

Prosecuting Opioid Use, Punishing Rurality

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I. INTRODUCTION

The opioid crisis spotlights rural communities,¹ and accompanying that bright light are long-standing, traditional biased tropes about backwards and

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¹ See, e.g., *Universities Lead Effort to Help Appalachians Trapped by Opioid Epidemic*, EUREKALERT! (Apr. 17, 2019), https://eurekaalert.org/pub_releases/2019-04/vt-ule041619.php [<https://perma.cc/T9MY-C9YN>]; *Pitt Receives \$5.8 Million for Opioid Research in Appalachia*, PITTHEALTHSCIENCES (June 24, 2019), <https://www.upmc.com/media/news/062419-liebschutz-ctn-grant> [<https://perma.cc/2AVD-M5QM>].

backwoods White² Appalachians.³ These stereotypes conflate rurality with substance use disorder as the next progression in dehumanizing stereotypes. Widespread attention to our nation's use disorder crisis, however, also brings an opportunity to recognize these fallacious stereotypes and to look more closely at the criminal legal systems in rural communities. In this Article, I use drug-induced homicide—what has become a popular prosecutorial charge in response to the opioid crisis—as a prism to identify and critique the failings in rural criminal courts more broadly. This Article includes modest recommendations that acknowledge and respond to these inadequacies while attempting to preserve people's constitutional rights and decrease opiate-related overdoses.

Drug-induced homicide converts an overdose to murder.⁴ The basic concept of drug-induced homicide is as follows: a drug user overdoses and the criminal justice system charges the drug distributor with homicide.⁵ In this regime, drug distribution often includes the simple act of sharing the illicit substance between two parties; under the circumstances, fate and tolerance levels frequently are the only distinctions between the person who lives and the person who dies. The person who dies becomes a martyr, regardless of any previous condemnation of her substance use, while the person who lives is charged as a murderer.

Under the Supreme Court case *Burrage v. United States*, prosecutors of federal drug-induced homicide charges must establish that the individual drug shared by the co-user, or distributor, in such circumstances, was the exclusive “but-for” cause of death.⁶ In other words, under *Burrage*, prosecutors are required to eliminate any other health ailment or drug in the decedent's bloodstream as the cause of death in order to proceed on a charge of drug-induced homicide.⁷ This prerequisite to a charge of drug-induced homicide, however, is only tested when—and if—the prosecutor's evidence is presented to a jury at trial.

Pretrial, state prosecutors often rely on death certificates that list the cause of death as overdose and the manner of death as homicide without performing a

² Please note that I capitalize White and Black when I am referring to peoples. THE CHICAGO MANUAL OF STYLE ¶ 8.38 (17th ed. 2017).

³ See Alec MacGillis & ProPublica, *The Original Underclass*, ATLANTIC (Sept. 2016), <https://www.theatlantic.com/magazine/archive/2016/09/the-original-underclass/492731/> [<https://perma.cc/HD5V-SB8L>].

⁴ See Valena E. Beety et al., *Drug-Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707, 709 (2019); see also Valena Beety et al., *The Drug-Induced Homicide Defense Toolkit 2* (Ohio State Pub. Law, Working Paper No. 467, 2018) [hereinafter *Drug-Induced Homicide Defense Toolkit*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265510 [<https://perma.cc/4VB3-C5TY>] (living document).

⁵ See *Drug-Induced Homicide Defense Toolkit*, *supra* note 4, at 6.

⁶ *Burrage v. United States*, 571 U.S. 204, 211 (2014) (quoting MODEL PENAL CODE § 2.03(1)(a) note on subsec. (1) (AM. LAW INST. 1985)) (“[But-for causation] represents ‘the minimum requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result.’”).

⁷ See Valena E. Beety, *The Overdose/Homicide Epidemic*, 34 GA. ST. U. L. REV. 983, 985 (2018).

toxicology report, let alone an autopsy.⁸ County coroners, who are elected public officials with no required medical or scientific training, routinely complete these death certificates.⁹ This nonscientific “evidence,” of course, can be used to pressure a defendant to plead guilty.¹⁰ Such a guilty plea on the part of the defendant eliminates the prosecutor’s duty to establish the but-for cause of death or even insist that the state or municipality conduct an autopsy.¹¹ Drug-induced homicide charges have a required scientific underpinning: the prosecution needs specific scientific evidence, which demonstrates that the defendant’s shared drugs were the but-for cause of the victim’s death, and defense attorneys can challenge the charge if such scientific evidence is not presented.¹² That critical requirement, however, is rarely tested by a trial.¹³

In a previous piece, I discussed the troubling role of unscientific coroner findings on cause and manner of death in drug-induced homicide cases and the dramatic disparity between coroner and medical examiner systems.¹⁴ Medical examiner systems with trained doctors function predominantly in cities and high population counties, while elected, and frequently scientifically untrained, coroners generally serve rural communities.¹⁵ Experts have rebuked the coroner system as unscientific and “anachronistic” dating back to at least 1928.¹⁶ I have also written on defense strategies for defense attorneys representing a client

⁸ *See id.* at 987.

