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Teaching Law Students, Judges, and the Community: Rational Sentencing Policies¹

Robert J. Levy

I devoted a great deal of my teaching energy during the last ten years of my tenure at the University of Minnesota Law School to a course I called the Sentencing Workshop. The Workshop provided a unique opportunity for law students and judges to learn from each other about the intricacies, the successes and failures of the American criminal justice sentencing structure and practice. I will describe it in three phases: initially, to give some context, I will report a dramatic Workshop discussion which occurred the fifth or sixth year the course was offered. A short summary of the program's mechanics follows, followed by an anecdotal and analytic picture of the Workshop's pursuit of its several educational missions.

I

There were 27 people sitting around a large oblong of conference tables. It was an unusual law school class: eight trial judges, four from South Carolina, four from Oklahoma, and 13 students. The teaching "team" included the Minnesota public defender, a well-known local corrections consultant, and a former prosecutor now in private practice.

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1. This paper is the written version, with a few stylistic amendments and corrections and with some but not all footnotes updated, of a public lecture delivered at the University of Minnesota Law School on Oct. 11, 1996, on the occasion of the presentation to me of the William L. Prosser Chair in Law. The Workshop was offered at Minnesota for 15 years, until my retirement in 2001. Eventually, seven other law schools added the program to their curricula more or less as it is described here. The program would not have been possible had the late Dan Freed, an enormously talented and innovative teacher, not been willing to share with me the method he devised for combining educational opportunities for law students with continuing education for judges. For my own continuing interest in the sentencing of criminals, I am indebted to the late Caleb Foote, my long-time friend, co-author and severest critic, who introduced me to the pains and pleasures of criminal law as an academic endeavor, and whose decency, fine intelligence, and sense of moral outrage about unfair and undue punishment of criminals I have tried to emulate. See Robert J. Levy, Caleb Foote: A Personal and Loving Remembrance, 12 Berkeley J. Crim. L. 127 (2007).

Each participant had received a large “casebook” consisting of the available file material (excluding the actual sentence) for at least one defendant sentenced by each of the judges. Each participant had read the files, each (other than the actual sentencer of a particular defendant) had sentenced each of the defendants and had written an “opinion” explaining the sentence. A “box score,” a short summary of all participant sentences, had been prepared by the students; and the box scores, the sentences and accompanying memoranda, a 169-page package, had been sent to each participant. As they sat around the table that morning, then, all participants were fairly familiar with each case and with other participant’s sentences and reasoning.

The participants had met once before, five weeks earlier, and discussed a separate group of cases. The first weekend, like this one, began on Thursday evening with dinner, lasted until Sunday morning and included almost constant social and intellectual interchange. In short, each participant had already learned a considerable amount about the others’ backgrounds, experience and attitudes about sentencing and corrections.

I expected that the Crocker case,² from South Carolina, would stimulate controversy. The 30-year-old defendant had pleaded guilty to four counts of burglary.³ The defendant’s house break-ins were, to say the least, unusual—they appeared to have been committed to permit him to fondle the feet of inhabitants while they slept. Because of his behavior, Crocker was quickly shifted from jail to the forensic unit of the state hospital.⁴ The defendant was found to be sane, but suffering from “major depression with psychotic features,” an “obsessive compulsive disorder and paraphilia . . . and sexual sadism.” He presented “evidence of recurrent obsessions about negative events happening to his family members,” neutralized by “spitting in his bed at nighttime repeatedly,” “a sexual preoccupation with feet,” and “other sexual fantasies that are more sadistic in nature.”⁵ While hospitalized for an appendectomy, Crocker had been discovered in the hospital morgue feeling the feet of a corpse. During his state hospital stay, Crocker’s depression as well as his psychosis improved; but, “despite high doses of appropriate medications,” the obsessive compulsive disorder did not improve. The doctors concluded that Crocker required specialized treatment for his sexual sadism—treatment available only at a private hospital in Atlanta, Georgia. The doctor informed the trial judge that if the defendant “did not receive treatment he would either

2. Needless to say, the defendant’s name has been changed to protect his privacy.
3. As is true of procedural and substantive issues in other cases described in this essay, some of the Crocker charges have been simplified and others eliminated. Crocker, for example, was actually charged with one count of first degree burglary (with violence), three counts of second degree burglary, and two counts of driving with a suspended license. He pleaded to the two driving counts and four counts of second degree burglary. In addition, to save space, some medical diagnoses have been shortened and simplified.
4. His jail cellmate promptly committed suicide—only one of the many mysteries of this case.
5. On one occasion, Crocker had attempted to order a tear gas gun to help subdue a victim, but had not actually acquired the weapon and had never otherwise acted on his fantasies.

be killed, commit suicide, or kill someone”—but that the cure rate “would be about eighty-five percent, if he completed his counseling.”

The “box score” for the Crocker case showed great differences among Workshop sentencers. All but one of the judges chose an incarcerative sentence, varying from an unspecified period to 35 years. The student sentences were as varied: one student recommended a form of fine; their incarcerative sentences ranged from one to ten years.

Workshop discussions usually began by resolving the case’s factual ambiguities. The sentencing judge stated that the Georgia treatment facility was not a realistic alternative because no post-hospitalization control of the defendant could have been maintained. But he admitted that the defendant’s sentence could have been suspended on condition that he be returned to the court for sentencing at the end of the hospital’s treatment. The judge also disclosed that the defendant’s family had agreed to pay the cost of hospitalization in Georgia. The former prosecutor suggested that sending this defendant to prison was in fact a death sentence. Then, when asked directly, the sentencing judge disclosed that he had sentenced Crocker to 16 years in prison.

I saw, or thought I saw, the judge give a small, tight smile. Oppressed by my vision of this unfortunate defendant and his problematic future, angry that a sentencer might be pleased with himself for imposing under-the-table capital punishment, I was ready for a confrontation. Yet I let the opportunity pass. Had I really seen a smile? Or just one more of those many masks judges wear—this one to disguise his discomfort with the need to fulfill his civic responsibility at such awful personal cost to a hapless criminal? If I was wrong, I’d cause a row and might do some harm. Or was I afraid to pick a fight? The dramatic quality of the case, the emotional intensity of the discussion, led some of us irresistibly to such personal questions—and others to more abstract professional introspection.

We spoke no more about the Crocker case—but we learned many and varied lessons that day—lessons about criminals and their pasts and futures, about judges and their values and methods, about law and life. I won’t try to recount those lessons; rather, I will focus on the Workshop’s methods of inducing and facilitating them.

