

2010

# Changing the Topography of Sentencing

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## Recommended Citation

Kate Bloch, *Changing the Topography of Sentencing*, 7 *Hastings Race & Poverty L.J.* 185 (2010).

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**Author:** Kate Bloch

**Source:** Hastings Race & Poverty Law Journal

**Citation:** 7 HASTINGS RACE & POVERTY L.J. 185 (2010).

**Title:** *Changing the Topography of Sentencing*

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# Changing the Topography of Sentencing

KATE E. BLOCH\*

## Introduction

By August of 2008, the population in California's prisons was approaching two hundred percent of design capacity.<sup>1</sup> One year later, in August of 2009, with a portion of the correctional system under the direction of a special master<sup>2</sup> and another portion under the auspices of a receivership,<sup>3</sup> the United States District Court ruled on the overall fate of California's correctional system and its inmates.<sup>4</sup>

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\* Kate E. Bloch, Professor of Law, University of California, Hastings College of the Law. I would like to thank Judge Ronald Albers, Michael Cobden, Jennifer Friedenbach, Eumi Lee, Dr. Emily Murphy, and Bob Offer-Westort for their much-appreciated feedback on this essay. I am grateful also for the excellent research assistance of Amanda Tylicki and reference library assistance of Chuck Marcus and Vince Moyer, and to Todd Daloz, Anna Kirsch, and Keith Ogden for their involvement in proposing and researching possible topics and speakers for the three presentations on alternative sentencing models at the California Correctional Crisis Conference. Finally, I thank the Hastings 1066 Foundation for funding support, and the members and previous and current editorial board of the *Hastings Race & Poverty Law Journal* who supported the Conference and, along with Tom McCarthy, the publication of this issue of the journal.

1. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 21868, at \*30 (N.D. Cal. Feb. 9, 2009) (three-judge court, tentative ruling).

2. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2007 U.S. Dist. LEXIS 56043, at \*4-5 (E.D. Cal. July 27, 2007) ("By order filed September 13, 1995, this court found defendants in violation of the Eighth Amendment with respect to the provision of constitutionally adequate mental health care to inmates incarcerated in the California Department of Corrections, now known as the California Department of Corrections and Rehabilitation ("CDCR"). On December 11, 1995, this court appointed J. Michael Keating, Jr. as the Special Master to oversee the development of remedies for the systemic constitutional violation and to monitor implementation of court-approved remedies.").

3. *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2007 U.S. Dist. LEXIS 43673, at \*4 (N.D. Cal. June 4, 2007) ("In February 2006, this Court appointed a Receiver to take control of the delivery of medical services for prisoners confined in California state prisons. The Court took this extraordinary step of last resort because the State's conceded inability to discharge its constitutional obligations had led to such a crisis in the delivery of medical care in California state prisons that, on average, 'one inmate needlessly dies every six to seven days due to constitutional deficiencies.' See October 3, 2005 Findings of Fact and Conclusions of Law Re Appointment of Receiver at 1.").

4. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943, at \*37-44 (E.D. Cal. August 4, 2009).

The Court concluded:

The massive 750% increase in the California prison population since the mid-1970s is the result of political decisions made over three decades, including the shift to inflexible determinate sentencing, and the passage of harsh mandatory minimum and three-strikes laws, as well as the state's counterproductive parole system.<sup>5</sup>

...

California's practice of sending parole violators back into the state prison system for an average of four months and incarcerating them during that time in crowded reception centers endangers public safety and burdens the criminal justice system.<sup>6</sup>

...

[T]he state's prisons have become places "of extreme peril to the safety of persons" they house, while contributing little to the safety of California's residents. . . . Thousands of prisoners are assigned to "bad beds," such as triple-bunked beds placed in gymnasiums or day rooms, and some institutions have populations approaching 300% of their intended capacity. In these overcrowded conditions, inmate-on-inmate violence is almost impossible to prevent, infectious diseases spread more easily, and lockdowns are sometimes the only means by which to maintain control. In short, California's prisons are bursting at the seams and are impossible to manage.<sup>7</sup>

As if to underscore the peril described by the Court, four days after the District Court's ruling, prisoners rioted in one of California's heavily overcrowded prisons, a reception center that serves to process prisoners into or back into the state correctional

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5. *Id.* at \*392-93.

6. *Id.* at \*320. The practice of returning parole violators to prison for just a few months is referred to as "churning." *Id.* at \*321.

7. *Id.* at \*37, \*39-40 (citations omitted) (quoting Governor Arnold Schwarzenegger, Prison Overcrowding State of Emergency Declaration (Oct. 4, 2006)).

system.<sup>8</sup> News reports indicate that the Chino reception center was built to house 3,000 inmates but was housing almost double that number, 5,900 inmates, and that approximately ninety-five percent of the inmates were there on parole violations.<sup>9</sup>

In its rulings, the District Court found that California was violating the constitutional rights of its inmates.<sup>10</sup> Invoking its power to remedy constitutional violations of this magnitude, the federal court warned, “no other relief will remedy those violations . . . [except] a ‘prisoner release order,’”<sup>11</sup> and ultimately held that “[w]ithin 45 days, defendants shall provide the court with a population reduction plan that will in no more than two years reduce the population of the CDCR’s adult institutions to 137.5% of their combined design capacity.”<sup>12</sup> The Court explained, “[a]t the adult institutions’ present design capacity of 79,828, this equates to a population of just below 110,000.”<sup>13</sup>

