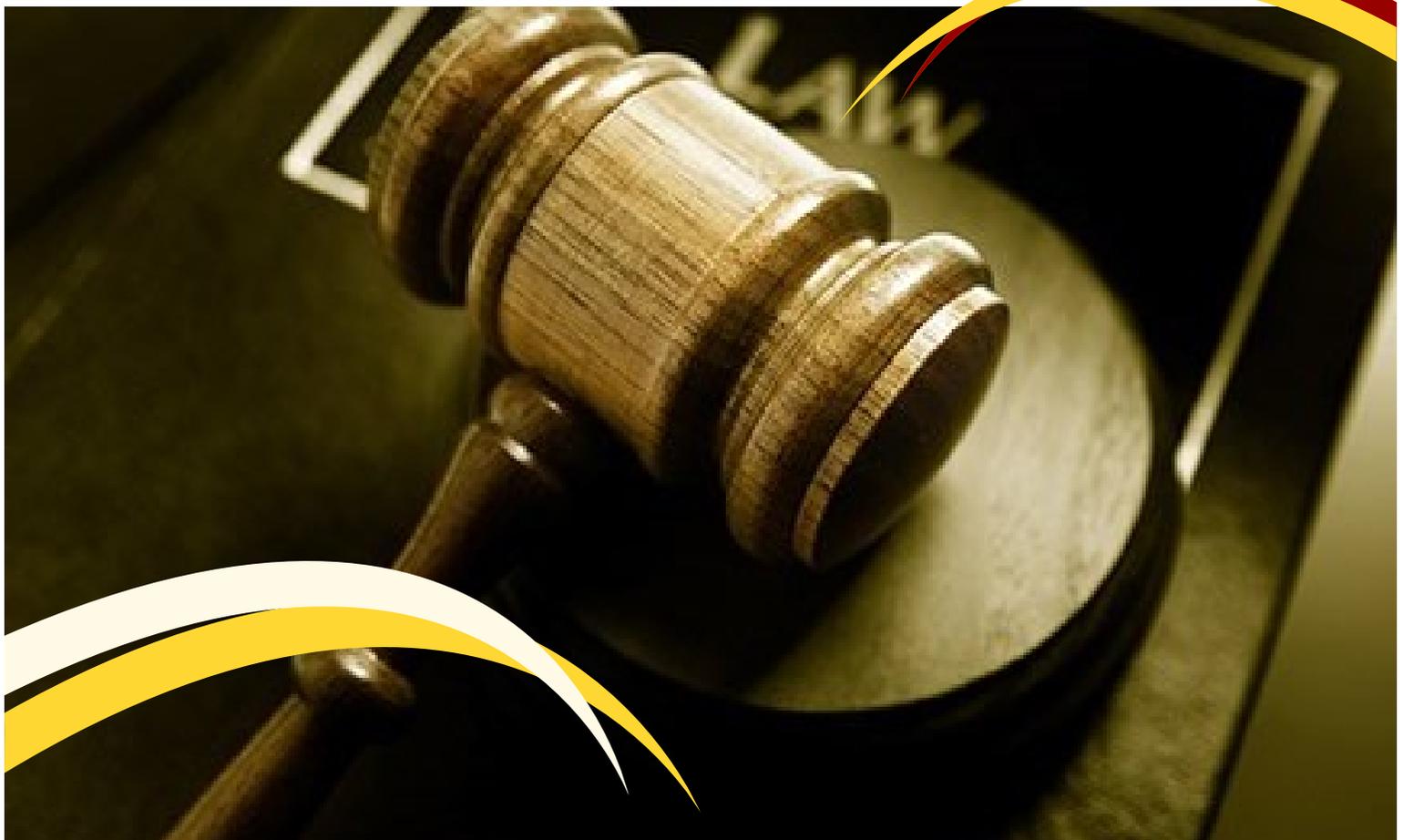


# The Justice Academy Journal

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## Judicial Sentencing Strategies and Recidivism

...Addressing the Multivariate Nature of Crime and Human Behavior...