I cannot do justice to the Minnesota Sentencing Workshop without pausing to outline the desperately serious social and legal problem that drives it—our impoverished correctional system and its overcrowded prisons. Consider a few randomly chosen facts. Although the crime rate has remained fairly stable in recent years, the number of prisoners, state and federal, doubled between 1980 and 1990: In 1980 there were 23,779 federal prisoners; in 1994 there 95,034.⁶

6. See U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics* (1995) [hereinafter *Sourcebook*]. In 1980, there were 23,779 federal and 295,819 state prisoners; in 1990 there were 58,838 federal and 684,544 state prisoners. *Id.* at 548 tbl. 6, 11. In 2009, the comparable figures were 208,118 federal and 1,405,622 state prisoners. Most of the obviously dated statistics in the text have been retained so that readers can know the scope of the problem

At the end of 1994, there were more than 1.4 million persons incarcerated in prisons and local jails and at least 29 state and federal government prison systems were operating at above their rated capacities.⁷ In 1995, California had 134,718 prisoners in facilities designed for 77,884; the prediction at that time was that by 2000 there would be 214,963 prisoners.⁸ Meanwhile, California state spending for prison administration was 9 percent of the state budget in 1994, but was predicted to increase to 18 percent by 2002.⁹ In 1994, the incarceration rate for African-Americans was seven times the rate for white defendants.¹⁰ In 1980, drug offenses accounted for 19,000 state prisoners; in 1993 they accounted for 186,000.¹¹ American sentences are out of all proportion to sentences for similar crimes in the Western Europe countries to which we

as of the time this speech was delivered and decide for themselves whether the problem is larger or smaller today.

7. *Id.* See also <http://www.justice.gov/jmd/2011justification/pd/fy11-bop-se-justification.pdf> (“BOP facilities are very crowded—36 percent above rated capacity system-wide as of January 21, 2010. Over 171,000 of the current federal inmate population are in facilities operated by the BOP, which are intended to house only about 125,811”).
8. See Sourcebook, *supra* note 6. When a federal lawsuit was filed in 2001 complaining that overcrowded prison conditions in California violated rights of prisoners, the prison population was approximately 156,000 in facilities designed to house a population of just under 80,000. A three judge federal district court held that these conditions violated the Fourteenth Amendment and ordered the state to reduce the prison population to 137.5 percent of design capacity. The three judge court order was affirmed by a divided Supreme Court in *Brown v. Plata*, 131 Sup. Ct. 1910 (2011).
9. Peter W. Greenwood, et al., *Rand Research Review: Focus on Crime and Drug Policy, Three Strikes, Serious Flaws and a Huge Price Tag 2* (RAND Corp. 1995).
10. For a contemporaneous account of the continuing racial disparities in American criminal justice administration, described as “rife with inequality,” see William J. Stuntz, *Unequal Justice*, 121 Harv. L. Rev. 1970, 1971 (2008) (“African Americans constitute 13 [percent] of the general population, but nearly half of a record-high prison population. The imprisonment rate for Latino males is almost triple the rate for white males; black men are locked up at nearly seven times the rate of their white counterparts. The differentials in drug punishment are even larger: of every 100,000 black Americans, 350 are imprisoned on drug charges; the analogous figure for whites is 28.”) (Citations omitted).
11. See also E. Blumenson & E. Nilson, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 Va. J. Social Prob. & the Law, 43, 48, 59 n.64, 65 (2009) (Approximately 25 million Americans used marijuana during 2008; in 2001, 4,000 defendants received federal prison sentences for marijuana offenses and approximately 11,000 received state sentences; in 2006, 43.9 percent of the almost two million arrests for drug abuse violations were for marijuana.).

turn in making quality of life comparisons.¹² And there is much, much more.¹³ In short, by almost any measure, American incarceration policies unduly strain our financial and human resources and may well be placing too heavy a burden on us and on the next generation.¹⁴

12. See Michael Tonry, *Intermediate Sanctions in Sentencing Reform*, 2 U. Chi. L. Sch. Roundtable 391 (1995). Comparisons to other countries take no account of the occasional absurdly lengthy sentences imposed in some states—such as the Oklahoma case in which a jury sentenced the defendant to a 10,002 year consecutive sentence. Bill Braun, *Jury Gives Rapist 10,002 Years*, [Tulsa] Trib. & World, Apr. 18, 1996, at A9. Lengthy sentences in federal prosecutions for child sexual abuse are regularly approved in federal Courts of Appeal. See, e.g., *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (trial judge’s 17 year prison sentence reversed; trial judge instructed on remand to impose proper sentence of 30 years in prison); *United States v. Seljan*, 547 F.3d 993 (9th Cir. 2008) (defendant more than 80 years old sentenced to 20 years); *United States v. Zastrow*, 534 F.3d 854 (8th Cir. 2008) (73 year old defendant sentenced to prison for 20 years).
13. See also *United States v. Dyce*, 78 F.3d 610, 616 (D.D.C. 1996). First time offender, single occasion drug courier given five year sentence because her “family circumstances” were not deemed “extraordinary” within the meaning of a federal sentencing guidelines criterion for downward departure from guideline, despite the fact that defendant had two young children and a baby she was breast feeding, since older children could be cared for by other adults in the family and sentence could be postponed until after the baby was weaned. A member of the appellate panel commented: “The unfortunate fact is that some mothers are criminals, and, like it or not, incarceration is our criminal justice system’s principal method of punishment. . . . A term in jail will always separate a mother from her children.” *Id.* at 617 (concurring opinion).
14. When this speech was given, as is the case today, academic as well as popular literature was full of criticism of state and federal legislative and judicial sentencing policies (and, of course, the consequent overcrowding of state and federal prisons). For a recent illustration, see D. Cole, *Can Our Shameful Prisons be Reformed?*, N.Y. Rev. Books 41 (Nov. 19, 2009). See also Randal C. Archibold, *Driven to Fiscal Brink, State Opens Prison Doors*, N.Y. Times, Mar. 24, 2010. A very significant segment of the academic community interested in reform supported and continues to support (despite what some see as an effort by the U.S. Supreme Court to undermine it) the “Sentencing Guidelines” movement, begun in a few states and given enormous weight by its adoption by the U.S. Congress. The movement was undergirded by widespread opposition to individual judges’ extreme variation (and more than occasional harshness) in exercising their sentencing discretion. For early and biting criticism of the federal guidelines, see Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85 (2005). For a fair history of the Guidelines “movement,” an accurate account of the vast literature produced by advocates and opponents, a description of the dismantling of the federal guidelines by the U.S. Supreme Court, as well as a thoughtful and objective analysis of the sentencing problem and support for a carefully limited guidelines approach to sentencing, see Robert Weisberg, *How Sentencing Commissions Turned Out To Be a Good Idea*, 12 Berkeley J. Crim. Law 179 (2007). See also Kevin Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 Colum. L. Rev. 1082 (2005); Kevin Reitz, *Modeling Discretion in American Sentencing Systems*, 20 Law & Pol’y 389 (1998). (Professor Reitz was the reporter for the American Law Institute’s Model Penal Code: Sentencing, Plan for Revision, an effort which adopted a kind of guidelines system, but much less complex than the federal one.) Although I suspect that most guidelines advocates would disagree, I believe the Workshop program is consistent with any guidelines system that contemplates a sufficient number of broad, discretionary “downward departure” categories—of a kind that would permit trial judges to “depart” substantially (e.g., deviate, almost always, to a lower period of incarceration) from the legislatively or sentencing