Applying this percentage to the actual number of inmates in state prison custody produces the following: the CDCR population totals calculated in the week preceding the District Court order (July 29, 2009) put the prison population in excess of 149,000.<sup>14</sup> At that population level, this means an order for a plan to release at least 39,000 prisoners.<sup>15</sup>

Although a range of factors have contributed to the overpopulation of California’s prisons,<sup>16</sup> one of the most significant is California’s extremely high recidivism rate and the related

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8. Gillian Flaccus, *Devastation Marks Scene of California Prison Riot*, S.F. CHRON., Aug. 11, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/08/09/national/a075357D19.DTL> (reporting on riot that began August 8th, 2009)

9. *Id.*

10. *Coleman*, 2009 U.S. Dist. LEXIS 67943, at \*49.

11. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 21868, at \*28-29 (N.D. Cal. Feb. 9, 2009).

12. *Coleman*, 2009 U.S. Dist. LEXIS 67943, at \*394-95.

13. *Id.* at \*290 (citations omitted).

14. DATA ANALYSIS UNIT, CAL. DEP’T OF CORR. AND REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT JULY 29, 2009 1 (2009), available at [www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Population\\_Reports.asp](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Population_Reports.asp).

15. Of course, the actual number of prisoners that need to be released in any given week will depend upon the number of prisoners exceeding the court’s designated limit of just below 110,000, and may potentially be adjusted if new prison facilities become available. Since the Court’s order, the California Legislature has entertained bills to reduce the prison population. See, e.g., *Inmate Release Plan Hits Snag in California Assembly*, CNN.COM, Aug. 25, 2009, <http://www.cnn.com/2009/POLITICS/08/25/california.prisoners.release/index.html>.

16. For an overview of the problem, see Hadar Aviram, *Defining the Problem*, 7 HASTINGS RACE & POVERTY L.J. (this issue, Winter 2010).

churning of parole recidivists through short-term stays in reception centers.<sup>17</sup> By some measures, California has the highest recidivism rate of any state in the nation, exceeding seventy percent.<sup>18</sup>

Underlying this recidivism rate must be a recognition that, even with harsh sentencing approaches, the overwhelming majority of inmates are released back into society. California releases approximately 120,000 inmates from state prisons each year.<sup>19</sup> Whether and how the sentencing and correctional systems have responded to the factors that brought the offenders to the prison gates in the first place and how the system treated them during their incarceration will be critical in determining whether they will return through those gates as recidivist offenders.

It is to recognize that California has been making efforts, especially in very recent years, to consider the motivational factors that landed the inmates at the prison gates and to revise how it treats prisoners while incarcerated and how the correctional system prepares them for reentry.<sup>20</sup> For example, the passage of AB 900 focuses the California Department of Corrections and Rehabilitation “on the ‘R’ in CDCR”<sup>21</sup> by requiring that “new beds [funded by AB 900] . . . be supported by rehabilitative programming for inmates, including, but not limited to, education, vocational programs, substance abuse treatment programs, employment programs, and prerelease planning.”<sup>22</sup> This 2007 legislation demonstrates a

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17. “[T]here is evidence that the more punitive the methods of crime control, the more violent offenders become . . . .” Bandy Lee & James Gilligan, *The Resolve to Stop the Violence Project: Transforming an In-House Culture of Violence Through a Jail-Based Programme*, 27 J. PUB. HEALTH 149, 149-155 (2005). “Overall, it has been observed that, unless mitigating factors are present, recidivism goes up, not down, with imprisonment.” *Id.* at 149.

18. Ryan G. Fischer, *Are California’s Recidivism Rates Really the Highest in the Nation? It Depends on What Measure of Recidivism You Use*, 1 BULLETIN 1 (Ctr. for Evidence-Based Corr., Univ. of Cal. Irvine), Sept. 2005, (reporting a “70% plus recidivism rate” but noting that “California’s technical violation rates are higher than other states, however its rates of new arrests and new criminal convictions are not always higher.”).

19. Press Release, Cal. Dep’t of Corr. and Rehab., Parole Reform Increases Supervision of Serious Offenders; Adds Evidence-Based Screening to Reduce Recidivism (Sept. 17, 2007), available at [http://www.cdcr.ca.gov/News/2007\\_Press\\_Releases/press20070917.html](http://www.cdcr.ca.gov/News/2007_Press_Releases/press20070917.html).

20. See Eumi Lee, *The Centerpiece to Real Reform? Political, Legal, and Social Barriers to Reentry in California*, 7 HASTINGS RACE & POVERTY L.J. (this issue, Winter 2010).

21. Cal. Dep’t of Corr. and Rehab., AB 900 Prison Reforms: Achieving Results, Focusing on the “R” in CDCR, [http://www.cdcr.ca.gov/News/AB\\_900\\_Achievements/Focus\\_On\\_R\\_In\\_CDCR.html](http://www.cdcr.ca.gov/News/AB_900_Achievements/Focus_On_R_In_CDCR.html) (last visited Oct. 24, 2009).

