Heartstrings or Heartburn: A Federal Judge's Musings On Defendants' Right and Rite of Allocution

BY MARK W. BENNETT

Sentencing is, for me, and I believe most of my colleagues, the most daunting task we perform as federal district court judges. Depriving individuals of their liberty is never easy nor should it be.[1] Thinking about the appropriate sentence often leads to sleepless nights and stirring internal struggle and debate. I have sentenced two defendants to death, many more than that to probation, dozens to life, and have handed down every possible sentence in between.[2] I have heard more than 2500 sentencing allocutions. As a practicing lawyer for 16 years before that, I was a proud member of the C.J.A. panel from the week after passing the Iowa bar in 1975 until taking the oath of office as a federal judge. During that time, I had the great privilege of standing next to many defendants in federal court when they allocuted. Sometimes I felt proud; sometimes I nearly fainted. Never in my wildest imagination did I think allocutions were as important as I have found them to be on this side of the bench.

Allocutions Are Not Meaningless

Some of the allocutions I have heard have pulled at my heartstrings and even brought me to tears, while others have given me heartburn and elevated my already too high blood pressure. On rare occasions, all have happened in the same allocution. For me, a defendant's right of allocution is one of the most deeply personal, dramatic, and important moments in federal district court proceedings. As my wonderful mentor, colleague, and friend, Judge Brock Hornby of the federal district court in Maine, recently wrote:

> Federal judges sentence offenders face-to-face. It is a profoundly human exercise that cannot be captured in a mere transcript or sentencing statistics. Judicial sentencing vividly showcases governmental power and, sometimes, on the part of other participants, repentance, recalcitrance, compassion, sorrow, occasionally forgiveness. In today's world of vanishing trials, it is one of the few places where federal judges regularly interact publicly with citizens.[3]

Because U.S. magistrate judges in our district take guilty pleas, and many defendants who go to trial wisely do not testify, the allocution often is my first, only, and last direct contact with a defendant. I find them immensely important. More often than not, they help shape the sentences I impose — for better or worse. In many cases, I find the allocution more significant in crafting a sentence that is "sufficient but not greater than necessary"[4] than anything the defense lawyers are able to do or argue. I disagree with claims by academics in law review articles that changes in criminal procedure have rendered the historic

rite of allocution meaningless.[5] In my courtroom, allocution is always factored into the crucible of intense scrutiny that I give the § 3553(a) factors when imposing a sentence.

As the U.S. Supreme Court noted in *Green v. United States*,[6] "As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal." Even a cursory browsing of the history of this long-standing right/rite reveals its purpose to be tempering punishment with mercy and reflecting that sentencing should, as recognized in the more modern parlance of the 18 U.S.C. § 3553(a) factors, be individually tailored through the use of judicial discretion to reflect the individual circumstances of each crime and each defendant. Unfortunately, while it has been around for centuries, "allocution practice" is the most underdeveloped and least sharpened arrow in the defense lawyers' quiver. That's what prompted me to write this article.

The Rules of Allocution

The first rule of allocution: Discuss allocution early and often with your client and explore the pros and cons of waiving this precious right/rite. After advising a defendant in lay terms about the right of allocution, I am shocked how often the defendant turns to defense counsel, often an experienced assistant federal public defender or C.J.A. counsel, and asks, "Should I say something?" It seems like the very notion of an allocution has caught the defendant and counsel completely by surprise. It strikes me that at this stage it is a little too late to decide if the defendant should give an allocution and what should be said. The ritual usually continues with counsel turning to me and asking, "May I have a moment to discuss this with my client?" The answer is always the same: "Yes." I can't help wondering how counsel has overlooked the allocution, as I say to myself: *You have got to be kidding me! Where have you been the last 90 days? You are a walking violation of the Sixth Amendment. You have appeared before me dozens of times — don't you have a clue how important your client's allocution can be to me? I have frequently commented on the record why the allocution has motivated me to reduce the defendant's sentence.*

The second rule of allocution: Have some idea what your client is going to say. I recently listened to an almost six-hour allocution spanning two days in a complex white collar fraud case following a guilty plea to 21 various fraud counts and an adverse jury verdict on three tax counts. The defendant's allocution as to why he was innocent of *all* counts lasted longer than the plea, the defendant's evidence at trial, and the jury deliberations — combined! I speculate that most of my colleagues do not reward a defendant at sentencing for protestations of innocence in allocution, let alone six hours' worth. I know I did not. Another poor allocution came from a defendant who, after a lengthy trial, told me what a terrible and unfair judge I was. *Hmmm … Who do you think the trial judge on your § 2255 petition is going to be?*

The third rule of allocution: Avoid the clichés that federal trial court judges hear over and over again. These allocutions fall into three distinct categories: (1) the overly apologetic, (2) the narcissistic, and (3) the "I have seen the light."