The notion of punishment as a consequence for criminal behavior and its purpose as a mechanism for deterrence has long been an issue of considerable debate among members of the criminal justice system including law enforcement agencies, probation authorities, juvenile justice practitioners, and especially those of us within the judiciary. A variety of complementary and disparate perspectives and philosophies exist relative to this particular aspect of jurisprudence, but given the plethora of approaches used by the courts, it is safe to assume that there is a distinct lack of consensus about the most effectual strategies for sentencing those convicted of a crime. Two principle theories and ideologies are prevalent with regard to this aspect of jurisprudence. They have been defined within scholarly journals as the consequentialist theory and the retributive theory.

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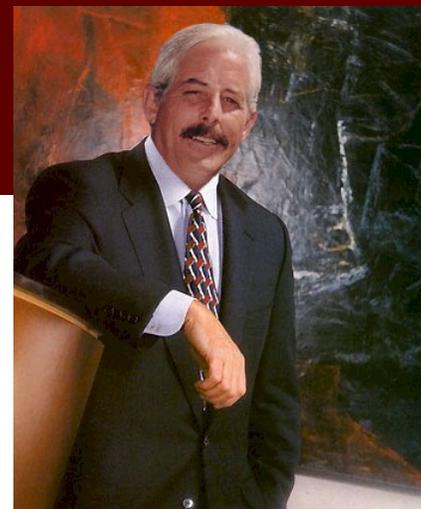
The consequentialist theory of punishment seeks to serve as a deterrent to criminal behavior. The retributive theory conversely seeks to punish offenders because they deserve to be punished for the crimes they have committed. The former philosophy endeavors to serve as a means by which to elicit voluntary compliance to accepted social norms and behavior expectations, as specified within criminal statutes, while the latter philosophy owes its lineage to an Old Testament viewpoint, or perhaps as a derivative of the Code of Hammurabi. The notion of scaled punishments for violations of these social expectations resides at the heart of both of these forms of governance.

Modern adaptations of both the consequentialist and retributive theories are pervasive throughout the many jurisdictions within our nation. Each sovereign state elects representatives who serve as legislators and who are entrusted with the responsibility for deciding and authoring statutory laws. This process of representative governance seeks to keep pace with the evolutionary permutations of societal expectation regarding behavior and compliance by those it governs. Contained within the statutes enacted by the legislature are prescribed punishments and the prerogatives available to the court for dealing with those who violate these laws.

A point of interest that cannot be overlooked with regard to those who occupy the state legislature is their relatively unfamiliar grasp of the theories of punishment, as a mechanism of imposing social justice. It seems reasonable to conclude that state representatives who do not possess experience within the criminal justice system or a familiarity with the judiciary are likely to avoid complex considerations of what does and what does not constitute consequentialist philosophy.

Equally important is the realization that legislators might also lack proficiency with the various aspects of retributive theory or its real intent. An examination of the plethora of state criminal codes that exist throughout our nation gives rise to the remarkable degree of similarity that exists with regard to specific forms of criminal behavior, while still other aspects of these penal codes display a very unique view of the norms and values for the states they represent. This isn't really very surprising when you consider how laws are enacted and the impact of the appeals process, but it does give rise to deliberation over whether or not our system of justice has lost track of the most effectual strategies for preventing crime, deterring behavior, and punishing those who commit such acts with an eye on the avoidance of recidivism.

### About the Author:



**Judge Hal Campbell, Ph.D.**  
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Hal Campbell currently serves as the Executive Director of JusticeAcademy.org. He also serves as a member of the teaching faculty for the University of Maryland concentrating in the areas of public policy strategy, criminal law, constitutional law, justice administration, empirical analyses, and higher education.

Judge Campbell recently concluded a term of service as a member of the judiciary in the State of Montana. His appointment to the bench was bestowed by the Montana Supreme Court, Commission on Courts of Limited Jurisdiction. Prior to this appointment to the bench, he served for over twenty-five years as a tenured professor and department chair with the California State University. His public policy and law enforcement experience includes a variety of senior management positions with the Los Angeles County Sheriff's Department. From 1978 to 1989 he held positions in the department including Law Enforcement Planning Coordinator, Chief Analyst, and began his career as a Deputy Sheriff.