22. CAL. GOV’T CODE § 15819.40(a)(2) (Deering 2009).

legislative and executive commitment to rehabilitative endeavors.<sup>23</sup> But, despite good intentions, funding has lagged, leaving the promise of new beds with their associated programming, for the moment, largely just a promise.<sup>24</sup>

California's recent efforts are laudable, but were clearly not, in the Court's view, adequate.<sup>25</sup> The return to prison of inmate recidivists and the levels of overcrowding have produced a correctional system in crisis.<sup>26</sup> The scope and severity of the crisis give urgency to the search for alternative sentencing models, models that offer the potential to more effectively reduce recidivism and overcrowding by reaching offenders and changing behaviors in both the short and long term, and ultimately improving public safety.

Three concurrent presentations at the California Correctional Crisis Conference<sup>27</sup> explored alternatives that seek these ends. The first panel focused on community justice courts, and, in particular, the recently opened court in San Francisco's Tenderloin District.<sup>28</sup> The second presentation, building on advances in neuroscience, examined scientific alternatives in drug addiction treatment and prevention. The third pursued a restorative justice approach, a model that has been steadily gaining attention in the United States and around the globe.

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23. Proposition 36 as well as new screening mechanisms for assessing risk and releasing prisoners represent two additional examples of state efforts to reduce overcrowding. For information on Proposition 36, see Judicial Council of California, Proposition 36, <http://www.courtinfo.ca.gov/programs/collab/prop36.htm> (last visited Sept. 14, 2009). For a discussion of the new COMPAS screening program, see Fact Sheet, Cal. Dep't of Corr. and Rehab., COMPAS Assessment Tool Launched: Evidence-Based Rehabilitation for Offender Success, available at [http://www.cdcr.ca.gov/Divisions\\_Boards/Adult\\_Programs/docs/FS\\_COMPAS\\_Final\\_4-15-09.pdf](http://www.cdcr.ca.gov/Divisions_Boards/Adult_Programs/docs/FS_COMPAS_Final_4-15-09.pdf) (last visited Oct. 26, 2009).

24. *Coleman*, 2009 U.S. Dist. LEXIS 67943, at \*235.

25. *Id.* at \*51.

26. See *Cal. Corr. Peace Officers Ass'n v. Schwarzenegger*, 77 Cal. Rptr. 3d 844, 848 (Ct. App. 2008) ("October 4, 2006, the Governor issued a 'Prison Overcrowding State of Emergency Proclamation,' finding that 'all 33 CDCR prisons [were] at or above maximum operational capacity, and 29 of the prisons [were] so overcrowded that the CDCR [was] required to house more than 15,000 inmates in conditions that pose substantial safety risks, namely, prison areas never designed or intended for inmate housing, including, but not limited to, common areas such as prison gymnasiums, dayrooms, and program rooms, with approximately 1,500 inmates sleeping in triple-bunks.'").

27. The California Correctional Crisis Conference was held March 19-20, 2009. See California Correctional Crisis Conference, <http://cacorrectionalcrisis.org> (last visited Nov. 6, 2009).

28. The establishment of community justice courts is another vehicle through which California is attempting to address the correctional crisis. For a discussion of the Community Justice Court in San Francisco's Tenderloin District, see Michael Cobden, *Tenderloin Community Justice Center*, 7 HASTINGS RACE & POVERTY L.J. (this issue, Winter 2010).

All three models seek to identify and address motivational factors at the heart of the offender's conduct.<sup>29</sup> This key characteristic affords each model hope of reducing recidivism and prison overpopulation, and enhancing public safety through approaches that are substantially different than those of the prevalent correctional models that have spawned the overcrowding crisis. The succeeding pages of this overview furnish a brief perspective on two of the models, the community justice court and neuroscience and drug treatment. The third model, restorative justice, is the subject of the article following this overview essay.

## I. Community Justice Courts

The Tenderloin District's Community Justice Court ("CJC") opened in March 2009. As the court's website describes its role, the CJC "addresses the primary issues facing the individual and not just their crime."<sup>30</sup> It is thus designed to be a problem-solving court. This type of court aims to do "more than just adjudicating the facts of the individual case . . . [it aims] to address the underlying problems that brought the defendant, this particular individual, before the court."<sup>31</sup>

Problem-solving courts may specialize in specific types of offenses or issues, as in drug courts, domestic violence courts or mental health courts. For example, as of 2006, "approximately 90 adult drug courts operate[d]"<sup>32</sup> in California. Or, problem-solving courts may have more general mandates about offenses and issues but be geographically bounded. The CJC is not an offense or issue-specific court. Instead, it has jurisdiction over "citations, infractions, misdemeanors, and some felony cases"<sup>33</sup> that occur within its geographic domain, almost all of which lies in San Francisco

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29. See *infra* notes 30-31, 79-98 and accompanying text. Kate Bloch, *Reconceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY L.J. (this issue, Winter 2010).

30. Community Justice Center, <http://www.sfsuperiorcourt.org/index.aspx?page=96> (last visited Oct. 26, 2009).

31. Judy H. Kluger, *The Impact of Problem Solving on the Lawyer's Role and Ethics*, 29 FORDHAM URB. L.J. 1892, 1893 (2002). Judge Kluger has served as the judge for the Midtown Community Court in Manhattan, a problem-solving court. *Id.*

32. CTR. FOR FAMILIES, CHILDREN & THE COURTS, JUDICIAL COUNCIL OF CAL., CALIFORNIA DRUG COURT COST ANALYSIS STUDY 5 (2006), available at <http://www.courtinfo.ca.gov/programs/collab/drug.htm#whatis>.