Here is an example of an overly apologetic allocution: "I want to apologize to everyone, on this planet and on all others in the Milky Way and beyond," or its sister variation: "I want to apologize to you, your Honor, the prosecutor, my lawyer, the court security officers, your law clerk, and your auto mechanic."[7] *That's nice — everybody but the actual victims of your crime*. Stale and rote allocutions of the narcissistic variety include: "I really want to see my son graduate from high school." *Did you think about that when you were committing your crime?* "I really want to walk my daughter down the aisle." "If you give me probation, you have my personal guarantee I will never come back to your court." My personal favorite of the "I have seen the light" variety is this one: "If you give me probation, I will talk to high school students about drugs." *Would those be the same students you hooked on methamphetamine?* Its sister cliché goes like this: "If you show me some leniency, I will become a drug counselor when I get out." *Do you have a clue how often I have heard that one?*

The fourth rule of allocution: A really bad allocution can earn you a longer sentence, sometimes, with an upward variance, a *much* longer sentence! I have a long tradition of asking questions of defendants during their allocutions (after a proper Fifth Amendment warning). I frequently ask defendants about the history of violence that is included in the PSR report. I recall one such sentencing when I addressed the defendant: "I note in paragraph 45 of the PSR report that you knocked your then live-in girlfriend off the front porch and broke her jaw in seven places and her leg in three places. Why would you do that to her?" He responded: "She deserved it." I countered: "Excuse me, I don't think I heard your answer." His follow-up: "I said she deserved it." *I don't know what you could have said that would have helped you, but this really, really hurt you!* He received an extra 10 months per word.

The fifth rule of allocution: There are times a defendant should never allocute. When a defendant's allocution can only lengthen the sentence, I often send a not-so-subtle message to defense counsel and the defendant that silence is golden. The difference between good lawyers and great lawyers is often the judgment of knowing when not to say something. For example, after receiving the government's recommendation of a sentence at the mandatory minimum, I usually turn to defense counsel and ask: "Would you like to talk me out of a sentence at the mandatory minimum?" There is one and only one answer: "No thank you, your Honor." All too often, a defense lawyer cannot resist the urge to wax eloquent and, on occasion, has actually talked me into a higher sentence. The same is true for the defendant.[8] If I have indicated that I will impose the minimum sentence I can — this is not the time for the defendant to try to earn an Oscar. *In terms of risk/reward, there simply is no possible benefit to saying something because you are on a one-way elevator — it only goes up!*

Allocutions That Work

Having identified the major gaffes defense counsel and defendants have committed before me, a discussion of what works might be more useful. My basic principles of allocution include: (1) a sincere demeanor; (2) a discussion of what "taking full responsibility" actually means to the defendant; (3) an acknowledgment that there are victims (e.g., even when the PSR indicates "no identifiable victim," as it does in most drug cases); (4) an understanding of how the crime affected the victims; (5) an expression of genuine remorse; (6) a plan to use prison or probation time in a productive manner; (7) a discussion of why the defendant wants to change his or her criminal behavior; and, perhaps most importantly, (8) information that

helps humanize the defendant and the defendant's role in the crime.

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 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. Perhaps I am fooling myself, but I think that faking sincerity is no easy task.[9] While it is not impossible to gauge, sincerity is harder to sense when a defendant is reading verbatim from a script, often speaking too fast and not making eye contact. I think defendants should be encouraged to speak from their hearts rather than from their written statement whenever possible. And it is not just a matter of eloquence or sophistication. I have heard extraordinarily sincere allocutions from folks who could not read or write and infuriatingly insincere nonsense from sophisticated, highly educated white collar defendants.

I often bristle during allocution when a defendant claims to "take full responsibility" for the crime, but has absolutely no response when asked what that means. Defendants can mouth the buzzwords, but are clueless as to what the words actually mean to them as an individual. I will often then ask, "Well, the statutory maximum sentence is life. Are you taking full responsibility for that sentence?" Good answers require a thoughtful response that few defendants are capable of coming up with spontaneously. Thoughtful responses tend to separate the con artists from the very sincere defendants, who have given their criminal conduct and their desire to change a lot of thought — even in unsophisticated ways.

Genuine recognition of the impact of the crime on the victims and remorse are very important to me. As I indicated above, a defendant who apologizes to everyone, both imaginable and unimaginable, and in the long litany briefly mentions any "victims" or "the community" without any explanation, strikes me as insincere. A more impressive allocution details how the defendant's criminal conduct actually affected the victims.

Genuine remorse is essential to my consideration of a downward variance. It is hard to fake anguish. One can sense it. As most of our mothers told us when

we were young: "It's not what you say but how you say it" that's often more important. In an impressive work on the role of remorse and apology in the criminal justice system, Professors Bibas and Bierschbach note that "criminal procedure neglects the power of remorse and apology."[10] I don't. As these professors note: "When offenders express genuine remorse … the effects can be profound."[11]

Many moving allocutions reflect that the defendant has thought about what specific changes are needed and wanted to make a real difference. Defendants must be realistic to influence me. Defendants should not make any claims that after serving the 20-year mandatory minimum, they aspire to succeed me on the bench or become an astronaut. However, a true desire to learn a specific trade and a request to go to a specific Bureau of Prisons institution that offers that trade can sometimes be very helpful. It at least shows that the defendant and counsel took the time to explore some possibilities. I have a book (a must-have for defense lawyers) that describes each of the 115 Bureau of Prison facilities and can quickly test the accuracy of these requests or discuss with the defendant a more suitable facility.[12] An armed career criminal with 27 scored criminal history points and a guideline range of 360 months to life in prison should not request a prison camp to learn horticulture and do community gardening work outside the prison gates.

