



SPEAKING IN SENTENCES

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FEDERAL JUDGES SENTENCE OFFENDERS face-to-face. The proceedings showcase official power vividly and, sometimes, individual recalcitrance, repentance, outrage, compassion, sorrow, occasionally forgiveness – profound human dimensions that cannot be captured in mere transcripts or statistics. But while materials on federal Guidelines, statutory mandatory minimums, and sentencing data are voluminous, relatively little attention is paid to federal sentencing *proceedings* as they occur today.¹ In a world of vanishing trials, these public communal rituals

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¹ There is brief treatment in MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 36-38 (1972). In characterizing pre-Guidelines proceedings, Professor Stith and Judge Cabranes mentioned several elements I describe in this account, *e.g.*, “a face-to-face encounter between individuals,” “a wide audience . . . includ[ing] victims, their families and friends, the family and friends of the defendant, the general public, and even the appellate courts.” KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING* 81 (1998). A Sentencing Judge/Commissioner provided pre-*Booker* mandatory-Guideline comments. Reuben Castillo, *Reflections on Sentencing by a Judge/Commissioner*, 29 *LITIG.* 8 (2002). Occasional academic scholarship addresses the significance of sentencing proceedings. *See, e.g.*, R.A. Duff, *Punishment, Retribution and Communication*, in *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 126, 133 (Andrew von Hirsch et al. eds., 3rd ed. 2009); Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 *OHIO ST. J. CRIM. L.* 423, 424-25 (2007); David Tait, *Sentencing as Performance: Restoring Drama to the Courtroom*, in *SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES* 469, 470 (Cyrus Tata & Neil Hutton eds., 2002).

are vital opportunities for federal courts to interact openly and regularly with citizens. How they are conducted can rival the importance of the actual punishment; managers or forepersons who penalize workers, parents or teachers who discipline children, certainly judges, know that.² My topic, therefore – Speaking in Sentences – is what should and should not be said when federal judges punish individuals.

WHAT ACTUALLY GOES ON AT A FEDERAL SENTENCING?

Sentencing proceedings are fundamentally oral. Yes, there is Symbolism: the black-robed judge elevated above the rest of the U.S.-flagged courtroom; the defendant, sometimes in prisoner's garb, occasionally leg irons, with deputy U.S. Marshals nearby; the presence (sadly, often the absence) of family members, victims, news media, and court observers. Tears, glares, and gestures embellish the proceedings. But the crucial element is what is said, who says it, and who listens.

Customarily, sentencing proceeds as follows.³ The judge opens the proceedings, ensuring that the defendant and counsel have read and discussed the presentence report; the prosecutor presents the government's sentencing recommendation and reasons; defense counsel presents the defendant's sentencing recommendation and reasons; the defendant's family and friends (if any are present) speak; victims (if any are present) speak; the defendant speaks; the lawyers have a final opportunity to comment on what has been said;

² I disagree with Judge Frankel's assessment – "truly a formality in most cases" – FRANKEL, *supra* note 1, at 36. That has not been my experience in over twenty years of sentencing in two districts, nor was it what Judge Frankel wanted. See *id.* at 38.

³ There is no "particular order" for the proceedings, FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 140 (5th ed. 2007); the applicable rule, FED. R. CRIM. P. 32(i), has few requirements. I bypass objections to guideline calculations and factual disputes requiring evidentiary-based findings. I also exclude capital cases, punishment for violating probation and supervised release, and resentencing for later cooperation. They raise different issues.

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the judge consults with the probation officer who wrote the presentence report; finally, the judge pronounces sentence and describes appeal rights.

INVISIBLE SPEAKERS

Some prominent messages at sentencing come from speakers who are not physically present. Congress has its institutional say through the language of statutes prescribing sentencing ceilings and floors. The U.S. Sentencing Commission has its institutional say through the detailed Guidelines Manual. Appellate courts impose requirements through written decisions in previous cases.

VISIBLE SPEAKERS

Prosecutors

Assistant United States Attorneys announce the government's sentencing position. The prosecutors' audience is generally the judge, sometimes the defendant, often the victim and the community. Prosecutors emphasize the gravity of the offense, the defendant's criminal history, the risk to the community, and the need to proclaim a strong message about criminal behavior's consequences.