⁹ *Id.* at 992.

¹⁰ *See id.* at 999.

¹¹ *See id.* at 1004.

¹² *See id.*

¹³ Beety, *supra* note 7, at 985.

¹⁴ *See id.* at 1004 (“The combination of political motives and under-educated and under-funded coroners serving as death investigators leads to faulty forensic determinations of the manner of death—homicide—and also questionable determinations of the cause of death—opioid overdose—as the scientific underpinnings of a drug-induced homicide charge.”).

¹⁵ *See* Ira P. Robbins, *A Deadly Pair: Conflicts of Interest Between Death Investigators and Prosecutors*, 79 OHIO ST. L.J. 901, 910 (2018); NAT’L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 245–46 (2009).

¹⁶ Clarissa Bryan, *Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in a Coroner System*, 7 NAELA J. 199, 216 (2011) (“If leading scientists in 1928 deemed the coroner system ‘anachronistic,’ it is difficult to justify its continued operation today. The apparent shortfall of the system to engage medical science in the performance of death investigations is simply unacceptable.”); *see also* Alex Breitler, *‘Too Much Power’: Rethinking Sheriff-Coroner Role*, RECORDNET.COM (Dec. 9, 2017, 4:26 PM), <http://www.recordnet.com/news/20171209/too-much-power-rethinking-sheriff-coroner-rol> [<https://perma.cc/M4Z6-R8AC>] (“As early as 1928, even before the advent of modern forensic science, experts began recommending that the office of coroner be abolished in favor of scientifically trained staff. Almost 90 years later, this advice appears to have been ignored in some areas, where coroners may be eligible for election simply by being registered voters with clean criminal records.”).

charged with drug-induced homicide.¹⁷ Those solutions are practical; they acknowledge the problems in drug-induced homicide prosecutions and the opportunities to present robust defenses.¹⁸

This Article, instead, explores how drug-induced homicide is a window into the unique form of criminal justice that operates in largely insular, sparsely populated rural areas. The “smallness” of rural communities and their courts is problematic because, among other things, very few new attorneys return to their rural communities to practice.¹⁹ Indeed, most Americans now live in an urban or suburban area.²⁰ The few attorneys who do return to their rural roots have no choice but to adopt a practice involving a diverse range of cases. Often, these returning attorneys are either solo practitioners or partners in two-lawyer firms, who take court-appointed criminal cases while litigating family law, social security, property, and other civil matters. One can imagine how these rural attorneys are incentivized to prioritize their cases involving paying clients and those that are court-ordered in a judicial system that regularly runs out of funds for court-appointed attorneys and binds their payments over until the next fiscal year.²¹

For similar reasons, a rural area’s legal community is unlikely to be characterized by turnover or change in leadership. Both prosecutors and defense attorneys, who are in the good graces of the local bar and bench, routinely maintain their positions for years, if not decades, and act as repeat players cementing courtroom practices.²² There may be no recognized conflict of interest where a small town judge, who is married to the chief of police, signs warrants issued by her husband’s deputy officer; that is simply the way things

¹⁷ See *Drug-Induced Homicide Defense Toolkit*, *supra* note 4, at 3 (“This Toolkit is intended to serve as an informational guide for defense counsel and other interested parties working to mount a defense for individuals charged with drug-induced homicide or similar crimes resulting from overdoses.”).

¹⁸ See *id.* (“The creation of this toolkit was spurred by two related trends: (1) information . . . about pervasively inadequate defense being provided to many individuals charged with these crimes, and (2) widespread efforts by prosecutors to disseminate information and tools that aid other prosecutors and law enforcement in investigating and bringing drug-induced homicide and related charges.”).

¹⁹ Jack Karp, *No Country for Old Lawyers: Rural U.S. Faces a Legal Desert*, LAW360 (Jan. 27, 2019), <https://www.law360.com/articles/1121543/no-country-for-old-lawyers-rural-u-s-faces-a-legal-desert> [<https://perma.cc/E2KS-M3KY>]; see also Bryan K. Scott, *Access to Justice: A Rural Judge’s Perspective*, 25 NEV. LAW. 3, 4 (2017).

²⁰ Kim Parker et al., *Demographic and Economic Trends in Urban, Suburban and Rural Communities*, PEW RESEARCH CTR. (May 22, 2018), <https://www.pewsocialtrends.org/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities/> [<https://perma.cc/RJS4-CC23>].