Let me say something about the Workshop goals. Sitting across from me in a restaurant after two full days of the first Workshop session, one of the Oklahoma judges—an infrequent talker, apparently a little skeptical about the discussions, and a stern sentencer—asked me quizzically: “What’s the ‘real’ agenda here?”¹⁵ “Whose agenda?” I responded, “The Edna McConnell Clark Foundation’s, the law school’s or mine?” The Foundation wanted influential judges to understand the costs and dangers of overcrowded prisons and the virtues of what is often called alternative punishment, hoped the judges would be influenced to make greater use of nonincarcerative sentences and would persuade their colleagues and communities that prisons are precious correctional resources to be used only where necessary but certainly less frequently than they were currently being used. The law school’s agenda was quite different since it is in the business of educating law students. With financial help from the Foundation, the law school believed that students would learn more about criminal law from the Workshop than we could squeeze into courses with more credit hours; and students would also be educated about judging, relations between lawyers and judges, and about professionalism. My agenda was even broader than the law school’s: in addition to educating law students, I wanted judges to have leisure from the time constraints of their dockets, from the pressures put on them by prosecutors, defense counsel and reporters; I wanted to help them to explore their sentencing methods and, with the aid of their colleagues, to decide whether they are satisfied or might want to consider changes.

Perhaps I should also have described my personal correctional values. But that would have been duplicative—in facilitating the discussions I could not, and didn’t try, to hide my own values. The judges knew that I believed our prisons and the lengthy sentences imposed by judges are a national disgrace; that the extreme length of too many criminal sentences can be explained more by politics than by sound policy; and that overcrowded prisons and extremely

commission determined guideline sentence in cases of the kind described in this essay. Of course, supporters of guideline orthodoxy would complain that broad downward departure provisions will produce the kind of indeterminacy that in the past has produced great sentence variations for similar criminal behavior and harsh sentences imposed by “tough” judges. For some indication that, both before and after the U.S. Supreme Court freed federal trial judges from the mandatory features of the federal guidelines, not all federal judges agreed with their policy underpinnings, see, e.g., Peter Lattman, *In Galleon, Prison Term Seen as Test*, N.Y. Times, Sept. 20, 2011, at B1. “Judge Rakoff . . . sentenced . . . a former health care company executive facing an 85-year sentence under the guidelines, to three and a half years in prison. . . . Judge Rakoff wrote that the proposed sentence exposed the ‘utter travesty of justice that sometimes results from the guidelines’ fetish with abstract arithmetic.” In another case, Judge Rakoff sentenced a defendant to four years in prison when the prosecutor recommended a Guidelines determined sentence of six and a half to eight years with the comment that “the guidelines give the mirage of something that can be obtained with arithmetic certainty.” Peter Lattman, *Defendants Sentenced in Insider Trading Case*, N.Y. Times, Sept. 22, 2011, at B3.

15. Unless otherwise noted, all participant quotations in this paper are approximate and from memory.

lengthy sentences inhibit the creation and substantial use of alternatives to prison for punishing criminal behavior.¹⁶ Sentencing guidelines can increase uniformity and limit to some extent excessive imprisonment, but we must find a way to insure that sanctions will always be “the least restrictive necessary to achieve their purposes.”¹⁷ Sentencing judges should distinguish professional criminals from those who, although they commit crimes, even violent crimes, do so for reasons like hunger, poverty, mental illness, brain dysfunction or other disability, ignorance, or a craving for drugs or alcohol. I hoped that the judge knew and I was sure he would eventually conclude, that I would never try to impose what some would consider these radical views on other participants in the Workshop.

II

The University of Minnesota sentencing seminar and Workshop was an unusual law school curriculum offering; it carried five credits, mixed students with judges, prosecutors, defense counsel and correction officials, fed the students and took them to such exotic places as Claymore and Paul’s Valley, Oklahoma, where they spent time with a judge on the bench and learned about another state’s criminal justice system at first hand.

During the first semester we conducted a fairly traditional sentencing seminar, addressing theories of punishment, guideline sentencing, day-fine experiments, jails, home detention, electronic monitoring, and the like. The students also visited a state prison, heard from directors of drug and sex crime treatment programs and from those who administer community punishment programs of a variety of kinds. By the end of the semester the students understood most current sentencing schemes as well as the national crisis caused by our incarceration policies.

During the first semester, judges were chosen for the Workshop by state officials. Each of the judges provided file materials on six defendants he or she had sentenced. The cases were often complex because we specifically asked the judges for cases they had found difficult to sentence. The first session’s

16. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 592 (1996) (describing the theory of “failure of democratic politics” as the “conventional answer” to the public’s resistance to alternative sanctions: “Members of the public are ignorant of the availability and feasibility of alternative sanctions; as a result, they are easy prey for self-interested politicians who exploit their fear of crime by advocating more severe prison sentences. The only possible solution, on this analysis, is a relentless effort to educate the public on the virtues of the prison’s rivals.”) *Id.* Professor Kahan claimed that the public’s resistance to alternative sanctions is better explained by their failure to satisfy the “expressive dimension” of punishment. *Id.*
17. Norval Morris, *The Future of Imprisonment* 59-62, 73-76 (Univ. of Chicago Press 1974). Morris described the notion as sentencing “parsimony.” *Id.* at 60. For an analysis of the competing meanings of the term, see Richard Frase, *Sentencing Principles in Theory and Practice*, 22 *Crime and Justice: A Review of Research* 363 (1997). For a recent, and very explicit and sarcastic, rejection of the notion of sentencing “parsimony,” see *United States v. Irej*, 612 F.3d 1160, 1196 (11th Cir. 2010).