When defendants cooperate and incriminate others, prosecutors request sentences below the Guideline range or statutory floor, as the Guidelines and statutes allow.⁴ (Encouraging cooperation promotes prosecutors' ability to pursue other cases.) For other defendants, prosecutors typically argue for a sentence within the Guidelines,⁵ rarely urging a non-Guideline sentence based upon other sen-

⁴ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2010); 18 U.S.C. § 3553(e).

⁵ "In the typical case, the appropriate balance among these [statutory sentencing] purposes will continue to be reflected by the applicable guidelines range, and prosecutors should generally continue to advocate for a sentence within that range." Memorandum from Eric H. Holder, Jr., Attorney Gen., U.S. Dep't of Justice, to all Federal Prosecutors 2 (May 19, 2010), *available at* www.nylj.com/nylawyer/adgifs/decisions/060110holdermemo.pdf. To what used to be an unyielding call for guideline sentences, that memorandum actually provided prosecutors "significantly more discretion." Lanny A. Breuer (Assistant Attorney Gen., U.S. Dep't of Justice, Criminal Division), *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 FED. SENT'G REP. 110, 113 (2010).

tencing factors. They do so despite the Supreme Court's rulings that, for constitutional reasons, Guidelines are no longer mandatory⁶ and that, although Guidelines must be calculated, the judge cannot give them even presumptive weight in determining a sentence.⁷ Or they leave the matter to the judge, expressly recognizing judicial discretion to sentence outside the Guidelines.⁸

By *routinely* insisting on a Guideline sentence, prosecutors fail to contribute persuasively to the judicial choice whether, or how far, outside the Guidelines an appropriate sentence lies.⁹ Perhaps prosecutors still are learning to adjust to new flexibility Attorney General Holder accorded them in 2010,¹⁰ or perhaps it is just difficult to accept judicial sentencing discretion after almost 20 years of mandatory Guidelines. But federal sentencing will be better served when

⁶ United States v. Booker, 543 U.S. 220, 258-65 (2005).

⁷ Rita v. United States, 551 U.S. 338, 351 (2007) (“the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply”).

⁸ See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.730.B (1997) (“[r]ecognizing . . . that the primary responsibility for sentencing lies with the judiciary, government attorneys should avoid routinely taking positions with respect to sentencing, reserving their recommendations instead for those unusual cases in which the public interest warrants an expression of the government's view,” but also urging prosecutors to “bear in mind the attitude of the court toward sentencing recommendations by the government”). These provisions appear open to wide interpretation. In some districts, sentencing recommendations are the norm, just not outside the Guidelines; in other districts, prosecutors do not recommend particular sentences.

⁹ The UNITED STATES ATTORNEYS' MANUAL directs prosecutors as “advocates for the United States . . . to argue concerning those adjustments [to the Guideline base offense level] (and, if necessary, departures allowed by the guidelines) in order to arrive at a final result which adequately and accurately describes the defendant's conduct of offense, criminal history, and other factors related to sentencing.” *Id.* § 9-27.720.B.2. My point is that this advocacy should include factors that take a sentence outside the Guideline range. Professor Stith remarks the “loss of credibility” resulting from prosecutors routinely opposing non-Guidelines sentences. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J 1420, 1484 (2008).

¹⁰ See *supra* note 5. I observe recent cautious incremental change.

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prosecutors' sentencing presentations apply faithfully the Supreme Court's instructions on sentencing rather than default reflexively to the Guidelines. In an era of fewer trials, sentencing advocacy can be an important prosecutorial function. Not all sentences should be Guideline sentences, prosecutors should be trained on how to advocate a sentence, and prosecutorial sentencing decisions should be publicly visible, not limited to their below-the-radar choices that affect sentences (such as how to charge a defendant or when to present evidence to the sentencing judge).