33. Cobden, *supra* note 28.



Supervisory District 6.<sup>34</sup> The CJC can refer those who appear before it to a wide range of social services: “drug treatment, mental health programs, support groups, counseling, career development and job training,”<sup>35</sup> a number of which are located within a few steps of the courtroom itself.<sup>36</sup>

In evaluating the potential location, along with the need, for a community justice court in San Francisco, The Center for Court Innovation prepared a needs assessment report in January of 2008.<sup>37</sup> Some of the statistical data related to crime, which the Center compiled, speak to the choice to locate the court in the Tenderloin. The Assessment explains, for instance, that the CJC region accounts for “roughly one-fourth to one-third of all the city’s crimes, other than vehicle-related offenses,”<sup>38</sup> with an especially substantial percentage of drug-related offenses. In 2005, the Assessment reports, the Tenderloin alone “accounted for 34 percent of the total drug-related offenses in San Francisco.”<sup>39</sup> The Assessment also notes that, according to Adult Probation Department estimates, twenty-four percent of “probationers currently living in San Francisco . . . reside in the CJC Region.”<sup>40</sup> The Assessment opines that “[t]his is an exceptionally high number given that the population of Supervisory District 6 constitutes less than 10 percent of the city’s total population.”<sup>41</sup>

In addition, the Assessment paints a picture of the socio-economic situation in the CJC region, noting that the region falls almost entirely within the city’s district that “has the highest percentage of people — 23 percent — living below the federal poverty level.”<sup>42</sup> It further notes that “[a] 2007 homeless count showed that of the 2,771 homeless individuals counted citywide on

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34. CTR. FOR COURT INNOVATION, COMMUNITY JUSTICE CENTER NEEDS ASSESSMENT REPORT: TENDERLOIN, SOUTH OF MARKET, CIVIC CENTER AND UNION SQUARE 9 (2008), available at <http://www.sfsuperiorcourt.org/index.aspx?page=96> (“The CJC Region does not coincide perfectly with any existing geographic subdivisions used by government agencies to collect data. Almost the entire CJC Region is in San Francisco’s Supervisory District 6, however, with small sections to the north located in Supervisory District 2 and Supervisory District 3.”).

35. Community Justice Center, *supra* note 30.

36. *Id.*

37. See CTR. FOR COURT INNOVATION, *supra* note 34, at 1.

38. *Id.* at 3.

39. *Id.* at 4.

40. *Id.* at 13.

41. *Id.*

42. *Id.* at 4.

January 31, 2007, 1,239 of them, or 45 percent, were found in Supervisorial District 6.”<sup>43</sup> The Assessment also observes that the CJC Region houses a substantial number of programs and services, including many directly relevant to the needs of those suffering from the effects of poverty.<sup>44</sup> The Assessment cites one estimate of “200 social and health service providers in the Tenderloin alone.”<sup>45</sup>

The CJC hopes to emulate the approach of two innovative New York models, the Red Hook Community Justice Center in Brooklyn and the Midtown Community Court in Manhattan.<sup>46</sup> The two New York courts, for example, share an emphasis on “creative partnerships and problem-solving” as well as offender accountability in conjunction with the supply of services to the offender.<sup>47</sup> Like these models, the CJC strives to connect those who appear before it with community services and to monitor their progress. It seeks to provide a coordinated and almost immediate link to services that address the underlying issues that may have motivated the offender’s conduct, from drug counseling, to mental health support, to shelter referrals.<sup>48</sup> The CJC uses the leverage of criminal charges to enhance the likelihood that defendants will participate in the relevant services and fulfill the other conditions that may be imposed in the case.<sup>49</sup>

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43. *Id.* For additional information on the socio-economic conditions in the CJC Region, see *id.* at 11-12.

44. *Id.* at 12.

45. *Id.* (citing Metroactive, Tenderloin Turnaround, Mar. 1, 2009, available at <http://www.metroactive.com/papers/sfmetro/03.01.99/tenderloin2-9907.html>).

46. Cobden, *supra* note 28. A report sponsored by the Judicial Council of California indicated that by mid-2005 California had more than 265 collaborative courts, including 158 drug courts and 4 community courts. ROBERT V. WOLF, JUDICIAL COUNSEL OF CAL., CALIFORNIA’S COLLABORATIVE JUSTICE COURTS: BUILDING A PROBLEM-SOLVING JUDICIARY 3 (2005), available at <http://www.courtinnovation.org/publicationsall.html>.

47. The Center for Court Innovation, Community Court, <http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=570&documentTopicID=17> (last visited Oct. 18, 2009).

48. Cobden, *supra* note 28. For a study of results from the Court’s first three months of operation, see Melissa Sills, Analysis of the Outcome of San Francisco Community Justice Court 6 (June 17, 2009), available at [sfpublicdefender.org/files/2009/06/cjc-report-by-m-sills.pdf](http://sfpublicdefender.org/files/2009/06/cjc-report-by-m-sills.pdf). In 2009, Ms. Sills, who was a Ph.D. student at the Goldman School of Public Policy, U.C. Berkeley, reported on 431 cases from early March of 2009, the month in which the Court opened its doors, until early June. *Id.*

49. See Cobden, *supra* note 28; The Center for Court Innovation, Red Hook Community Justice Center, <http://www.courtinnovation.org/index.cfm?fuseaction=Page.viewPage&pageID=572> (last visited Oct. 18, 2009). With jurisdiction over certain felony cases, the court can also sentence the accused to or back to state prison. C.W. Nevius, *Public Defender Is No Friend to Justice Center*, S.F. CHRON., Aug. 29, 2009, at C1.