cases were chosen and arranged to assure continuing participant involvement and coverage of a wide variety of crimes and defendants' and situations. They also assured at least one opportunity for the judges to show that in particular cases and classes of cases students injected their personal values into the sentence just as much as they believed judges do. In fact, the students usually sentenced defendants accused of rape, sexual abuse of children and vehicular homicide much more harshly than they sentenced defendants accused of other violent crimes and much more harshly than the judges sentenced these same defendants. The second session discussed participants' sentences of a new set of defendants previously sentenced by participating judges.¹⁸

The third session materials differed substantially. Each of the judges was initially asked to find a current case in which an unsentenced defendant seemed slated for a prison term. When a suitable case involving a substantial offense had been selected, a "client-specific planner" was hired. The planner investigated the case and resources in the community, and prepared a report recommending some kind of punishment. Client-specific planners, specially trained and highly skilled criminal corrections experts, prepared presentence investigation reports essentially oriented to the defendant's individual background with the goal of punishing without incarceration. Participants received files of these cases after they had sentenced the defendants, and then having read the client-specific plan, could recommend a different sentence. The client-specific planner attended the last session.¹⁹

18. At each session, the core group usually expanded to include a variety of criminal justice professionals from states which had adopted sentencing programs or states considering whether to adopt one.
19. Client-specific plans differ in a variety of respects from traditional, and frequently prosecution oriented, pre-sentence investigations. First and foremost, CSPs are, as indicated above, defendant- and non-incarceration oriented, while always making it clear that the recommendation is not an effort to allow the defendant to evade punishment for the crime. Unlike most probation officers, the planner, typically a trained criminal justice sentencing expert (either self-employed or an employee of a private agency), makes use of resources in the community generally unknown to corrections professionals that emphasize both punishment and rehabilitation—for example, private and/or publicly financed in-patient alcohol or mental health treatment facilities. Planners also help connect the defendant to the resource before the judge is scheduled to sentence as well as facilitate a mutual commitment by both the defendant and the resource to work together—thus increasing the likelihood that the judge will accept the recommendation. The planner also looks for and usually finds a stable member of the community who knows the defendant and is willing to take some responsibility for the punishment and rehabilitation process, thus helping to minimize the judge's fears of allowing the defendant to remain in the community. Even if client-specific planners and their plans played no role in persuading Workshop judges that non-incarcerative sentences can succeed, they would still be enormously useful; they show judges how much help good pre-sentence investigators (PSIs) could provide in seeking just and individualized sentences. Showing judges that they should and need not be satisfied with the status quo encourages them to seek improvement in their own presentence evaluation systems.

III

The formal Workshop sessions were fun—as good law school classes are fun for well-prepared students. We discussed the cases and the individual defendants, how fair and just sentencing principles should be applied, community understanding and acceptance of judges' roles, prosecutorial discretion and its impact on judges, and judicial authority and its impact on prosecutors. The discussions informed participants about these issues and about varying approaches to them from state to state. Occasionally, judges learned for the first time about correctional resources available in their own states.²⁰ The judges were bombarded with interesting and challenging nonincarcerative sentencing options for their cases—from home confinement and day fines to a variety of other forms of supervision.²¹

But the discussions went deeper. They created an atmosphere of collegial inquiry, of shared purpose and joint responsibility—for the issues and for each participant. The formal sessions and collective meals fomented a kind of social and intellectual camaraderie and friendship. Inevitably, students shared with the judges aspects of their professional and personal lives, and the judges (perhaps in a more guarded fashion) reciprocated. In such an intimate setting, outside the hierarchical atmosphere of the courtroom, professional exchange can be seasoned with personal disclosure. During a discussion of mandatory minimum sentences for drug offenders, for example, a student announced that her sister was about to be released from a state prison at the end of a five-year sentence for dealing drugs. And one student insisted that prisoners know about and adapt their behavior to state sentencing grids and policies—and he was sure of his facts because he had twice served prison sentences in Minnesota before being scared straight in a Georgia lock-up waiting for another sentence. On these occasions, when the usually unmentioned personal worlds of Workshop participants overtly intruded upon the discussions, the large role that sentencers' backgrounds and values play in their sentences became obvious. In addition, in such circumstances, the judges found it difficult to avoid feeling a kind of avuncular responsibility for the students' education and long-term professional development. Thus, the social relationships the Workshop developed were vital to their method and their success.

But intimacy and free exchange are only the conditions precedent for the kind of education the Sentencing Workshop sought—to challenge judicial belief systems. I have come to believe that as sentencers, judges develop a

20. See *infra* pp. 18-20.

21. Consider a case reported by a Missouri judge at the first Minnesota Workshop session. A recommendation was made that a retired and pensioned 78-year-old child molester, almost certainly addicted to the powerful painkillers he was taking for a broken neck, probably an alcoholic, and possibly suffering from a brain disorder, be sentenced to share his home with a community—or defendant-financed—permanent companion rather than to the two consecutive 15-year prison terms the sentencing judge had actually chosen. The rationale was that the alternative sentence would save the community the substantial cost of the defendant's stay in prison and provide just as much safety for neighborhood children.

set of myths that provide cover for their professional selves. To understand a judge's sentencing decisions, then, students have to notice and appreciate the roles played by these myths; to facilitate reconsideration of their sentencing behaviors, judges have to be encouraged, even coaxed, to articulate the myths and to free themselves from their power.

Initially, judges have to understand that judicial unanimity about how to sentence any defendant, whatever the crime, is a fantasy. Awareness of their fundamental correctional policy disagreements came as a surprise and a disappointment to many of the judges. They were always noticeably relieved when the box score showed their sentences to have been the same or similar. One judge produced his own box score, insisting that there was actually more judicial agreement about sentences than the student-produced box score showed. And one of the judges from Missouri refused initially to sentence any defendant sentenced by his colleagues because, as he wrote to me, "I am not an appellate court; I do not exercise reviewing power over my colleagues."²² The atmosphere of the Workshop helped judges acknowledge the very diverse sentencing world in which they operate—an essential first step toward voluntarily setting aside their other professional defenses.²³

One of the judges' most powerful myths is shared by citizens generally—that only a prison sentence qualifies as punishment; probation, no matter what its nature or concomitants, does not. As Professor Kahan put the matter, "Imprisonment is the punishment of choice in American jurisdictions."²⁴ It may well be that widespread understanding and use by judges of "intermediate" or