Defense Counsel

Defense lawyers argue for leniency at sentencing, emphasizing obstacles defendants faced growing up, downplaying criminal history, suggesting defendants have seen the error of their ways, and highlighting good things defendants have done, as well as family, employer, and community support.¹¹

But frequently, their advocacy suggests failure to counsel defendants over what is realistic. *Booker*, making the Guidelines advisory, is not the brass ring for defense lawyers; time served, or probation, is seldom an attainable goal in a federal sentence. Criminal defense lawyers need to learn "the normal pattern of sentences for the offense involved,"¹² then be compassionately but plainly candid with clients about what sentence is likely, and the range within which to advocate. It probably is not the message clients want to hear, but that honesty is a lawyer's role.¹³ Sentencing advocacy requires planning, skill, hard work, and a case theory¹⁴ to show a

¹¹ They also identify factors affecting prison assignment.

¹² ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 4-8.1(a) (3rd ed. 1993).

¹³ I recognize that it is difficult for court-appointed lawyers to gain the confidence of clients who distrust lawyers they did not choose, paid by the same government that prosecutes.

¹⁴ See Kimberly A. Thomas, *Sentencing: Where Case Theory and the Client Meet*, 15 CLINICAL L. REV. 187 (2008); 2 FED. DEFENDERS OF SAN DIEGO, INC., DEFENDING A FEDERAL CRIMINAL CASE § 16.06 (2010); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 13:16 (3d ed. 2004).

judge why the statutory sentencing factors call for a particular sentence. A narrative, written or oral, of the defendant's tough life is not enough. Some of the most effective advocacy occurs when a defendant's lawyer seeks a reasoned sentence that, while undoubtedly greater than the defendant wants, persuades the judge (when an unrealistically low request would have left the judge higher).¹⁵

Moreover, defense lawyers must assess the impact of the sentencing *proceeding*, not just its outcome, on the defendant and family. I wince when a lawyer tells me his client is not very bright, ostensibly in mitigation, but in an obvious affront to the defendant's dignity alone or in front of family. I worry when a lawyer tells me her client does not wish to speak, a subject I explore further below. I wonder at some revelations made publicly in the presence of family. At the end of sentencing hearings, defendants should feel that they have been portrayed to the judge and the community fairly and with dignity.

Victims

Many federal crimes do not have identifiable victims – narcotics conspiracies and illegal immigration, for example. But some do – in bank robberies, tellers; in fraud cases, the marks. Victims have a right to be reasonably heard at sentencing,¹⁶ and the United States Attorney's office has a victim advocate assigned to ensure victims know of the hearing. Cases recognize that victim allocution can “force the defendant to confront the human cost of his crime; . . . allow the victim ‘to regain a sense of dignity and respect rather than feeling powerless and ashamed,’” and, importantly, affect the sentence.¹⁷

¹⁵ See Stanley J. Roszkowski, *Sentencing Provisions and Considerations in the Federal System*, 13 LOY. U. CHI. L.J. 621, 635 (1982).

¹⁶ 18 U.S.C. § 3771(a)(4); FED. R. CRIM. P. 32(i)(4)(B).

¹⁷ *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1016 (9th Cir. 2006) (quoting Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 41 (2001)). See also Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 435 (2008) (“to educate other participants in the sentencing proceedings, and to enhance the perceived fairness of the legal system”). Defense

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When victims speak, their audience is obvious. They want the defendant to know – and feel – what he or she has done to them. Often, they turn their bodies to make clear where they are addressing their remarks. Secondarily their audience is the judge, and typically they request a suitably harsh sentence. Occasionally, a victim expresses forgiveness, or compassion for the background that led to the crime.

Adding victims' voices has been a critical improvement to federal sentencing hearings. Without their presence, the only non-institutional participants in the courtroom were the defendant and perhaps the defendant's family and friends. The presence and voices of victims restore balance to proceedings that publicly impose the community's punishment upon those who have injured others and affronted community standards.