²¹ Anders W. Lindberg, *We’re in Big Trouble: The Issue of Timely Payment of Court Appointed Counsel*, 4 W. VA. LAW. 24–25 (Oct.–Dec. 2009), <https://wvyounglawyers.com/wp-content/uploads/2013/10/Oct-Dec-2009.pdf> [<https://perma.cc/DD92-SW48>].

²² See Jennifer D. Oliva & Valena E. Beety, *Discovering Forensic Fraud*, 112 NW. U. L. REV. 121, 128 (2017).

get done in rural communities.²³ In fact, in rural counties, lawyers who serve as judges in one county may serve as prosecutors in the adjacent county. This practice places defense attorneys in the unenviable position of having to decide how to best challenge an opposing prosecutor, who very well might be ruling on their motions in a different case.²⁴ Finally, in certain rural counties, it is a common practice for prosecutors to meet with defendants pre-arraignment to try to work out a deal—that is, before the defendant is assigned an attorney to advance that individual’s interests.²⁵ This practice commonly results in a slew of defendants prepared to plead guilty at arraignment, notwithstanding the well-settled fact that plea negotiations are a critical stage in criminal proceedings during which defendants are entitled to counsel.²⁶

In this Article, I address problems particular to rural communities roiled by the opioid crisis, and I acknowledge the undue burdens on rural people of color in rural criminal legal systems. Simply stated, in my proposed solutions I contend that rural communities should eliminate drug-induced homicide offenses and expand Good Samaritan laws to protect eyewitnesses to overdoses and encourage life-saving interventions. I advocate for the decriminalization of witnessing these overdoses. I further recommend the enactment of legislation that establishes coroner training or, in the alternative, separates the roles of coroner and sheriff because such reforms could prove vital depending on the needs of the community. I argue that the focus of coroners and medical examiners should be shifted from criminalization and prosecutions to promoting positive public health outcomes, consistent with coroners’ and medical examiners’ professional obligations.²⁷ I maintain that such reforms will result in fewer overdose deaths, mitigate shame and obfuscation, and open a door toward evidence-based responses to the ongoing crisis.

II. OPIOID CRISIS

A. *Rurality and Race*

Americans are socialized to envision rural peoples as ethnically monolithic: all the same and all White. Yet rural areas can be diverse, and not all are fairly

²³ See *State ex rel. Brown v. Dietrick*, 444 S.E.2d 47, 54 (W. Va. 1994).

²⁴ Peter A. Joy, *Lawyers Serving as Judges, Prosecutors, and Defense Lawyers at the Same Time: Legal Ethics and Municipal Courts*, 51 WASH. U. J.L. & POL’Y 23, 24–25 (2016).

²⁵ SIXTH AMENDMENT CTR., *THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES* 19 (Oct. 2015), <https://sixthamendment.org/utah-report/> [https://perma.cc/T22X-9QJJ].

²⁶ *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970).

²⁷ Judy Melinek et al., *National Association of Medical Examiners Position Paper: Medical Examiner, Coroner, and Forensic Pathologist Independence*, 3 ACAD. FORENSIC PATHOLOGY 93, 97 (2013) (“Unlike with crime laboratory examinations, which are usually generated to determine guilt or innocence, the medicolegal death investigation is primarily a public health effort.”).

characterized as White dominant.²⁸ The prevailing vision of White rurality excludes Black Americans in the “Black Belt” across the Deep South, Latinx communities in the Rio Grande Valley on the border of Texas and Mexico, and indigenous North Americans in the rural Southwest and West.²⁹ Nearly 90% of Black Americans living in rural (nonmetropolitan) areas are in the South and, according to the most recent census, the indigenous peoples of North America are more likely to reside in rural (nonmetropolitan) areas than metropolitan ones (1.9% v. 0.8%).³⁰ National statistics, therefore, reject the notion that rurality is monolithically White and noninclusive of diverse communities.³¹

Rural areas, however, are aligned in their high concentration of poverty.³² In particular, rural communities are far too often dominated by generational or persistent poverty.³³ Rurality is predominantly equated with unemployment, lack of transportation, and lack of access to adequate healthcare.³⁴ The rural areas mentioned above—the Black Belt, the Rio Grande Valley, and the North

²⁸ See Mara Casey Tieken, *There’s a Big Part of Rural America Everyone’s Ignoring*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/opinions/theres-a-big-part-of-rural-america-that-everyones-ignoring/2017/03/24/d06d24d0-1010-11e7-ab07-07d9f521f6b5_story.html [<https://perma.cc/72M2-99MQ>] (“In defining rural white America as rural America, pundits, academics and lawmakers are perpetuating an incomplete and simplistic story about the many people who make up rural America and what they want and need.”).