22. The quotation is from a note sent to me as a substitute for the judge's sentences for the first session.
23. In the Workshop's first year, the casebooks sent to the judges contained their sentences as well as the other information about each case. Thereafter, because the tendency reported in the text became obvious, the casebook version of the cases blocked out any mention of the actual sentence. The judges' sentences of other judges' cases became considerably less uniform.
24. Kahan, *supra* note 16, at 591. *See also* Norval Morris & Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing Scheme* 3-5 (1990): "At present, too many criminals are in prison and too few the subjects of enforced controls in the community. . . . [Commonly discussion] assumes that the norm of punishment is imprisonment. . . . This is true neither historically nor in current practice. Most felonies are not now punished by imprisonment. Prison may be the norm of punishment in the minds of some citizens, but it is not to those acquainted with the operation of our criminal justice systems. . . ." The authors remind readers that the term "alternatives" "gives false promise of reducing the present overcrowding in American prisons and jails," because "currently" intermediate punishments tend to be imposed on offenders who would otherwise be given a probationary or a suspended sentence rather than those who would otherwise go to jail or prison. *Id.* at 4. Kevin Reitz, Michael Tonry and the Structure of Sentencing Laws, 86 *J. Crim. L. & Criminology* 1585, 1595 (1996), detected "a world-weary tone [in one of Tonry's later books] in recognition that intermediate punishments have not been taking the country by storm," and attributed the change to recognition that the occasional "highly touted programs" have been "drops in the bucket rather than sea changes," and that the "most visible proof of the failure of the intermediate sanctions movement to date is the unabated velocity of the growth of American prisons."

“alternative” punishment correctional policies will eventually dispel this myth. The fact that Workshop discussions focused so narrowly and intensely on each defendant and his or her background and total situation compelled the judges to think about each defendant as an individual whose punishment demands careful and individualized consideration, no matter how far the offender’s behavior may have strayed from community norms. The more a sentencer knows about a defendant, the more difficult it becomes to impose any punishment—especially an automatic prison term. In addition, the judges heard a variety of serious proposals for punishment, many of which were limited to significant nonincarcerative sanctions. That otherwise reasonable people, experts as well as inexperienced students, sincerely believed that an intermediate punishment can both effectively and justly replace an incarcerative one in a specific case did much to legitimate such punishments. This dynamic influenced sentencers during each of the Workshop sessions, helping to dispel the myth that only prison produces punishment.²⁵

The most important judicial myth is that judges have no power. To deal with the pain of depriving men and women of their freedom and sometimes their lives, judges insist that theirs is a world of slot machine criminal justice: Pull the lever marked with the crime charged and the sentence will shortly appear in the window. Judges’ first reaction to the Workshop was to ask why they had been invited; they often insisted that the only key players in sentencing are prosecutors and the legislature. In sentencing, the judges claimed, their personal warrant is nonexistent, their discretion minimal—until they were confronted with indisputable evidence of a more complex reality.

During a session in one of the early years, for example, one of the South Carolina judges described a female defendant, a 34-year-old single mother with two young children, a high school graduate, “obviously an addict, living on welfare and SSI,” charged with conspiracy and distribution of crack cocaine. The defendant had spent two days in jail before raising bail. According to the judge’s description of the case,²⁶ conspiracy carried a five-year penalty; distribution of crack had just been amended to remove the mandatory aspect of a 15-year sentence and \$25,000 fine. Although the penalty had become discretionary, “the amendment still left a prohibition against suspending any portion of the sentence imposed,” the judge’s memorandum explained, and this provision, the judge believed, “effectively eliminated the possibility of probation on these charges.” The penalty for distribution of powder cocaine

25. See, e.g., the post-Workshop statement made to his colleagues by one of the judges who participated in the Workshop’s first year, *infra* text following note 35. This myth, I believe, continues to invigorate partially at least some of the academic support given to the “sentencing guidelines movement” because it is thought to be the only way to cabin judicial disparity in sentencing. For a short discussion of the situation in the federal courts, see *supra* note 14.

26. Most of the South Carolina cases contained very little file material. At the time, trial judges in that state “rode circuit” and had trouble obtaining files from local court systems. Most of the cases considered in the Seminar were based on the trial judge’s memorandum reconstructing the facts.

was the same as for crack without a mandatory minimum. The defendant had a minor and inconsequential prior criminal record. The prosecutor dropped the conspiracy charge in exchange for a plea to crack distribution. The presentence investigator (PSI) recommended a probationary sentence with drug abuse treatment and intensive supervision. The judge tried to have the defendant placed in a treatment facility, but discovered that the beds were limited to males. In short, the judge made it clear that he did not want to imprison this defendant. The judge deferred sentencing until he was to return to the county five months later. By then the defendant “had gotten drug treatment and appeared to be dramatically improved.” The prosecutor refused to reduce the charge to distribution of powder cocaine so that the judge could impose a probationary sentence. Although the judge’s report never specifically criticized the prosecutor’s intransigence, he reported that he had sentenced the defendant to only the two days she had served when first arrested.²⁷

Two hours later, when we began to discuss judges’ power to persuade prosecutors to accept what appears to them to be a proper sentence in a specific case, the South Carolina judge, like the others, had no clue! The judge was simply unwilling to understand, or perhaps only to acknowledge to us, that he had deliberately and successfully undermined the prosecutor’s supposed sole authority to determine the parameters of the penalty in this case, and that undermining would undoubtedly have an influence on the prosecutor’s cooperation with the judge in future prosecutions. Nor did the other judges appear to appreciate how the judge-prosecutor power balance had been rearranged. It is clear that there is professional as well as personal emotional safety in assumed powerlessness—and it takes time and patience, diplomatic student and faculty persistence, and the right atmosphere, to break through that safety net.²⁸ But when the personal and emotional style of the

27. It has never been clear to me, no expert on South Carolina sentencing law, why the judge could not have given a probationary sentence. The judge did indicate that he made a practice of sentencing drug defendants to at least one year in prison because only with such a sentence would they be eligible for in-prison treatment programs. For the Seminar’s purposes, it was not necessary to unravel the legal issue.
28. On many occasions during Workshop sessions, judges from the same state disagreed about the appropriate (or even legal) sentence for a particular defendant. Curiously, some of the judges, disagreeing with their colleagues, insisted that they had to follow state legislative discretionary sentencing guidelines because otherwise they would be left awash in a sea of discretion. Yet one of the colleagues of the judge who made this explicit claim insisted that he never consulted the state’s guidelines until he decided in the particular case what a just sentence would be. There were many other occasions when seminar discussions indicated that at least some judges know that special circumstances demand special sentencing styles. In one South Carolina case, the defendant “streaked” under the stands at a high school football game, apparently to attract the attention of the female cheerleaders of the local team. The defendant, a mentally disturbed individual who had not taken the medicine which usually controlled his otherwise bizarre behavior, was “arrested” by members of the local team and held for the police. When the circuit riding judge came to town for the sentencing hearing, he was informed that the defendant was taking his medicine regularly and that the courtroom was filled with angry parents of the offended cheerleaders. The judge reported to the Workshop that he told the clerk to advise the defendant in court that

Workshop helps judges to forgo such safety nets, they can and do reexamine their community obligations as sentencers from a very different and more sophisticated perspective.