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A subtle, yet detectible, undertone of public policy debate has emerged over the past few decades, instigated largely by elected politicians who feel compelled to appeal to their constituencies about the perils of allowing judges to “legislate from the bench”. I find this assertion somewhat perplexing because it seems reserved largely for matters of disagreement over the imposition of capital punishment, when it should be on the minds of everyone, all the time. It is not a question of territory, but of forcing the judiciary to actively engage in political deliberation over statutes and punishments can be thought of as the natural consequence of a failure on the part of the legislature to adequately consider the complexity of criminal law and criminal procedure, as it applies to the very important issues of deterrence and punishment. Writing laws that simply prescribe a term of confinement as a consequence for a criminal act or which endeavor to balance the scales of justice by adding a fine does not meet the test of adequacy, for either theory discussed previously.. Enacting statutes that remove or severely limit the prerogatives of the judiciary to respond to criminals who are found guilty within their courts also fails to meet the imperative of providing effectual public policy determinations relative to sentencing strategies that make a difference.

It is not only legislatures that experiences the challenge of deriving effective public policy, but we also see the effect brought about by limitations in higher education. One of the limiting consequences of extreme pedagogical specialization within the legal education arena is that there isn't time during law school to study other important topics that provide a depth of understanding relative to human behavior. Due largely to the importance of attorneys becoming familiar with the breadth of understanding about the legal practice, and the generalist strategy mandated by the American Bar Association for all practicing attorneys<sup>(1)</sup>, the administration authorities of law schools leave little, if any room, for study within the curricula of relevant topics such as multivariate sentencing strategies, the philosophy of punishment, or behavior modification through corrections based treatment programs. Such courses are not even offered within the curriculum provided by the National Judicial College for newly elected and appointed judges. Instead, new members of the judiciary are forced to concentrate on those court administration and criminal procedure matters that they will need during their term, and which are prescribed within the Desk book that governs the operation of their court. Punishments and effectual sentencing strategies are not a matter of careful reflection, but instead are replaced by determinant sentencing guidelines, outlined in the Bond book. In the case of felony offenders, for example, members of the judiciary seldom consider what, if any, steps will be taken to rehabilitate the offender, while that person is confined within the prison setting. Again, it is partly a function of compartmentalization of the justice system which prescribes that those determinations are rendered beyond the purview of the court. It is also partly based on the absence of an appreciation that recidivism is one of the natural byproducts of incarceration unless the time spent in confinement is used to correct deficiencies, enable critical thinking and reasoning skills, to reinforce dignity and self-worth on the part of the offender, to activate positive decision making skills that serve to reject temptations after release, to reinforce personal focus, and inspire a personal drive to attain parity with their contemporaries in society.

Few if any of these very important attributes and abilities are addressed as part of the retributive theory and only a small number of highly specialized criminal courts maintain either the authority or the inclination to consider such effectual sentencing strategies. Juvenile and drug courts have, for the most part, set the standard for innovative sentencing practices that seek to rehabilitate, enable, and empower those convicted to make the changes necessary to succeed in life.

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With regard to felony offenders, it appears prudent for the court to insist upon a multivariate strategy of treatment, rehabilitation, and corrections that seeks to provide not just the opportunity for hardened convicts to break the cycle of criminality upon release, but which bestows the skills and judgment necessary to make this transformation a reality. Naturally, such conditions should conform to the specifications outlined by the United States Sentencing Commission and state Supreme Court mandates, but still there exists a plethora of options available to the court for aggressively pursuing a mitigating solution to recidivism<sup>(2)</sup>.