Defendant's Family and Friends

Every judge has seen a downcast defendant brighten when, midway through sentencing proceedings, family members straggle into the courtroom after a long bus trip. They are there not simply to beseech the judge, but to demonstrate loving support for a human being confronting a daunting crisis. Sentencing hearings are often morality plays; family and friends are a critical part of the audience, even when silent.¹⁸ What is troubling is their frequent absence, whether because of distance or cost, or because the defendant has no one.¹⁹

When family and friends speak, their statements cover the waterfront: surprise and disbelief at what happened without their knowledge or over their protests; description of later rehabilitation and improvement; love and forgiveness with a promise to "be there"

lawyers fear victim statements' impact. See generally 3 FED. DEFENDERS OF SAN DIEGO, INC., *supra* note 14, Ch. 23.

¹⁸ Or even when babies cry, or toddlers are restless. Child care may be unaffordable, or this may be the defendant's last practical opportunity to see an infant or child, if only across the courtroom.

¹⁹ Letters can be helpful substitutes, if screened and presented in advance.

during prison and thereafter. Most often they try to distinguish this defendant from other offenders and justify more compassionate treatment.

Sometimes speakers read from a document, usually because of nervousness, occasionally because of a lawyer's concern over the statement. (Expressions of disbelief in guilt can suggest a defendant has not owned up to the crime with friends and family, and not accepted responsibility for the offense.) But too often it appears the lawyer has played insufficient role in screening who will talk and what they will say. It is startling how often the remarks focus on the speaker rather than the defendant. Statements of friends and family are critically important to defendants, certainly emotionally, maybe in their sentencing impact. They should not be scripted, but neither should defense advocates present them without screening and advice.

The Defendant

According to Justice Frankfurter, a defendant's "common-law right of allocution" was recognized as early as 1689 and the reasons for it still were relevant in 1961: "to have the opportunity to present to the court his plea in mitigation [because t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."²⁰ But allocution is more than that. Permitting a defendant to speak reaffirms human dignity in the face of severe punishment.²¹

Defendants' statements can be powerful. They can also be inconsequential, off-putting, or both. Sometimes defendants speak without a note, either awkwardly or with remarkable insight. Sometimes defendants read prepared statements, from personal nervousness or

²⁰ *Green v. United States*, 365 U.S. 301, 304 (1961). See also *Hill v. United States*, 368 U.S. 424, 425-26 (1962).

²¹ See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450 (2005) ("personal, dignitary, and democratic import beyond its instrumental role within the criminal case"); Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 *FORDHAM L. REV.* 2641, 2643 (2007) ("mitigation and humanization").

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lawyer carefulness. Many defense lawyers consider the statements highly risky and worry defendants may jeopardize the Guideline reduction for acceptance of responsibility, or say something else damaging²² – allocution does result in some higher sentences.²³ It is not uncommon to see a whispered warning or a lawyer’s hand on the shoulder of a defendant straying into potentially dangerous territory.²⁴ But this is a critical part of the public sentencing process²⁵ – for the defendant, victim, community, and judge – and a lawyer should think long and hard before dissuading a defendant from exercising this right. As a judge, I want desperately to hear defendants speak. For defendants who have pleaded Guilty or who have not testified at trial – together, almost every sentencing – it is my only window into their minds and souls.²⁶ Failure to speak is an irretrievably missed opportunity.²⁷

²² “And then the judge asks my client if he wants to say anything and I just hold my breath that it’s not going to taint the whole thing.” Benjamin McMurray in *Symposium – Judicial Discretion: A Look Forward and a Look Back Five Years After Booker*, 22 FED. SENT’G REP. 5, 321 (2010). Suggestions for damage control appear in 2 FED. DEFENDERS OF SAN DIEGO, INC., *supra* note 14, § 17.09.06.05, and on the Office of Defender Services website.

²³ *E.g.*, *United States v. Burgos-Andujar*, 275 F.3d 23, 30 (1st Cir. 2001) (allocution increased sentence in civil disobedience case).

²⁴ *See* Thomas, *supra* note 14, at 202:

[T]he lawyer must make a delicate decision between supporting the client’s version and watching the client receive an additional penalty, and trying to foist her own view on the client to save the client from additional punishment, at the potential cost of undermining the client’s autonomy.