²⁹ See DAVID L. BROWN & KAI A. SCHAFFT, *RURAL PEOPLE AND COMMUNITIES IN THE 21ST CENTURY: RESILIENCE AND TRANSFORMATION* 122–41 (2011).

³⁰ *Id.* at 124–25.

³¹ See Lisa Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 137–38 (2009).

³² BROWN & SCHAFFT, *supra* note 29, at 193 (“[N]onmetropolitan poverty rates have been consistently higher than metropolitan poverty rates throughout the last thirty years.” (internal citations omitted)); see also Steven M. Virgil, *Community Economic Development and Rural America: Strategies for Community-Based Collaborative Development*, 20 J. AFFORDABLE HOUSING & CMTY. DEV. L. 9, 25 (2010) (“The irony of rural America plays out in many ways. Although most of the nation’s raw materials and food comes from rural communities, these same communities face a stunning lack of resources for themselves. There are fewer people, fewer dollars, less infrastructure, reduced access to technical assistance, and persistent poverty in the places that typify rural America.”).

³³ See BROWN & SCHAFFT, *supra* note 29, at 190 (“[R]ural poverty is especially persistent and intractable when the people left behind live in places that have been left behind.”).

³⁴ See *id.*; see also Lexy Gross, *The Opioid Epidemic and Rural America: Why the USDA Should Lead the Response*, 10 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 257, 262 (2018) (“Nearly forty percent of U.S. counties did not have a substance-use disorder treatment facility in 2016. Among the most rural counties, fifty-five percent did not have a treatment facility. In counties with facilities, few had medication-assisted treatment. In one survey of patients attending medication-assisted treatment at a methadone clinic, people on average traveled sixty minutes per visit almost daily and nearly half were relying on public transportation. A lack of transportation, weather, cost, and other reasons were named as barriers to getting treatment.”).

American indigenous peoples' reservations—are all areas of persistent poverty.³⁵

Notably, poverty rates for people of color are higher in rural areas than in urban locales. Professors Brown and Schafft note in their book, *Rural People and Communities in the 21st Century*, that “[i]n nearly every instance, nonmetropolitan poverty rates are higher for all racial and ethnic groups and age categories.”³⁶ Thus, “for most minority groups, minority status and nonmetropolitan residence represents a ‘double jeopardy,’ dramatically increasing the risk of experiencing poverty.”³⁷

Poverty particularly impacts people of color in rural communities; people of color are also notably overrepresented in the criminal legal system.³⁸ Rural criminal legal systems are underfunded but their dysfunction has largely been overlooked because of their small size and low population.³⁹ Despite their relatively low population, rural communities have steadily and increasingly incarcerated defendants at a rate higher than suburban and urban communities, such that today, rural communities incarcerate the most people.⁴⁰

³⁵ Other areas of generational poverty are Appalachia and the Ozarks. See BROWN & SCHAFFT, *supra* note 29, at 193 (“[P]ersistently poor rural counties are not randomly distributed throughout rural America. Rather they concentrate in less-developed regions including the Rio Grande Valley, Appalachia, and the Mississippi Delta.”).

³⁶ BROWN & SCHAFFT, *supra* note 29, at 126.

³⁷ *Id.*

³⁸ Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 759 (2018) (“The black arrest rate is at least twice as high as the white arrest rate for disorderly conduct, drug possession, simple assault, theft, vagrancy, and vandalism. The black arrest rate for prostitution is almost five times higher than the white arrest rate, and the black arrest rate for gambling is almost ten times higher.”).

³⁹ See Lindberg, *supra* note 21, at 25.

⁴⁰ *Rural America Has Highest Jail Incarceration Rates in the U.S. Despite Low Crime Rates, New Report Reveals*, VERA INST. OF JUST. (June 13, 2017), <https://www.vera.org/newsroom/rural-america-has-highest-jail-incarceration-rates-in-the-u-s-despite-low-crime-rates-new-report-reveals> [https://perma.cc/4GCM-HVT9]. See generally JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. OF JUST., OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA 12–14 (June 2017), <https://www.vera.org/publications/out-of-sight-growth-of-jails-rural-america> [https://perma.cc/5WWB-U238] (establishing that rural areas have seen highest growth in pretrial incarceration rates and rate of people held for other law enforcement or correctional agencies); RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., DIVIDED JUSTICE: TRENDS IN BLACK AND WHITE JAIL INCARCERATION 1990–2013, at 18–20 (Feb. 2018), <https://www.vera.org/publications/divided-justice-black-white-jail-incarceration> [https://perma.cc/RW6B-TK9Y] (establishing that rural areas registered the highest percentage increase in White jail incarceration rates).