I often find very impressive defendants who explain why they want to change their criminal behavior and explain specifically and realistically how they intend to do that in prison and beyond. These defendants express in their allocutions both a deep desire to change and at least the thoughtful beginnings of a rudimentary plan to do so. Again, to be effective, allocutions need to be reality-based and not "pie in the sky."

Finally, allocutions give defendants a critically important opportunity to humanize themselves in my eyes. An article by Professor Kimberly Thomas, *Beyond Mitigation: Towards a Theory of Allocution*,[13] should be required reading for every criminal defense lawyer. The last line of her article is worth noting here: "Allocution stories based on the theory of humanization give defendants a point in the process to be heard and give life to a historic practice."[14] Thus, factors that mitigate and help explain a defendant's criminal conduct and lifestyle choices are critically important. They demonstrate a defendant's insight into prior conduct and can be seen as a meaningful step towards rehabilitation and redemption.

Allocutions are important to me not because I believe in tempering justice with mercy. In my view, true justice must often include mercy — not be tempered by it. Attorneys have an unfailing obligation to help their clients decide whether or not to allocute, and if they do, provide guidance on what to say. I beg you not to give this most intimate, personal, dramatic, and often very effective moment the short shrift I did when I stood years ago in your shoes next to defendants.

Notes

1. Early in my second year as a judge I had a discussion about sentencing with a mentor judge before whom I had practiced extensively. I told him of the extraordinary difficulty and emotional toll I was encountering in sentencing. He said, "Don't worry, Mark, it will get much easier." Out of respect, I did not respond, but I said to myself, *if it gets easy to deprive someone of their liberty please shoot me*. I have not been shot, and it hasn't gotten any easier.

2. One might think the Northern District of Iowa is a sleepy little district in terms of criminal sentencings. It is not. For example, in 2008, it was in its traditional place of fifth in the nation of the 94 districts in terms of criminal defendants sentenced per judge, at 271; the national average was just 91. Administrative Office, United States Courts, Federal Court Management Statistics — 2008, U.S. District Court — Judicial Caseload Profile (2009), http://jnet.ao.dcn/cgi-bin/cmsd2008.pl.

3. D. Brock Hornby, *Speaking in Sentences*, 14 Green Bag 2d 141, 141 (2011).

4. 18 U.S.C. § 3553(a).

5. *See, e.g.*, Jonathan Scofield Marshall, *Lights, Camera, Allocution: Contemporary Relevance or Director's Dream?*, 62 Tul. L. Rev. 207, 212 (1987) ("Modern criminal procedure has rendered allocution virtually obsolete."). It is not just academics who have questioned the importance of allocutions. Marvin E. Frankel, who was then a U.S. district court judge for the Southern District of New York and one of the pioneers of the sentencing guidelines movement for federal courts, observed, "Speaking … of the usual case, defendant's turn in the spotlight is fleeting and inconsequential." Marvin E. Frankel, Criminal Sentences: Law Without Order 38 (1973).

6. 365 U.S. 301, 304 (1961).

7. Of course there are exceptions to this rule. As Judge Brock Hornby pointed out in an email to me critiquing this piece: "But I have had moving allocutions from illegal aliens, apologizing to the people of this country, expressing their love for this country, their dream since childhood of living here, and their regret that because of their actions they cannot return." Email from Hon. D. Brock Hornby, U.S. District Court Judge for the District of Maine, to Mark W. Bennett (Feb. 2, 2011, 3:17 EST) (on file with the author).

8. Judge Brock Hornby also pointed out in "mildly disagreeing" with my fifth rule, that an allocution "can have an important role in the sentencing ritual, in its impact on victims, on the defendant's family and on the community if reported." *Id*. I agree, but I believe the risk outweighs the benefit unless very, very carefully done.

9. Or is it? Perhaps all of us overestimate our ability to gauge sincerity. *See* Christopher Chabris & Daniel Simons, The Invisible Gorilla and Other Ways Our Intuitions Deceive Us 80-115 (2010) (chapter entitled *What Smart Chess Players and Stupid Criminals Have in Common*).

10. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology Into Criminal Procedure*, 114 Yale L.J. 85, 89 (2004).

11. *Id*. at 115.

12. Allen Ellis & Michael Henderson, Federal Prison Guidebook (2010-2012 Edition).

13. 75 Fordham L. Rev. 2641 (2007).

14. *Id*. at 2683. ■

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