²⁵ Some defendants famously have used allocution for political statements. *See, e.g.*, Rachel F. Moran, *Critical Race Studies: Race, Representation, and Remembering*, 49 UCLA L. REV. 1513, 1533-34 (2002)(John Brown); JAMES BOYD WHITE, *ACTS OF HOPE* 279-81 (1994)(Nelson Mandela).

²⁶ Otherwise, I have a defendant only on paper, through the Presentence Report. (Guilty plea proceedings generally involve one-word answers to formalistic questions.)

²⁷ Some judges actually engage the defendant in conversation. But silence may be necessary where defendants are appealing trial convictions. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 4-8.1(d) (3rd ed. 1993). Because of the right against self-incrimination, silence at sentencing cannot

When defendants speak, there are several audiences. Much of the statement is aimed at the judge, seeking a lower sentence. But defendants often apologize to their victims, present or not, sometimes turning to address them directly. Defendants apologize to parents, children, spouse, or siblings, seeking forgiveness. Occasionally, defendants apologize to the prosecutor, the community, or the United States for their destructive behavior. Sometimes they thank prosecutors for fairness, and deputy marshals for respectful treatment. All these public statements carry significance, regardless of whether they sway the punishment.²⁸ They can affect victims, and the community if reported; they can also affect the defendant and family when they are uttered sincerely and with dignity.²⁹

Probation Officers

Probation Officers can make sentencing recommendations, but most federal judges direct that no one else learn them.³⁰ Judges may invite Probation Officers' confidential input before or during sentencing proceedings.³¹ Lawyers on both sides hate the practice,

be used to support an adverse factual inference to "determine the specifics of the crime." *Mitchell v. United States*, 526 U.S. 314, 326, 329 (1999). Even under mandatory Guidelines, however, the Supreme Court reserved decision on "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility." *Id.* at 330.

²⁸ For a rich discussion concerning apology's role, see Jeffrie G. Murphy, *Remorse, Apology and Mercy*, in *CRIMINAL LAW CONVERSATIONS* 185, 185-95 (Paul H. Robinson et al. eds., 2009).

²⁹ "[F]our words said sincerely can have a powerful impact: 'Your Honor, I'm sorry.'" CAMPBELL, *supra* note 14, 13:21; Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85, 88, 90, 98 (2004) ("Apology . . . is a powerful ritual for offenders, victims, and communities," but suggesting sentencing as not the best occasion).

³⁰ FED. R. CRIM. P. 32(e)(3) permits this. In 2009, only 20 districts routinely permitted disclosure; 62 districts precluded disclosure; 6 permitted judges to order non-disclosure in individual cases. 2 FED. DEFENDERS OF SAN DIEGO, INC., *supra* note 14, § 17.09.04.

³¹ Judges may not rely on undisclosed information, unless they summarize it and give "a reasonable opportunity to comment on that information." FED. R. CRIM. P. 32(i)(1)(B).

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accustomed as they are to a fully adversarial process, but Probation Officers are the one unbiased sounding board available to judges for hugely important sentencing decisions that must be made otherwise alone.

The Judge

Sentencing is judges' most difficult duty, not solely because of the heavy responsibility in judging another human being. These are occasions when judges' spoken words are scrutinized. Judges must address a variety of audiences simultaneously, audiences whose interests may diverge widely.³² Judges struggle with what to say, without appreciable education for the task.

When Guidelines were mandatory, federal sentencing hearings were surreal. In a public ceremonial rite³³ – where the most important thing should be the understanding of the defendant, victims, family, friends, and community observers – mandatory Guidelines stole the language of sentencing from citizens.³⁴ The discourse was in algebraic formulae (“base offense level under Guideline 2D1.1(c)(4), enhancement for role in the offense under Guideline 3B1.1”); defendants looked like deer caught in the headlights; and everyone else’s eyes glazed over.³⁵ Under mandatory Guidelines, little was left to say after the formulaic conclusions. Sentencing

³² Cyrus Tata, *Accountability for the Sentencing Process – Towards A New Understanding*, in SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES 399, 418 (Cyrus Tata & Neil Hutton eds., 2002) (“Judges should be expected to give a rather different style of account of sentencing practice to different audiences . . . according to the purpose and context of the account.”).