B. Opioid Crisis

Overdoses are the number one cause of accidental death nationally—and have exceeded motor vehicle-involved deaths.⁴¹ Similar to the prevailing narratives of rurality, the narrative of the opioid crisis is dominated by Whiteness in rurality. This exclusionary narrative ignores that indigenous North American communities saw a larger increase in overdose deaths between 1999 and 2015 than any other group.⁴² The dominant narrative also ignores the fact that people of color in urban cities are overdosing at a faster rate than individuals in the suburbs and rural areas.⁴³ Finally, this narrative disregards the data that proves that substance use disorder affects all people, of all classes, of all distinctions, across the United States.⁴⁴

The White-washing of the opioid crisis was likely provoked because the crisis revolved around prescription pill overdoses. This is because physicians were more reticent to prescribe prescription opioids to people of color.⁴⁵ This biased health care treatment relies on antiquated but persistent stereotypes about race and pain tolerance.⁴⁶ As a result, prescribers and dispensers have historically ensured that White people have far easier access to prescription opioids than their non-White counterparts.⁴⁷

⁴¹ Fred Hosier, *Top 10 Causes of Accidental Death*, SAFETY NEWS ALERT (Dec. 5, 2018), <https://www.safetynewsalert.com/number-of-accidental-deaths-hits-new-high/> [<https://perma.cc/XA7H-L4NA>].

⁴² *Native American Overdose Deaths Surge Since Opioid Epidemic*, ASSOCIATED PRESS (Mar. 14, 2018), <https://www.apnews.com/81eb3ae96c2b4f6aae272ec50f0672d2> [<https://perma.cc/4T68-8DNQ>] (explaining that the increase in opioid overdose deaths among Native Americans from 1999–2015 was higher than any other ethnic group during the same period); see also Elizabeth Weeks & Paula Sanford, *Financial Impact of the Opioid Crisis on Local Government: Quantifying Costs for Litigation and Policymaking*, 67 U. KAN. L. REV. 1061, 1079 (2019) (“The opioid crisis has had an especially severe impact in tribal nations. At a hearing before the Committee on Indian Affairs, chief medical officer of the Indian Health Service (IHS) reported that American Indians and Alaska Natives had the highest drug overdose death rates in 2015. Also, between 1999 and 2005, Native Americans’ deaths by overdose increased by ‘more than 500 percent.’” (footnote omitted)).

⁴³ Marisa Peñaloza, *The Opioid Is Surging in Black, Urban Communities*, NPR (Mar. 8, 2018), <https://www.npr.org/2018/03/08/579193399/the-opioid-crisis-frightening-jump-to-black-urban-areas> [<https://perma.cc/8V2N-DPX5>]. Washington, D.C. is a city with one of the most quickly rising rates of overdoses due to fentanyl use. See *id.*

⁴⁴ *Today’s Heroin Epidemic*, CTNS. FOR DISEASE CONTROL & PREVENTION (July 7, 2015), <https://www.cdc.gov/vitalsigns/heroin/> [<https://perma.cc/ZAY9-6A8R>].

⁴⁵ See DAYNA MATTHEW, JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE 69 (2015).

⁴⁶ *Id.* at 114–15; see also DEIRDRE COOPER-OWENS, MEDICAL BONDAGE: RACE, GENDER, AND THE ORIGINS OF AMERICAN GYNECOLOGY 124 (2017).

⁴⁷ MATTHEW, *supra* note 45, at 69.

The trajectory of the opioid crisis, however, has moved on from prescription pills to heroin and other drugs laced with fentanyl.⁴⁸ The leading cause of death now is street-based synthetic opioids like fentanyl and carfentanyl, which are tremendously more powerful than pills and even heroin, and are particularly prevalent in polysubstance overdoses.⁴⁹ As the U.S. government has threatened doctors prescribing painkillers with criminal investigation, doctors have curtailed their opioid prescribing and, therefore, forced those dependent on prescription opioids to resort to riskier street drugs, heightening the overdose crisis.⁵⁰

Certain urban and suburban communities have implemented innovative and progressive responses to this evolving crisis. These strategies, which include the introduction of harm reduction measures, such as clean needle exchanges, safe injection sites, and the development of third or fourth generation drug courts, represent the playbook of largely coastal cities.⁵¹ Rural communities, on the other hand, often wrestle with a morality/science dichotomous view of substance use disorder that may preclude harm reduction strategies.⁵² A morality framework of substance use, in fact, is prevalent nationwide.