A 2005 literature review analyzed seven studies conducted to evaluate the effectiveness of community courts, including studies on both of the New York courts, along with a study of one community court in Minneapolis and a study of one in Connecticut.<sup>50</sup> The studies employed a range of methodologies and furnish a useful chapter in the evaluation of community courts.<sup>51</sup>

The literature review highlights a number of perceived successes of these courts. First, the review indicates that both New York models have generated substantial community support and positive receptions within their communities, often even among offender populations.<sup>52</sup> As described in the review, one study of the Midtown Community Court reports a significantly higher percentage of offenders held accountable for the types of crimes the court handled, a specific goal of that court.<sup>53</sup> The same study, according to the review, documented reductions in prostitution and vending arrests as well as decreased recidivism.<sup>54</sup>

Nonetheless, as the review points out, there are notable limitations on the scope and methodologies of some of the studies.<sup>55</sup> For instance, the review notes that two of the studies involved community surveys recording community perspectives on the success of the court. But, according to the review, they apparently did not utilize either administrative or court data to evaluate success.<sup>56</sup> Of the two studies that performed cost-benefit analyses, the literature review reports the results as mixed, with one study finding an increase in costs and one finding savings.<sup>57</sup> The review indicates that both of these studies lamented their inability to quantify, in monetary terms, benefits like improved quality of life, which could offset costs.<sup>58</sup> Not surprisingly, the review

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50. DANA KRALSTEIN, COMMUNITY COURT RESEARCH: A LITERATURE REVIEW, CENTER FOR COURT INNOVATION 1 (2005) available at <http://www.courtinnovation.org/publicationsall.html>. Dana Kralstein was serving as the associate director of research at the Center for Court Innovation. *Id.*

51. *Id.*

52. See, e.g., *Red Hook Justice: Community Court Earns \$350K from Feds*, BROOKLYN DAILY EAGLE, Apr. 17, 2009, [http://www.brooklyneagle.com/categories/category.php?category\\_id=4&id=27699](http://www.brooklyneagle.com/categories/category.php?category_id=4&id=27699); See also KRALSTEIN, *supra* note 50, at 2-3.

53. KRALSTEIN, *supra* note 50, at 2.

54. *Id.* at 3.

55. *Id.* at 4.

56. *Id.* at 1-2.

57. *Id.* at 3.

58. *Id.*

recommended additional research regarding the effectiveness of community courts.<sup>59</sup>

Unlike the New York models, the CJC has not enjoyed robust community or political support.<sup>60</sup> As Michael Cobden underscores in his article in this issue, the CJC is “currently fighting for survival”<sup>61</sup> as a result of disparate political views about the value and success of the project and precarious funding.<sup>62</sup>

Critics of the CJC voice a number of concerns.<sup>63</sup> They charge, for example, that the court prosecutes crime spawned by poverty, like sleeping on the sidewalk, but treats these offenses as behavioral, mental health or substance addiction issues.<sup>64</sup> Moreover, critics contend that since the opening of the CJC, the treatment of sleeping offenses has changed, resulting in a greater likelihood that the accused will end up prosecuted, without counsel, and potentially incarcerated.<sup>65</sup> In addition, critics note that the court does not itself provide services for substance users.<sup>66</sup> Consequently, it refers defendants to existing programs resulting in a diversion of “resources from voluntary participants to those with a court mandate — informal though it technically may be.”<sup>67</sup>

One of the most salient recent issues about the CJC revolves around the high dismissal rate for charges. An analysis of the outcomes of 431 cases that the court handled between early March 2009, the month in which the court opened, and early June of 2009,

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59. *Id.* at 4-5.

60. Although a baseline community survey conducted by San Francisco’s Department of Public Health, Community Behavioral Health Service noted that “[a]ll the various demographic groups and all the neighborhoods within the study area felt similarly: the CJC is a great idea. Fifty-nine percent were positive or very positive about its opening, while only eight percent expressed any negative sentiment toward the CJC.” CHARLES SIMONS, CITY AND COUNTY OF S.F., COMMUNITY JUSTICE CENTER BASELINE SURVEY, FALL 2008 5 (2009). *But see* E-mail from Bob Offer-Westort, Civil Rights Organizer, Coalition on Homelessness, to Kate E. Bloch, Professor of Law, Univ. of Cal., Hastings College of the Law (Aug. 28, 2009, 14:30 PST) (on file with *Hastings Race and Poverty Law Journal*); Cato, *Further Advances in the Prosecution of Sleep*, STREET SHEET, Aug. 15-31, 2009, at 1, 5. *See also* Heather Knight, *New S.F. Court Dismisses over Half Its Cases*, S.F. CHRON., June 25, 2009, at A1.

61. Cobden, *supra* note 28.

62. Cobden, *supra* note 28. *See also* Knight, *supra* note 60; Tamara Barak Aparton, *Seeking Justice for Tenderloin Court*, S.F. EXAMINER, Aug. 13, 2009.

63. E-mail from Bob Offer-Westort, *supra* note 60; Cato, *supra* note 60. *See also* Knight, *supra* note 60.

64. Cato, *supra* note 60.

65. *Id.*; E-mail from Bob Offer-Westort, *supra* note 60.