Then there is the myth of sentencing consistency based upon a coherent and articulable sentencing philosophy. After some initial collegial loyalty during the first Workshop session, the judges began to disagree with, even criticize, each other openly. The judges rapidly grasped the students' sentencing predilections and questioned them as to their motives and purposes. The students, initially intimidated, learned to reciprocate, making good use of clues about the judges' values and their sentencing inconsistencies to identify what participants from one year called personal "hot spots." During a session that year, for example, a Philadelphia judge, defending the lengthy sentence he imposed on a defendant with several priors, explained, "I don't believe in second chances." He awarded probation and every possible break to first offenders, he said, but if they appeared before him again, on a new charge or a probation violation, he insisted on the maximum. The second session's cases included sentencing by the same judge of a 40-year-old, calculating, articulate, and very well dressed professional bank robber. An addict, the defendant had a long string of priors but no lengthy sentence because he employed notes to tellers rather than a gun and was able, when apprehended, to blame confederates. Before the sentencing hearing, the defendant had signed up (but had not yet begun) a respected in-patient drug treatment program. The judge granted probation for the current offense on condition that the defendant enter the treatment program, and waived revocation of probation on the priors. We were never exactly sure what judicial "hot spot" this defendant touched. But the students' affectionate description of the judge thereafter as "One Chance Charlie" served as a continuing reminder to him and the other judges that sentences can be based upon covert, personal, idiosyncrasies.²⁹

The "hot spots" of individual judges emerged fortuitously because of what might be called the "chemistry" or the dynamics of the group. The process was stimulated by the facts of the difficult cases, by the judges' sentences, and by the judges' reactions to the sentences of other participants. The ordering of cases within and between sessions also affected the chemistry. The first session in the Workshop's initial year, for example, began with a second degree murder case that disrupted the students' as well as the judges' platitudes about incarceration for violent crime. The defendant was a slight 15-year-old African-American boy, "mildly mentally retarded" and attending classes in the ninth grade. Three older friends and the defendant decided to steal the purse of a woman coming out of a diner with her husband. Unfortunately, the boys did

he was sentenced to probation—and left town before the crowd could confront him.

29. The last case in one of our first sessions involved a sexual abuse charge. As I had expected, the students' sentences were extraordinarily harsh when compared to their sentences of other defendants or the judges' sentences in that case. One of the judges approached me privately and said: "You just put that last case in the materials to show that the students' sentences are as subjective and value laden as ours are!" I pleaded guilty.

not act until the woman was in the car. One of the boys threw a brick through the passenger window, allowing the defendant to grab the woman's purse. Tragically, the brick sent slivers of glass into the woman's carotid artery, killing her. The boys split \$20. The defendant was waived for adult prosecution and charged with first degree felony murder—a capital offense in Missouri. The defendant agreed to plead guilty to second degree murder and the prosecutor recommended a minimum 15-year sentence, leaving to the judge the choice between incarceration and probation. The defendant had been in jail for more than nine months when he was sentenced. Psychological tests conducted for the juvenile court transfer proceeding reported:

[T] defendant displayed . . . visual motor skills . . . equivalent to an average child aged 10 years and 2 months. Results of personality testing indicated that “[defendant] is a rather sad and lonely youth who has difficulty forming adequate emotional attachments with other people. . . .

Refusing to grant probation, the judge spoke at length at the penalty hearing, the transcript of which became part of the Workshop casebook. He commented:

You know, I believe this young man is probably not going to benefit by going to jail. I believe that he probably has a better chance of making something of himself if I placed him on probation. I believe that. I certainly know that he didn't throw the brick. . . .

You know, the circuit attorney's office, whose job it is to prosecute these cases, they had an option . . . to agree to a lesser time in the plea agreement. They could have made it a ten-year minimum, which is minimum for murder second and robbery first, and they chose to up the ante from ten to fifteen years. . . .

I believe that the reason the circuit attorney did make that conscious decision . . . was they believe [the defendant] is more culpable than perhaps you [defendant's counsel] believe he was. . . .

What you've got here is two innocent people who were minding their own business and just doing what normal people do, grabbing a bite to eat after they were working hard all day trying to make something of their lives. And we have four or five youths . . . who just disrupt that entire situation.

They've taken somebody who was a productive citizen . . . and killed her, were involved in killing her. . . .

[Y]our attorney can sit here and tell me everything positive about you—and one thing he did tell me back in chambers is, hey, Judge, this is the first offense, this is the first time this young man's ever been in any serious trouble. And as I told him, you picked one hell of a mistake to make.

If you would have picked a smaller mistake, and I know you don't pick your mistakes, but if your mistake would have been robbing somebody at gunpoint and not hurting anyone or taking drugs . . . or stealing a car, or, you know, stealing something out of somebody's house, but the mistake you made is

you took another human being and you were involved in causing the death of that lady.

And, you know, I just can't get past that. And I really have tried and I've come up with fifteen different ways of trying to get this, you know, to make this easier to swallow, but it's not any easier to swallow for me. . . . These kinds of cases just make me hate my job at times. I hate this . . .

If I put you on probation, I'd feel terrible. If I put you in jail, I'd feel terrible, and there's nothing in between. And there's nothing I can do here and maybe this is not my—it's not the system's function to make me feel good when I leave this seat and go back in my chambers, but there's nothing I can do here today to make me feel good.

We did not stop at that initial session to discuss the sentencing judge's pain; nor did we discuss the judge's failure even to look for some other sentence that might punish this defendant commensurately with the loss of life he had helped to cause without subjecting him to the extraordinarily grave risks to a young and physically vulnerable boy, not to mention the personal and social consequences, of 15 years in prison. But the emotional quandary the case posed for a sentencer, the judge's openness about how difficult it was for him to make what he saw as a Hobson's choice and the resonance for the other judges of this illustration of their sentencing dilemmas, set a tone for the group's discussions. The judges were compelled to confront rather than ignore the choices they make when sentencing, the pain they cause themselves and defendants when they impose "just desserts." It was very difficult thereafter for these judges to blind themselves to their awesome responsibility, to the power over other people's lives that responsibility authorizes, or to the personal values they inevitably bring to the sentencing endeavor.