A morality framework conceptualizes substance use disorder (SUD) as a moral failing and a personal problem to be overcome by individual strength of character and willpower.⁵³ The scientific evidence of SUD as a brain-altering disease is ignored under this regime. In the morality framework, people with

⁴⁸ Nicholas P. Terry, *Reports on the Opioid Crisis Are Full of Misidentified Problems and Poorly Calibrated Solutions*, BILL OF HEALTH (July 19, 2018), <http://blog.petrieflom.law.harvard.edu/2018/07/19/reports-on-the-opioid-crisis-are-full-of-misidentified-problems-and-poorly-calibrated-solutions/#more-26109> [https://perma.cc/ZF6H-NRHQ] (“[T]he . . . crisis now revolves around the abuse of non-prescription opioids by non-medical users, typified by . . . U.S. Post Office-delivered fentanyl.”).

⁴⁹ *Synthetic Opioid Overdose Data*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 19, 2018), <https://www.cdc.gov/drugoverdose/data/fentanyl.html> [https://perma.cc/24C7-GMSW] (“In 2017, more than 28,000 deaths involving synthetic opioids . . . occurred in the United States, which is more deaths than from any other type of opioid.”).

⁵⁰ See Sari Horwitz & Scott Higham, *Doctors in Seven States Charged with Prescribing Pain Killers for Cash, Sex*, WASH. POST (Apr. 17, 2019), <https://www.washingtonpost.com/world/national-security/doctors-in-five-states-charged-with-prescribing-pain-killers-for-cash-sex/2019/04/17/7670d20e-607e-11e9-9ff2-abc984dc9eecstory.html> [https://perma.cc/A5KY-7GBM].

⁵¹ *Laws Related to Syringe Exchange*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hepatitis/policy/SyringeExchange.htm> [https://perma.cc/9N6V-3N5V] (last updated Sept. 28, 2017) (thirteen out of twenty-two states with syringe exchange laws are located on a coast).

⁵² See, e.g., Josh Katz, *Why a City at the Center of the Opioid Crisis Gave Up a Tool to Fight It*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/interactive/2018/04/27/upshot/charleston-opioid-crisis-needle-exchange.html> [https://perma.cc/49CH-8ATT] (failed needle exchange program in Charleston, WV started in 2017 and shut down in Spring 2018).

⁵³ See Leo Beletsky, *America’s Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 2019 UTAH L. REV. 833, 842 (2019).

SUD are deserving of punishment and incarceration instead of health care treatment. Individuals struggling with SUD are often “treated” solely within the criminal justice system. Even where rural communities have implemented drug courts, with the goal of treating the underlying disorder rather than criminally punishing individuals for their use disorder, defendants are, more likely than not, sent to jail to “dry out.”⁵⁴

During the November 2018 election, an Ohio ballot initiative proposed to change the state constitution in order to (1) eliminate prison time for a drug possession charge until the third offense and (2) reduce drug possession from a felony to a misdemeanor.⁵⁵ This initiative was widely viewed as funded by outsiders such as Mark Zuckerberg, the Facebook CEO.⁵⁶ Judges across Ohio denigrated the initiative, including the Chief Justice of the Ohio Supreme Court, for failing to allow courts to have a “stick” as well as a “carrot” with which to treat drug offenders.⁵⁷ Emotional judges argued that incarceration is a tool for overcoming addiction,⁵⁸ despite studies on the harmful social and physical effects of even short-term stays in jail.⁵⁹ Prison systems’ lack of substance use disorder treatment can even turn deadly when incarcerated individuals who are suffering narcotics dependency experience severe withdrawal.⁶⁰ Terrifyingly, the most dangerous time for an individual with substance use disorder is immediately upon release from jail, when their⁶¹ tolerance is lowered and they are particularly susceptible to overdose.⁶² Notwithstanding this reality, the Ohio

⁵⁴ See generally Ursula Castellano, *Courting Compliance: Case Managers as “Double Agents” in the Mental Health Court*, 36 L. & SOC. INQUIRY 484, 506–07 (2011) (reasoning for jail time that imprisonment will “dry out” the defendant, who suffers from alcoholism).

⁵⁵ *Ohio Issue 1, Drug and Criminal Policies Initiative (2018)*, BALLOTEDIA, [https://ballotpedia.org/Ohio_Issue_1,_Drug_and_Criminal_Justice_Policies_Initiative_\(2018\)](https://ballotpedia.org/Ohio_Issue_1,_Drug_and_Criminal_Justice_Policies_Initiative_(2018)) [https://perma.cc/7LL9-HDTM].