³³ Tait, *supra* note 1, at 470 (sentencing as “symbolic ritual” and “official ritual”); *United States v. Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994) (defendant allocution “both a rite and a right”).

³⁴ STITH & CABRANES, *supra* note 1, at 5 (“nearly unintelligible to victims, defendants, and observers, and even to the very lawyers and judges involved. . . . Too often, when it is all over, neither the judge nor the lawyers are able to explain coherently, much less justify or defend, the sentence imposed.”); R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 189 (2001)(language should be accessible to lay participants).

³⁵ STITH & CABRANES, *supra* note 1, at 85 (“parties and spectators in the courtroom are staring ahead in dazed numbness, having lost all sense of what is happening”).

ranges open for judicial discretion could be as little as 6 months.³⁶

Because the Supreme Court found mandatory Guidelines unconstitutional, however, calculating that range is now only the beginning. In addition to Guidelines, the Supreme Court directed federal judges to consider a congressionally-mandated list of sentencing factors that, fortunately, are comprehensible to ordinary citizens.³⁷ Now lawyers, judges, and other courtroom participants can focus attention on sentencing elements the public understands.³⁸ It is imperative that judges rise to the occasion, and conduct sentencing proceedings in plain English, so that courtroom audiences can comprehend and evaluate the sentence and its rationale.

I make these few modest suggestions to my colleagues.³⁹

Be generous with time for victims' and defendant's allocution. If it is necessary to restrict (usually it should not be), give prior warning.

If victims make inappropriate comments, state (after they finish) that those comments will not affect the sentence.

After hearing from the various speakers, take a brief recess before imposing sentence. It signals that the judge is considering the statements, not just adhering to a predetermined outcome.⁴⁰

Get algebraic Guideline calculations and esoteric departure issues out of the way as quickly and briefly as possible (perhaps in writing).

³⁶ For long sentences, larger Guideline ranges (up to 81 months) apply. See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2010) (sentencing table).

³⁷ A defendant's history and characteristics; the need to reflect the nature, circumstances, and seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment; the kinds of sentences available; the Guidelines and Commission policy statements; avoiding unwarranted disparities among defendants; providing restitution to victims. 18 U.S.C. § 3553(a).

³⁸ That doesn't mean the result is obvious. These sentencing factors often point in opposing directions.

³⁹ To judges with overwhelming criminal caseloads, these suggestions may seem pollyannaish.

⁴⁰ See FRANKEL, *supra* note 1, at 40-41.

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Although it may be necessary to glance down to consult notes or gather thoughts, maintain eye contact with audiences.

Enumerate or summarize statutory sentencing factors (they are comprehensible to the audience), with an explanation of how they apply to *this* crime and *this* defendant.

Speak to victims, affirming their hurt.

Address the lawyers, accepting or rejecting their arguments.⁴¹

Speak to the family, recognizing their concerns, and perhaps positive qualities of a parent or offspring; urge them to support the defendant during prison and supervised release.

Speak to the community, emphasizing that the rule of law matters, crimes are punished, and the community is protected against those who are a threat.⁴²

Speak to the defendant, explaining the punishment, sometimes in language of retribution or reproof, sometimes encouragement. Respect the defendant's dignity nevertheless: "[It is] a mistake for judges to take it upon themselves to deliver moral lectures to defendants who are being sentenced."⁴³

Unavoidably, sentencing judges address the court of appeals and the U.S. Sentencing Commission.⁴⁴ Judges are educated repeatedly on that process. But speaking to other audiences is largely a matter of instinct, judgment, and life experience. Speaking to hurting victims and a defendant's wounded family comes pretty naturally. But it takes a lot of thought and sometimes sleepless nights to compose

⁴¹ "Even after the judge imposes the sentence, oftentimes I'm left wondering, 'So why didn't the judge care about what I just had to say? Why didn't it matter?'" McMurray, *supra* note 22, at 321.

⁴² Sadly in many locations, news media and community members often no longer attend. Their absence affects what judges say.