The second case that first year was decided by the judge who refused to review his colleagues' sentences. It involved a 22-year-old woman with a \$1,100 a week cocaine addiction. Although she had only completed ninth grade, she had managed to become a payroll clerk at a major company, responsible for a monthly payroll of more than \$400,000. To feed her drug habit, she embezzled over \$100,000 from the company. But by the time she was sentenced she had successfully completed a drug treatment program, held a steady job, was engaged to be married and the company had recovered more than half its loss from its insurance carrier. A host of neighbors and friends had written letters to the judge on her behalf.³⁰ Yet the judge sentenced her to seven years in prison and denied her the advantage of an unusual Missouri statutory "shock

30. This case illustrated two more of the myths sentencing judges live by: character references are "a dime a dozen" and of "no consequence"—unless the judge decides to award the light sentence they usually recommend, in which case character references are emphasized. Similarly, a defendant's "remorse" is of no consequence because all defendants are taught by their lawyers how to present themselves to judges so a judge who decides on a harsh sentence need not be constrained by the defendant's remorse. If the judge wants to impose a light sentence, a showing of remorse is emphasized. The game works as well with "absence of remorse."

probation” statute which would have allowed her to be granted parole after 120 days. A harsh sentence, certainly, one about which any group of reasonable sentencers might well differ, and Workshop participants saw it as the value judgment of a colleague entitled to respect but also to honest criticism. The sentencing judge could not ignore the variety and contrariety of opinion—whether or not he allowed it to affect him.³¹

During the second session, the “refuse to review colleagues” judge was again the center of attention—this time for his sentence of three boys from a St. Louis suburb, who, just before they graduated high school, had set fire to an animal hospital because the owner had fired one of them. The fire killed three dogs and caused \$325,000 in insured damage to the building. The defendants pleaded guilty to arson and burglary. Maximum sentences for the offenses charged added up to 38 years.³² Sentencing was postponed at the instance of defense lawyers until the boys had graduated from high school, participated in a church-sponsored camp for poor children, and matriculated at branches of the University of Missouri. The sentencing judge’s view of these defendants was sympathetic according to his comments in the sentencing hearing transcript:

Today I have to deal with people that I think almost are neighbors even though you are from [another suburb of St. Louis]. . . . [T]here is no place I have ever lived like [these two suburbs]. There is nothing that hurts more than . . . what I am having to do today. Most of the time . . . what I have to do just jumps out at me. You don’t get callous up here. I was the attorney for the penitentiary system. . . . And I didn’t see anybody down there that I didn’t think should be there. It was my job to keep them there.

With only one or two exceptions I enjoyed the job because I thought that’s right where they should be. But I have tried to send what I think were my quota of people down there that I don’t want to ever meet at [a local mall]. I don’t want them ever to meet my wife in [our suburb] or ever want them to see

31. The other cases for the first session of the first Workshop played on a variety of similar themes. They included: a young church worker who took nude pictures of himself with the children he was supervising, sentenced to five years in prison; a 25-year-old mother of two young children charged with selling two \$25 baggies of cocaine to an undercover agent, sentenced to five years in prison despite the prosecutor’s agreement not to oppose probation, denied “shock probation” because of the asserted importance of discouraging the use of drugs in southwestern Missouri; a 32-year-old man, married with two children, with six prior felonies but none within the last five years, who had fallen from the sixth floor of a building he was helping to paint and suffered multiple fractures all over his body with many consequential surgeries since, charged with shooting a friend in the back during an un consummated cocaine deal, sentenced to five years in prison; a 40-year-old woman caught transporting marijuana through the county in the back seat of her car, sentenced to two years in prison, suspended on condition of 30 days in the local jail. The Missouri judges’ sentences for the defendants in these cases were almost as varied as the facts of the set of cases chosen for the session.
32. The Minnesota State Public Defender, a frequent visitor at Workshop sessions, put a sharp edge on the conversation when he announced that he would have sentenced the boys to prison because otherwise he would not have been able to look his own dog in the eye.

my daughters walking down the street. . . . I am persuaded that you and your cohorts aren't that kind of person. . . .

This is as mean as anything I have ever seen. As senseless as anything I have ever seen. I presume by now that you know that. . . .

The judge then suspended imposition of sentence for five years so that the defendants, if successful on probation, would have no criminal record, on condition that they serve 60 days in county jail (but only on weekends during the summer), maintain employment of 30 hours a week during the summers and a B average in their college schoolwork, graduate within four-and-a-half years, stay out of bars and drink no liquor or beer, maintain a 10:00 p.m. curfew and, finally, perform 200 hours of community service at a local animal shelter.

Was the young embezzler's sentence fair? Or the arsonist's?³³ Are the sentences consistent with each other under one or more of the (not necessarily consistent) theories justifying criminal punishment? I cannot with any assurance answer these questions; indeed, I suspect I could foment a lively argument about any of them in any audience. In the collegially confrontational atmosphere of the Workshop, though, students, faculty and the judge's colleagues were empowered to ask them—and they were entitled to reject what they believed to be superficial answers. The judge could, of course, have refused to reexamine his sentences or the moral and social policies underlying them but there was no ignoring the choice.³⁴ From such individual lessons, delivered in an atmosphere where all participants have agreed to learn from each other, delivered in respectful fashion, the judges can acknowledge new perspectives.

In my effort to describe the Workshop's methods I may unintentionally have failed to give enough credit to individual judicial participants. Each Workshop included judges who had personally led local initiatives to treat addicted defendants, judges who were aware that personal values inevitably have an impact but that objectivity and decency in sentencing can be achieved. On one occasion, for example, a former juvenile court judge held forth at some length and with discomfiting vehemence that a 22-year-old addicted mother should

33. All five of the other Missouri judges sentenced the defendant to five years probation conditioned on 60 days of weekend local jail time. Remember that these sentences were imposed by judges who had seen the actual sentence their colleague imposed. *See supra* note 24 and accompanying text. Most of the students and nonjudicial visiting participants (including the state public defender—despite his inflammatory opening comment) gave similar probationary sentences, with conditioned jail time varying from eight to 120 days. One student sentenced the defendant to prison for two years, to be served on holidays and weekends.

34. The discussion of the arson case was somewhat intense as it involved what some perceived as racial and gender sentencing differentials. At the end, though, the judge, a fine advocate if mischievous, wondered aloud how Workshop participants would have sentenced the arsonist if they had known he was Hispanic. Although the students knew that the defendant's name was some equivalent of "Brockingham Smythe," a name no person in the room would have identified as Hispanic, they were speechless. The judge's assertion was neither challenged nor clarified.

have had parental rights to her other children terminated because she failed to obtain medical help for a six-month old daughter who had been severely beaten by her boyfriend. One of the other judges commented, “Whenever I suspect that I’m angry, I go home and put off sentencing for another day.” The sermon was quiet, somewhat indirect, assigning neither blame nor shame; it was difficult to ignore but easy to follow.