⁵⁶ Jessie Balmert, *Ohio Issue 1: Why Is Facebook’s Zuckerberg Backing an Ohio Ballot Initiative to Reduce Drug Penalties?*, CIN. ENQUIRER (Aug. 30, 2018), <https://www.cincinnati.com/story/news/politics/elections/2018/08/30/facebooks-zuckerberg-backs-ohio-ballot-initiative-reduce-drug-penalties/1131315002/> [https://perma.cc/W3NF-JG5Y].

⁵⁷ Maureen O’Connor, *Facing Opioids*, 80 OHIO ST. L.J. 651, 653 (2019).

⁵⁸ Mark Gokavi, *Montgomery County Judges Make Rare Proclamations to Oppose Issue 1*, DAYTON DAILY NEWS (Oct. 29, 2018), <https://www.daytondailynews.com/news/local-govt--politics/montgomery-county-judges-make-rare-proclamations-oppose-issue/OWyija540Q1nmZjKzqEoqM/> [https://perma.cc/U83Y-NGRM].

⁵⁹ Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 LAW & SOC’Y REV. 275, 296 (2008).

⁶⁰ See Julia Lurie, *Go to Jail. Die from Drug Withdrawal. Welcome to the Criminal Justice System.*, MOTHER JONES (Feb. 5, 2017), <https://www.motherjones.com/politics/2017/02/opioid-withdrawal-jail-deaths/> [https://perma.cc/CVN6-QUBY].

⁶¹ Please note that I use the singular they when referring to someone whose gender is unknown or irrelevant. THE CHICAGO MANUAL OF STYLE ¶ 5.48 (17th ed. 2017); *Position Statement on Gender and Pronouns*, NAT’L COUNCIL TCHRS. ENG. (Oct. 25, 2018), <http://www2.ncte.org/statement/genderfairuseoflang/> [https://perma.cc/BGH9-XVZ6].

⁶² Beletsky, *supra* note 53, at 842.

ballot initiative failed overwhelmingly and the State—which suffers one of the highest overdose rates per capita in the country—continues to condemn people convicted of first-time, low-level drug offenses to incarceration.⁶³

The morality view of substance use disorder frequently interweaves poverty with shame.⁶⁴ In rural communities, the shift from focusing on the supply side of illicit substances—the “dealers”—to the demand side—the “users”—exposes the lack of jobs, and SUD as a “disease of despair.”⁶⁵ A focus on the demand side likewise shows the efficacy of medically assisted treatment, or MAT treatment, for people who use illicit substances, and may encourage courts and small governments to adopt harm reduction strategies.⁶⁶ Recovering users in rural communities often falter due to insufficient treatment beds, a lack of treatment options, and sometimes insurmountable transportation issues.⁶⁷ Rural communities with fewer resources are less able to effectively distribute the limited resources they have available, which makes the implementation of evidence-based harm reduction strategies all the more critical.⁶⁸

⁶³ *Ohio Issue 1*, *supra* note 55.

⁶⁴ See Beletsky, *supra* note 53, at 846.

⁶⁵ See KENNETH JOHNSON, CARSEY INST., DEMOGRAPHIC TRENDS IN RURAL AND SMALL TOWN AMERICA 20–25 (2006); see also Tanvi Misra, *Why the Rural Opioid Crisis Is Different From the Urban One*, CITYLAB (Feb. 14, 2019), <https://www.citylab.com/equity/2019/02/opioid-epidemic-data-drug-addiction-deaths-urban-rural/582502/> [<https://perma.cc/9C7U-ZLUV>] (quoting Syracuse University sociologist Shannon Monnat) (“I really do want to push back against this cliché that addiction does not discriminate The physiological processes that underlie addiction themselves may not discriminate, but the factors that put people in communities at higher risk are not spatially random.”).

⁶⁶ See Beletsky, *supra* note 53, at 861–62.

⁶⁷ JOHNSON, *supra* note 65, at 30.

⁶⁸ See Gross, *supra* note 34, at 257 (“Former Georgia governor, now-Secretary of Agriculture Sonny Perdue has said the challenge of combatting widespread addiction is magnified in rural areas ‘where there are fewer resources [with which] to mount an effective response.’” (footnote omitted)). See generally Virgil, *supra* note 32, at 14–18 (“A functional measure may also be used to define [rural] communities. Such a measure would include the prevalence and persistence of poverty, the availability of useful resources, and the investment that is made by both the private philanthropic and public sectors. Areas with combined high prevalence and persistence of poverty, low levels of resources for local use, and low levels of investment can be identified as rural without conflicting with more quantitative measures.”).