66. Cato, *supra* note 60; E-mail from Bob Offer-Westort, *supra* note 60.

67. Cato, *supra* note 60.

indicated that 235 of the 431 cases had been dismissed,<sup>68</sup> with an especially high percentage of dismissals for the following types of offenses: “obstructing sidewalk (95%), public nuisance (91%), lodging (93%), and infractions (83%).”<sup>69</sup>

What these percentages mean is open to debate. Critics argue that such high dismissal rates suggest an increased criminalization of poverty for very minor offenses that would not be prosecuted in other courts, with the dismissals reflecting wasted resources spent on the citation or arrest and court appearances for those charges.<sup>70</sup>

In contrast, others contend that, if these dismissals were conditioned on requiring those involved in the behaviors who were in need of help to meet with providers who could furnish such services, a high dismissal rate should be interpreted as evidence that the CJC is meeting one of its goals, namely connecting individuals to services, without the consequence of a criminal conviction.<sup>71</sup> Interestingly, a news account of the CJC’s more recent activity describes the court as “finally making progress.”<sup>72</sup> That perceived progress appears to rest on a number of factors. One is an apparent increase in both the number and seriousness of the offenses that the CJC is handling, with more referrals from the District Attorney’s Office rather than directly from police departments.<sup>73</sup> Second, the influx of these more serious charges has transformed the once relatively empty courtroom into a tribunal with a more fully engaged docket, giving greater claim to those who supported the investment of resources to create the court.<sup>74</sup> Nonetheless, substantial hurdles still loom before the CJC, the most daunting of which is perhaps the lack of public defender staff to represent the indigent individuals who appear before the court.<sup>75</sup>

One thing that does seem clear is that decisions about the effectiveness of the CJC would benefit from more extensive

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68. See Sills, *supra* note 48, at 3.

69. *Id.*

70. E-mail from Bob Offer-Westort, *supra* note 60. See also Knight, *supra* note 60. Another criticism charges that the CJC duplicates existing programs. For a response to that criticism, see Cobden, *supra* note 28. See also Knight, *supra* note 60.

71. See Knight, *supra* note 60 (describing such a conditioned dismissal by Judge Albers).

72. See Nevius, *supra* note 49.

73. *Id.*; Aparton, *supra* note 62.

74. See Aparton, *supra* note 62.

75. *Id.*; Nevius, *supra* note 49.

empirical study.<sup>76</sup> Whether the CJC will succeed, by whatever relevant measures are applied, or even have a lifespan sufficient to assess success or failure, remains to be seen.

## II. Neuroscience and Drug Treatment Alternatives

Advances in neuroscience offer the possibility of understanding and modifying human behavior in remarkable ways. A new scholarly discipline sometimes labeled “neurolaw” has evolved to investigate the relationship between these advances in neuroscience and the law.<sup>77</sup> One critical topic in this discipline is the study of “addiction neuroscience” and law. Dr. Emily Murphy, the speaker in the second concurrent presentation on alternative sentencing models at the California Correctional Crisis Conference, addressed evolving understandings and approaches in the field of addiction neuroscience.<sup>78</sup>

In the realm of treatment, one branch of research has focused on drug substitution, both with relatively well-known substitutes, like methadone, as well as with perhaps less familiar ones, like naltrexone.<sup>79</sup> Neurobiological research has shown how pharmacological agents bind with neuronal receptors to affect the desire to ingest or the physical responses to addictive narcotics, such

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76. For a cautionary note on some of the early studies of drug courts in particular, see Michael C. Dorf & Jeffrey A. Fagan, *Community Courts and Community Justice: Foreword: Problem-Solving Courts: Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003).

77. For a discussion of the MacArthur Foundation Law and Neuroscience Project, see *Fact Sheet: About the Law & Neuroscience Project*, MACARTHUR NEWSLETTER (John D. and Catherine T. MacArthur Found., Chi., Ill.), <http://www.macfound.org/site/apps/nl/content2.asp?c=lkLXJ8MQKrH&b=1135955&ct=4028697> (last visited Oct. 20, 2009). The term “neurolaw” is sometimes applied as a label for this emerging field. See, e.g., Posting of Thomas Nadelhoffer to Law and Neuroscience Blog, <http://lawneuro.typepad.com/the-law-and-neuroscience-blog/2009/07/what-is-neurolaw-anyway.html> (July 20, 2009, 14:05 PST); Posting of Neil Levy on Neuroethics and Law Blog, [http://kolber.typepad.com/ethics\\_law\\_blog/2009/06/call-for-papers-special-issue-on-addiction-neuroethics.html](http://kolber.typepad.com/ethics_law_blog/2009/06/call-for-papers-special-issue-on-addiction-neuroethics.html) (June 10, 2009, 2:07 PST).

78. Dr. Emily Murphy, Presentation at California Correctional Crisis Conference (Mar. 20, 2009). See Posting of Hadar Aviram to California Correctional Crisis Blog, <http://californiacorrectionscrisis.blogspot.com/2009/03/neuroscience-treatment-and-drug-courts.html> (Mar. 21, 2009, 6:33 EST). My thanks go to my colleague, Prof. Hadar Aviram, who summarized Dr. Murphy's presentation on the California Correctional Crisis Blog. *Id.* Dr. Murphy also addressed issues of prediction through neuroscientific advances. *Id.* See also John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006).