A national research study is underway regarding misdemeanor offenders under the authority of the lower courts entitled, the Last Chance – Deferred Imposition of Sentence Project. The study seeks to expand upon the successes of the past relative to innovative sentencing strategies, but from an empirical perspective as opposed to a qualitative frame of reference. The philosophy behind the use of deferred imposition of sentence, in combination with a multivariate sentencing and release strategy that seeks to force behavior modification and treatment as part of the sentencing conditions appears to have considerable merit in affecting changes in recidivism rates. If the findings of the national study provide a statistically significant basis for adoption, the Last Chance project could be used to send a clear message to a potentially salvageable offender of the need for change in behavior and afford a reasoned methodology of addressing an offender's behavior in order to reduce or eliminate critical factors that result in temptation and harmful life style choices which brought the accused to the attention of the justice system.

The study uses discriminant function analysis to identify discriminant variables that aggregate to influence criminality, and then structures these factors within a deferred imposition of sentencing strategy to significantly impact the probability of recidivism avoidance by the offender. As an example, incarcerating the offender for one month and then deferring the imposition of the remaining eleven months of a one year jail term for a misdemeanor criminal offense (for a one year period), extends the reach of the court. When combined with the imposition of specific conditions this strategy might well alter the likelihood of an offender becoming a perpetual participant in the criminal justice system and redirect them toward becoming a responsible member of society. Using a multivariate discriminant function array that identifies primary, secondary, and tertiary axes of correlation with an aggregate equation being the final result, can provide a mechanism to not only illustrate the strength and proportion of influence for each subtle level variable, but also provides a master sentencing equation that can be used by the court to determine the statistical probability of success in avoiding future criminal behavior for each offender, as compared against historical findings.

This approach creates a useful algorithm that can be applied by the courts to evaluate each potential offender who is being considered for inclusion within the Last Chance - Deferred Imposition of Sentence program. It also illustrates those factors which can be manipulated by the court, and from that supposition, it can be used to calculate a probability for their avoidance of recidivism in the future. The existence of such an equation also removes the court's reliance on the probation/parole department's intuition in such matters and gives the court a tangible tool that can be applied to calculating alternatives, and creating an effectual sentencing strategy for each offender in order to optimize their chances for success.

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Such an approach allows for the examination of a myriad of independent variables that are linked to the environmental, psychological, sociological, personal values, professional ability and qualifications, and behavioral trait discriminant nodes of the offender's profile. From such an examination, the court may be better positioned to structure the conditions of a sentence in order to maximize the statistical probability of the offender's success in avoiding a recidivistic life experience, at least in theory.

Incorporating a variety of enabling conditions, such as employment qualification training, critical thinking and reasoning education, a requirement to attain a G.E.D., speech communication classes, social expectation and conformance training, drug or alcohol dependency treatment, maturity training, and a plethora of other enabling alternatives, combined with a taste of incarceration, active supervision, positive reinforcement, the threat of negative consequences, and a last chance opportunity to succeed is just about all the court can do in hopes of correcting a person's behavior and helping them avoid future encounters with the criminal justice system.

The Last Chance study, which is sponsored by several concerned institutions and agencies, is expected to conclude in 2020 with the final results and findings being made available immediately thereafter. In the meantime there are a host of progressive steps that each court and every jurisdiction can take in order to optimize the effectual nature of the sentencing strategies they impose. A comprehensive resource is available at the United States Sentencing Commission <sup>(3)</sup>.

### Notes:

(1) ABA Standards and Rules of Procedure for Approval of Law Schools, 2015-2016, American Bar Association.

(2) Recidivism Among Federal Offenders: A comprehensive Overview, 2016, United States Sentencing Commission.

(3) Recidivism and the First Offender, 2004, United States Sentencing Commission.



## Research and Strategic Initiative Partnerships

- National Hostage Survival Probability Model
- Last Chance Deferred Imposition of Sentence Project
- School Violence Predictive Model
- Tactical Incident Team Advisory Network
- National Text Blocking for Drivers Project
- Directed Patrol and Strategic Enforcement Effectiveness Project
- Law Enforcement Executive Exchange Program
- Law School Video Library Project
- Police Academy Video Library Project

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