fall prey at some level to the gambler’s fallacy. The gambler’s fallacy is the well-documented “tendency of people to overestimate the likelihood that a short sequence will resemble the general population.”¹⁴⁰ A recent study investigated the decision-making of asylum judges, and found that asylum judges were “.5 percentage points less likely to grant asylum . . . if the previous decision was an approval rather than a denial,”¹⁴¹ and that “[a]fter a streak of two grants, judges are 5.5 percentage points less likely to grant asy-

136. Interview C, *supra* note 1, at 9–10; *see also* Interview A, *supra* note 70, at 6 (“[I]t should have been a positive experience. It should have been. It should have been a real experience. It wasn’t. It was just because the law states that you have that opportunity, they gave it to me. But they never considered anything, you know, again.”); Interview F, *supra* note 64, at 2 (“But for me it was relieving for me to say that, and so I knew nothing else was going to change. I knew nothing else was going to change, I knew he was going to give me the sentence that we had to agree to.”).

137. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383 (2006) (citation omitted).

138. *Id.*

139. *Id.* at 384.

140. Daniel Chen et al., *Decision-Making Under the Gambler’s Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires*, 131 *Q.J. ECON.* 1181, 1184 (2014),

141. *Id.* at 1199.

lum relative to decisions following a streak of two denials.”¹⁴² While these changes seem small, the “magnitudes are economically significant. Using the largest point estimate following a streak of two grant decisions, a 5.5 percentage point decline in the approval rate represents a 19% reduction in the probability of approval relative to the base rate of approval of 29%.”¹⁴³ These differences are particularly pronounced where the previous decision was recent in time¹⁴⁴ or in some characteristic of the applicant.¹⁴⁵ This research suggests that judges may not be able to divorce their decision-making in an individual case from the cases that have come before it. If a judge has recently heard a good or bad allocution, their standard for judging the next one may be correspondingly lower, taking the result of the sentencing hearing further out of the defendant’s control.

These demonstrated biases — bias against minorities and the gambler’s fallacy — show that defendants’ lack of faith in the power of their allocution is legitimate, and supports the feeling among some of the interviewees that allocution was nothing more than “theater”¹⁴⁶ or something that the judge merely wanted to get through.¹⁴⁷ While one subject did feel as if his allocution had helped him to achieve a lower sentence, he also expressed significant doubt as to allocution’s general efficacy:

That usually, especially in the situation where you plead guilty, when you plead guilty, you’re only going to get this or you’re going to get that. It’s almost a done deal. So the op-

142. *Id.* at 1201.

143. *Id.*

144. *See id.* at 1199 (“We find stronger negative autocorrelation within same-day cases. The stronger negative autocorrelation when two consecutive cases occur more closely in time is broadly consistent with saliency and the gambler’s fallacy decision making model because more recent cases may be more salient and lead to stronger expectations of reversals.”).

145. *See id.* at 1204 (“[T]he reduction in the probability of approval following a previous grant is 4.2 percentage points greater when the previous decision corresponds to an application with the same nationality as the current applicant.”).

146. Interview A, *supra* note 70, at 2 (“It was actually, it honestly felt like theater in many ways, because of the way they’d orchestrated it, and because of what they did, and what they allowed, and what they didn’t allow.”).

147. Interview C, *supra* note 1, at 6 (“[T]hey didn’t want to sit there and hear me read all that stuff.”); *see also* Bennett & Robbins, *supra* note 7, at 757 (“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.”).

portunity to speak is a formality. . . . But the decision is really basically all made.¹⁴⁸

Still, despite not seeming to truly believe that allocuting would have a positive effect on their sentences, interviewees consistently placed this function of the right to allocution as the most important.¹⁴⁹

The interviews conducted for this Note reveal that, at least for the interview subjects, the mitigation rationale is often at the forefront of defendants' minds when allocuting. And so, despite the problems with mitigation as a rationale (from its limited scope to the perception by defendants that it is unlikely to be effective), the mitigation rationale does make clear one seemingly inescapable truth about allocution: it comes at a time of significant desperation. As one subject put it:

It's tough, right, because it's like, you know, it is a desperate-ass time, and people are probably going to say anything that they can say. It's like, shit, somebody has a gun to your head, and you know, "Tell me what you want me to say so . . ." Or, "Tell me something, you know, why I should keep you alive." You know what I mean? It's like, you'll say anything, you know, and this is like, a pretty similar situation. Like, you know, like, you're, "We can give you anything from 0 to 20-some years, you know, like. . . . Talk."¹⁵⁰

As is clear from this quotation, an impending sentence is impossible to ignore, and the expectation that defendants could have anything other than mitigation as their primary motivation is, perhaps, unrealistic. Because defendants are facing a significant deprivation of liberty no matter the length of their sentence, their likelihood of successfully lessening their sentence through allocution matters far less than their hypothetical ability to do so. To say that a mitigation rationale does not make sense because sentences are rarely lessened is to adopt a judge-centric approach

148. Interview D, *supra* note 64, at 7.

149. *Supra* note 111.

150. Interview C, *supra* note 1, at 9.

to allocution that ignores the anxiety and limited opportunities for control of an individual defendant facing a significant period of incarceration. In contrast, a more defendant-centric view of the mitigation rationale recognizes that — so long as the possibility remains that a defendant can lessen their sentence by speaking — allocution is profoundly important.

VI. CONCLUSION

Creating a real opportunity for the presentation of mitigating information is difficult, given the problems laid out above: that defense counsel may be less engaged in preparation for an allocution aimed at mitigation; that a mitigation-centric model of allocution may proscribe certain language or subjects; that defendants may fear a potential backfire effect from presenting such information; and that defendants may feel their sentences are predetermined. But it seems clear that creating such an opportunity will require defense attorneys to spend more time discussing allocution with clients, both helping them develop what they want to say and discussing the potential consequences beyond the sentencing hearing.¹⁵¹ From the interviews, it seems that there is an art to presenting mitigating evidence without making a judge think that the defendant is merely presenting excuses; defense attorneys should consciously develop this skill, and help their clients to do so as well. Creating such an opportunity will also require a concerted effort on the part of judges to check their subjective judgments of defendants' feelings and explore their implicit biases, as well as to acknowledge and account for the clear advantage held by defendants who can express themselves in a way that would be considered classically articulate or likely to engender empathy. Additionally, more research is needed into defendants' experiences. More interviews should be conducted with a broader range of defendants, particularly women and people of different races, languages, and socio-economic classes, as well as people who allocuted in the federal system. A quantitative analysis of the effect of allocution on sentence length may also be informative.¹⁵²

151. For an example of how defense attorneys can better engage their clients in the process of crafting an allocution, see Wexler, *supra* note 72, at 118–28.

152. In considering such an analysis, Bennett & Robbins offer this caveat, which is instructive of the challenges such a study may pose: “[A]llocution appears to be very case-

Based on the interviews conducted for this Note, allocution is best regarded as being about mitigation, and this rationale is enough to justify its continued relevance. That the ultimate purpose of allocution for many defendants is mitigation does not mean that allocution is meaningless unless it is commonly effective at lessening sentences. Allocution's importance to defendants lies in its potential to lessen sentences, not in its likelihood of success. Adopting a mitigation rationale takes into account the observed preference of judges for a mitigation rationale. It acts as an acknowledgement of the practical reality that defendants, faced with a period of incarceration at the end of a sentencing hearing, are likely to have lessening that sentence as their primary motivation, and thus any opportunity to do so is important. This conclusion is well-encapsulated by the words of one interview subject: "[T]his is your last chance. . . . [A]re you going to take it or not?"¹⁵³

specific. Predicting an allocution's efficacy may not be a simple matter of calculating statistical correlations of how the allocution is performed." Bennett & Robbins, *supra* note 7, at 776.

153. Interview C, *supra* note 1, at 8.