79. Aviram, *supra* note 78. Another branch of research has focused on aversion drugs. *Id.*

as heroin.<sup>80</sup> For example, the drug naltrexone affects opiate receptors in the brain, blocking the high that heroin addicts might otherwise experience.<sup>81</sup>

In a noteworthy experiment involving naltrexone and the criminal justice system, researchers in Philadelphia -conducted “a controlled study of a naltrexone treatment program for federal probationers with a history of opioid addiction.”<sup>82</sup> They sought to determine “the ability of naltrexone therapy to reduce opioid use and rearrest.”<sup>83</sup> Of the subjects randomly assigned to the control group, who did not receive naltrexone, fifty-six percent were reincarcerated for probation violations during the relevant period.<sup>84</sup> In contrast, during the relevant period, only “[t]wenty-six percent of naltrexone subjects [] were reincarcerated for probation violations.”<sup>85</sup> The researchers concluded that the “data reported here provide evidence of the feasibility of integrating treatment for substance use disorders within the Federal Probation system, and the utility of naltrexone in reducing opioid use and re-arrest rates among persons with a history of opioid dependence.”<sup>86</sup>

Studies like the one described above provide encouraging evidence of possible options for narcotics addiction treatment. One of the primary challenges in the use of substitution drugs, like naltrexone, however, is ensuring regular ingestion of the substitute, particularly when the substitute does not produce the euphoria of the original narcotic or may have unpleasant side effects.<sup>87</sup>

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80. Elizabeth Norton Lasley, *Substance Abuse: Mapping the Pathway of Addiction*, in THE 2009 PROGRESS REPORT ON BRAIN RESEARCH (The Dana Found. ed., 2009), <http://www.dana.org/news/publications/detail.aspx?id=14392>.

81. Richard J. Bonnie, Donna T. Chen & Charles P. O'Brien, *The Impact of Modern Neuroscience on Treatment of Parolees: Ethical Considerations in Using Pharmacology to Prevent Addiction Relapse*, CEREBRUM, Nov. 25, 2008, <http://www.dana.org/news/Cerebrum/detail.aspx?id=13932>.

82. James W. Cornish, David Metzger, George E. Woody, David Wilson, A. Thomas McLellan, Barry Vandergrift & Charles P. O'Brien, *Naltrexone Pharmacotherapy for Opioid Dependent Federal Probationers*, 14 J. SUBSTANCE ABUSE TREATMENT 529, 530 (1997)w (cited in Bonnie, *supra* note 81).

83. *Id.* at 530.

84. *Id.* at 532.

85. *Id.*

86. *Id.* at 533.

87. “Naltrexone produces no positive mood state.” *Id.* at 530. For a discussion of methadone as a substitute for heroin, its ability to decrease cravings, and its side effects, including nausea and vomiting, see Heroin Dependence, Methadone Treatment, The Better Health Channel, [http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Heroin\\_dependence\\_methadone\\_treatment](http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Heroin_dependence_methadone_treatment) (last visited Oct. 18, 2009).

In addition to drug substitution, other treatment options are being discussed. One of the most invasive treatments is deep brain stimulation (“DBS”). Dr. Murphy explained that DBS involves the surgical implantation of a small rod-shaped device that produces electrical signals within the brain. The U.S. Food and Drug Administration approved DBS for treating a tremor disorder in 1997 and for treating Parkinson’s disease in 2002.<sup>88</sup> Dr. Murphy reported that more recent research suggests expansion of DBS clinical use beyond movement disorders to psychiatric conditions. For example, she noted that small-scale experiments have produced encouraging results in the treatment of depression and obsessive-compulsive disorder.<sup>89</sup> But, whether such treatments will prove effective for addiction and garner sufficient approval for regular application in the sentencing context remains speculative.<sup>90</sup>

With respect to prevention of drug addiction, Dr. Murphy raised the possibility of vaccination.<sup>91</sup> Researchers have, in fact, conducted a number of studies on potential addiction-fighting vaccines,<sup>92</sup> including a human therapeutic vaccine against cocaine.<sup>93</sup> Reports indicate that the vaccine against cocaine helps the body produce antibodies to the drug.<sup>94</sup> These antibodies then attack cocaine ingested by a vaccinated individual and will bind to it, preventing it

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88. Deep Brain Stimulation at Mayo Clinic, <http://www.mayoclinic.org/deep-brain-stimulation/> (last visited Sept. 14, 2009).

89. See generally T.E. Schlöpfer & B.H. Bewernick, *Deep Brain Stimulation for Psychiatric Disorders — State of the Art*, 34 ADV. TECH. STAND. NEUROSURG. 37 (2009).

90. Dr. Murphy cited concerns about the need for additional studies on the use of DBS in addicted individuals. Murphy, *supra* note 78. See Aviram, *supra* note 78; Andreas von Bubnoff, *Deep Brain Stimulation Being Tested with Brain Injury, Alzheimer’s, Obesity and More*, L.A. TIMES, June 1, 2009. For an article exploring the use of DBS as a future method for addressing addiction, see Bianca M.L. Stelten, Lieke H.M. Noblesse, Linda Ackermans, Yasin Temel & Veerle Visser-Vandewalle, *The Neurosurgical Treatment of Addiction*, 25 J. NEUROSURGERY 1 (2008). For a discussion of DBS in a patient with other disorders but whose addiction was affected by DBS, see Jens Kuhn, Doris Lenartz, Wolfgang Huff, SunHee Lee, Athanasios Koulousakis, Joachim Klosterkoetter & Volker Sturm, *Remission of Alcohol Dependency Following Deep Brain Stimulation of the Nucleus Accumbens: Valuable Therapeutic Implications?*, 78 J. NEUROLOGY, NEUROSURGERY, AND PSYCHIATRY 1152 (2007).