To summarize: The Sentencing Workshop sought to educate law students about sentencing and judging. Simultaneously, it gave trial judges an opportunity to explore their sentencing practices and policies. They collectively examined their own cases in enough detail that the underlying personal and emotional issues were sure to emerge. The surroundings allowed judges to be honest with each other and know that whatever criticism their sentences attracted was intended to be constructive. The criticism came from their peers, from a faculty they had come to trust as helpful, and from inexperienced students whose innocence excused their direct and bold style. Finally, the learning was personal, very emotional, anecdotal as well as intellectual, and without undue or embarrassing personal exposure. Such circumstances are ideal for reassessments of any kind. The Workshop made no effort to seek or impose conversions and no one’s basic values changed. Rather, the Workshop sustained a friendly, tolerant, democratic exchange over a lengthy period about matters that are vital to lawyers and to citizens generally. Each of the participants learned important lessons from the others about different ways of seeing the world and some of its inhabitants; many of the participants were influenced to interpret the world more tolerantly as a consequence of the exchange.

IV

And now, finally, a look at the “bottom line.” Reconsider the Crocker case for a moment. Obviously, the Workshop did nothing to help that defendant. But there are thousands of Crockers caught in our criminal justice system, sad, poor, uneducated, benighted, beleaguered, addicted, alcoholic, lacking self-control, confused, manipulative, even dangerous individuals. Even if we could afford the prison space our punitive instincts and our popular culture urge us to make available—and we know that we can’t—prison time won’t solve our need for community safety from criminal depredation. Cases like Crocker should teach us to look for other and more decent punishments to deal with at least some crime and some criminals. Judges in our Workshop who looked at the system saw that.

And what of the judge who sentenced Crocker? Did a “hanging” judge have an epiphany, become wedded to treatment rather than incarceration? No hanging judge—and no epiphany. But after the Workshop the same judge sentenced an addicted 22-year-old mother after she pleaded guilty to aggravated battery. Prior to sentencing, the case had the benefit of a client-specific plan and a lengthy group discussion during the Workshop. The judge followed the planner’s recommendation and ordered the defendant, with her

consent and that of the program, to spend a lengthy period at Delancey Street, a famed self-help and participant-run drug treatment program with a branch in North Carolina.³⁵

In addition, consider the following:

Item: One of the South Carolina judges, asked by his colleagues if the Workshop was useful, answered: “I know that in general our society believes that jail is always punishment; as a result of my time in Minnesota, I always ask myself whether punishment always has to be jail.”

Item: After the program’s first year, a very conservative judicial participant from southwestern Missouri told an assistant state corrections commissioner in my presence (and here I am quoting my own report of the incident to the Edna McConnell Clark Foundation):

It was not until a month or so [after the last Workshop session] that I realized it was the most important experience I have had as a judge, and the most useful one.

It was definitely the students who make the difference. . . . It was especially uncomfortable when one of my cases was to be discussed. It was especially bad for me because in my court and in my home what I say is the law. . . . There I had to justify everything or change my mind. It was a difficult but important experience for me.

I’m going to meet with [the state’s chief justice] and tell him to put his money where his mouth is—if he wants us to use alternative sentences, he damn well better make the resources available to us. I’ve now used Mineral Areas [a drug treatment program] four times since April, and I never even knew of its existence before I came to Minnesota.

And the judge’s assigned probation officer told the officer’s corrections department supervisor that something extraordinary must have happened because the judge had used his discretionary power to impose “shock probation” more in the four months after the last session of the Workshop than he had in his previous 11 years on the bench.

Item: One of the judges who attended the Workshop, who on his own and with no funding, initiated a local treatment program and a variety of alternatives to prison, wrote:

35. It is true that the judge found it necessary to tell local reporters that he was to be informed, “no matter where I am in the [s]tate,” if the defendant were to leave or be dismissed from the Delancey Street program. Moreover, “the judge admitted he was ‘a little hesitant’ about using the alternative sentence, reportedly the first of its kind in the state, but he said he was willing to take a chance. ‘I decided to take a one-time, take-a-look approach to this program,’ he said at a special sentencing hearing. . . . [The judge] said he wouldn’t have touched it if Delancey Street’s approach to alternative sentencing was a ‘feel good, touchy-feely program.’ He said his investigation found it ‘a tough program that demands full cooperation.’” Even judges occasionally have to give their pronouncements favorable “spin.”

I must confess to a certain level of skepticism at the beginning of the 1996 Sentencing Workshop. After 21 years of judicial experience, I had an attitude of “I’ve seen it all before.”

Having now completed the Minnesota Sentencing Workshop, I must say it is equally true that I have never seen anything like it. The Workshop was far and away the best educational experience I have known in the area of sentencing, and I feel I have gained a great deal personally by participating.

The Oklahoma judges, including myself, have experienced a kind of bonding with each other as a result of the Workshop.

Item: And here is a fairly typical response by one of the Workshop students:

This seminar will always be one of the most significant and impactful experiences of my life.

(Even if you discount, as I do, evaluations delivered non-anonymously and before grades are assigned, this has to be considered a positive judgment!)

The workshop was fun and educational for students and they rated it highly; it received testimonials from judicial participants. But did the Workshop do any good? And was it worth the cost? Fair questions. One Workshop visitor drew up a plan for an empirical study to determine how judge-participants’ sentencing behavior changed after the Workshop and to assess whether, over time, sentences to prison have decreased in the states whose judges have participated. A decent study would probably cost more than the Workshop’s budget for a number of years but it should certainly be undertaken. Pending contrary findings, however, I will continue to believe that judges are crucial actors in a criminal justice system paralyzed by political fear and public ignorance and unable to obtain legislative solutions to an impending correctional and social disaster. As sentencers in individual cases, judges can help to lessen the adverse consequences. As respected opinion leaders in their own communities and, collectively, as a powerful political force in their states, judges can help to cure the paralysis. Judges certainly should help and the Workshop motivates them to do so.

A personal aside: I was told that the very considerable time and emotional energy I devoted to the Workshop took too great a toll—during the last five years I could have made larger contributions to the law school’s scholarly output if the Workshop were not part of my teaching load. And if the issue must be drawn that narrowly that assessment is certainly correct. But the problem is larger than academic politics. Even if criminals are not among the citizens most deserving of improved situations, no one who knows what our prisons are now like and what they are likely to become should doubt the need for all of us to seek reform—for prisoners’ sakes and our own.