⁴³ "The error in that is in the suggestion that the judge is morally superior." Judge Richard S. Arnold, Remarks before the Judicial Conference of the Eighth Circuit: The Art of Judging 6-7 (Aug. 8, 2002), *available at* www.lb8.uscourts.gov/pubs/andservices/histsociety/coa8.arnold-richard_biography.html.

⁴⁴ Judge Gertner urges sentencing judges to write opinions that will create a "common law of sentencing." *See, e.g.*, *United States v. Garrison*, 560 F. Supp. 2d 83, 84-85 (D. Mass. 2008).

what to say to a defendant eye-to-eye or, through a listening journalist, to the community, particularly a divided community. To rephrase Victor Hugo, “it is easy to be fair, difficult to be just.”⁴⁵

Finally, at proceeding’s end, the defendant and counsel stand alone, and the judge pronounces sentence. Often, a final encouraging word, or perhaps a warning, is appropriate before the ultimate step – real and symbolic – when deputy U.S. marshals surround, cuff and escort the defendant from courtroom to confinement, without opportunity for a final family embrace.

CONCLUSION

Sentencing proceedings should address the community openly and understandably with a series of why’s about the crime and the punishment, the defendant, and the victim – with spoken answers of repentance or recalcitrance, punishment, deterrence, restitution, occasionally mercy.⁴⁶ Mandatory Guidelines frustrated this process, with their overemphasis on numbers and categories. We were seduced by hand-wringing about data that showed sentences were not uniform. Of course they weren’t. Sentences can never be uniform.⁴⁷

⁴⁵ MR. JUSTICE GILLES RENAUD, *LES MISÉRABLES ON SENTENCING: VALJEAN, FANTINE, JAVERT AND THE BISHOP DEBATE THE PRINCIPLES* 78-79 (2007) (rephrasing Inspector Javert’s statement, “It is very easy to be kind; the difficulty lies in being just.”).

⁴⁶ Thomas, *supra* note 14, at 209 (“themes of remorse, restitution, desert, and redemption”); STITH & CABRANES, *supra* note 1, at 84 (“defiance or contrition on the part of the defendant; vengeance or forgiveness on the part of his victims; condemnation, admonition, or forbearance on the part of the judge”).

⁴⁷ *Koon v. United States*, 518 U.S. 81, 113 (1996)(Kennedy, J.):

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.

Uniformity is also stymied by the country’s inability to settle on any consistent theory of sentencing (ambivalence apparent in the statutory sentencing factors, *supra* note 35); and by law enforcement and prosecutors’ discretion. See *United States v. Whigham*, No. 06-10328, 2010 Dist. LEXIS 125845, at *36 (D. Mass. Nov. 30, 2010) (Gertner, J.). Typically at sentencing, only prosecutors call for

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Yes, there should be strong norms to guide judges, but not strait-jackets. Sentencing is not only about outcomes, data, and uniformity.⁴⁸ Uncertainty, subtlety, debate, and public discussion – not easy application of across-the-board formulae – are necessary in determining particular federal sentences. Fair punishment calls for individualized wisdom exercised by the community’s arbiters in a public ceremonial process conducted in language that everyone understands:

If a judge is to respond to the demands and possibilities presented by a legal case . . . , he or she will have to speak in an extraordinarily rich and complex way, not in a voice that is merely bureaucratic and official. . . . That the judge’s voice is an individual voice, speaking to individuals – to the parties and their lawyers, to future parties and lawyers and judges – is a performance and validation of our claim to be a government by “the People,” for it is always one of us speaking to another one of us.⁴⁹



uniformity (*judicial*, not *prosecutorial*). In a particular proceeding, victims don’t want it, defendants, their lawyers, family and friends don’t want it, and when there is news coverage, uniformity is not the focus. Real-time, the community sees sentencing as an individual act. Only later, when data are gathered, does uniformity become prominent.

⁴⁸ Tait, *supra* note 1, at 473 (rejecting “the view that sees sentencing as little more than calculation and announcement of the ‘tariff’” and proposing “that the performance of justice [the sentencing proceeding] can impact on the public understanding, and support for the fairness of the outcomes”).

⁴⁹ See JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 269 (1984) (speaking of judicial opinions).