91. Murphy, *supra* note 78. See Aviram, *supra* note 78.

92. See Shari Roan & Karen Kaplan, *Vaccines for Drug Addiction Show Promise*, L.A. TIMES, Oct. 6, 2009, available at <http://www.latimes.com/news/nationworld/nation/la-sci-addiction6-2009oct06,0,3400048.story>.

93. See Thomas R. Kosten, Marc Rosen, Julian Bond, Michael Settles, John St. Clair Roberts, John Shields, Lindsay Jack & Barbara Fox, *Human Therapeutic Cocaine Vaccine: Safety and Immunogenicity*, 20 VACCINE 1196 (2002).

94. Roan & Kaplan, *supra* note 92.



from triggering the pleasurable effects of the cocaine itself.<sup>95</sup> Dr. Murphy explained the reasoning as follows: absent the euphoric effect, a vaccinated individual should prove less inclined to ingest the drug when he has the chance to do so in the future, and addiction will not develop. Progress in the science of addiction-fighting vaccines calls for serious legal and ethical consideration of whether or how such vaccines can play a role in sentencing policy.

Dr. Murphy also discussed research advances that may someday allow researchers to delete specific drug-related memories.<sup>96</sup> In the case of a drug addict, the goal would be to erase powerfully conditioned emotions and memories of persons, places, or situations that promote or act as triggers for drug seeking and use.<sup>97</sup> Without those memories, a former addict may have greater success upon quitting, as environmental factors outside of his control may be less likely to trigger relapse. Although the goal of relieving addicts of the driving desire to abuse narcotics is a worthy one, the prospect of selectively erasing someone's memories raises its own set of troubling ethical and regulatory dangers, particularly in the context of a sentencing regime.<sup>98</sup>

With respect to all the facets of addiction neuroscience, Dr. Murphy cautioned against unquestioning or too early acceptance of advances in neuroscience and drug treatment.<sup>99</sup> She advocated the handling of drug cases in a specialty drug court to provide an environment in which many of the advances themselves as well as the implications of their use could be thoughtfully considered.<sup>100</sup>

Perhaps, then, the ideal interface between neuroscience and the law should resemble the semi-permeable membrane of a healthy living cell. This membrane should serve as a filter, recognizing

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95. *US Scientists Working on Cocaine Vaccine*, MEDICAL NEWS TODAY, Jan. 2, 2008, available at <http://www.medicalnewstoday.com/articles/92873.php>.

96. Murphy, *supra* note 78. See Aviram, *supra* note 78. See also Richard Gray, *Scientists Find Drug to Banish Bad Memories*, TELEGRAPH, July 1, 2007, <http://www.telegraph.co.uk/science/science-news/3298988/Scientists-find-drug-to-banish-bad-memories.html>.

97. Gray, *supra* note 96; Amy L. Milton, Jonathan L.C. Lee, Victoria J. Butler, Richard Gardner & Barry J. Everitt, *Intra-Amygdala and Systemic Antagonism of NMDA Receptors Prevents the Reconsolidation of Drug-Associated Memory and Impairs Subsequently Both Novel and Previously Acquired Drug-Seeking Behaviors*, 28 J. NEUROSCIENCE 8230, 8230 (2008).

98. As Prof. Aviram notes in her blog entry, "The problem is, as some audience members pointed out, that drug use becomes such a pervasive aspect of a person's whole life, that a great many things and situations may be associations." See Aviram, *supra* note 78.

99. Murphy, *supra* note 78. See Aviram, *supra* note 78.

100. Murphy, *supra* note 78. See Aviram, *supra* note 78.

advances that meet appropriate standards of scientific validity and reliability, while blocking claims that fail to meet such standards. Law utilizes this characteristic of a semi-permeable interface in evaluating scientific evidence for admissibility in court hearings through *Daubert*<sup>101</sup> on the federal level and *Kelly*<sup>102</sup> in California. In relying on neuroscientific advances, scrutiny in the sentencing community should similarly begin with an evaluation of scientific reliability. But the interface between neuroscience and the law in the sentencing realm needs to be more selective. In addition to proven reliability, before the interface should permit the use of neuroscientific approaches for prediction, treatment, and prevention in the criminal sentencing arena, meaningful consideration of other dimensions like the ethical,<sup>103</sup> constitutional, and financial,<sup>104</sup> should also be part of the membrane's filtering function.

The District Court's prisoner release order underscores that the time has come to reconfigure the topography of sentencing in California. Like community courts, discussed above, and the restorative justice approaches in the following article, neuroscientific approaches to addressing the underlying motivating factors that incline offenders to commit crime, and return them again and again into the correctional system, merit our sustained attention.

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101. *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993).

102. *People v. Kelly*, 549 P.2d 1240 (Cal. 1976).

103. *See, e.g., Bonnie*, *supra* note 81.

104. David M. Eagleman, Mark A. Correro & Jyotpal Singh, *Why Neuroscience Matters for a Rational Drug Policy*, 11 MINN. J.L. SCI. & TECH. (forthcoming 2010).