III. LOW FUNDING IN RURAL CRIMINAL LEGAL SYSTEMS LEADS TO REPEAT PLAYERS AND CAPTURED DEFENSE ATTORNEYS AND PROSECUTORS

A. Prosecutors as Repeat Players

A handful of repeat players dominate rural criminal courtrooms and, therefore, reinforce entrenched patterns of behavior.⁶⁹ Prosecutorial power is often consolidated among only a few local attorneys, many of whom run unopposed in local elections.⁷⁰ These prosecutors are repeat litigants, influencing pretrial actions and resolutions by “advocating for interpretations of rules and decisions that favor long-term litigation objectives.”⁷¹ These long-term litigation objectives include reducing criminal trials and concomitant criminal procedure rights of defendants.⁷² Likewise, prosecutors’ consistent introduction of unreliable evidence, such as coroner death certificates, ultimately creates patterns of familiarity and acceptance. Such repeat behavior provokes judges to rely on their own precedent of accepting unreliable evidence from prosecutors.⁷³ These judges are most frequently former local prosecutors and, as such, are steeped in the same, non-inquisitorial culture.⁷⁴

Rural prosecutors may also be hired through Requests for Proposals (RFPs), which is a competitive bidding process.⁷⁵ Problems with such rural RFPs are legendary. For example, resource-poor towns are financially incentivized to hire the lowest bidder and, thereby, pay the least amount possible for the representation.⁷⁶ The low salary, in turn, incentivizes prosecutors to bring more

⁶⁹Oliva & Beety, *supra* note 22, at 121 (“Not only are judges likely to be former prosecutors, prosecutors are ‘repeat players’ in criminal litigation and, as such, routinely support reduced pretrial protections for defendants.”).

⁷⁰See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 593 (2009).

⁷¹Oliva & Beety, *supra* note 22, at 128 (quoting Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 47 (2014)).

⁷²See Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 400 (2007) (“In our current criminal system, repeat players generate the means to achieve vast economies of scale resulting in fewer criminal trials and therefore fewer opportunities to vindicate criminal procedural rights at trial.”).

⁷³Oliva & Beety, *supra* note 22, at 129–30 (“[P]rosecutors consistently introduce the same evidence in criminal cases, encouraging judges in criminal proceedings to rely on precedent. Over time, this has created a discrepancy in how trial judges rule on scientific evidence in civil versus criminal settings that cannot be explained by a difference in substantive law or the applicable rules of evidence.”).

⁷⁴Jon B. Gould & Kenneth Sebastian Leon, *A Culture That Is Hard to Defend: Extralegal Factors in Federal Death Penalty Cases*, 107 J. CRIM. L. & CRIMINOLOGY 643, 667 (2017) (hypothesizing that former service as a federal prosecutor could influence a judge’s rulings).

⁷⁵Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 189–95 (2017).

⁷⁶*Id.* at 188.

charges and attendant fees against a defendant in order to raise funds. In Ferguson, Missouri, for example, the local prosecutor told police to arrest local suspects on every charge possible while routinely recommending higher fines and opposing probation.⁷⁷ Missouri state law mandates that city prosecutors be hired through a competitive bidding process, and that the lowest bidder is entitled to the contract.⁷⁸ When resource-poor towns cannot afford to hire a full-time elected prosecutor, prosecutors may serve part-time.⁷⁹ Similar to court-appointed defense attorneys, these prosecutors spend the majority of their time engaged in private practice in order to make a living.⁸⁰

Ferguson, Missouri, a town of 20,000 people, and its surrounding towns exemplify this conundrum: the same person often is a part-time prosecutor in municipal court in one county and also a judge in the neighboring county.⁸¹ Defense attorneys litigate in an untenable position because should they advocate for their client against the prosecutor in case A, the prosecutor may punish their client in case B, where the prosecutor is the judge. This untenable dynamic is likely another reason why the 2015 Department of Justice Report on Ferguson found that its municipal courts issued a staggering number of arrest warrants—9000 in 2013 alone—often stemming from minor infractions, like traffic tickets.⁸² In Ferguson, the system mounted fines and lengthened jail time for those who were unable to pay or obtain adequate representation, resulting in an environment where both Blackness and poverty were functionally criminalized.⁸³

B. Court-Appointed Defense Attorneys

Rural communities are less likely to have a state-established public defender office and more likely to rely entirely on court-appointed attorneys to represent indigent defendants in criminal cases. Such court-appointed attorneys are likely to appear in front of the local judge repeatedly, and rely on that judge to continue to assign cases to them. The court-appointed attorney's livelihood is necessarily dependent on remaining in the good favor and graces of the local judge. That collusive dependency dynamic, of course, can create perverse incentives for court-appointed attorneys to satisfy the interests of the sitting judge at the

⁷⁷ *Id.* at 201–03.

⁷⁸ *Id.* at 165.

⁷⁹ *Id.* (“For other counties, cities, towns, and local governments of similar size, hiring a full-time prosecutor or district attorney is often cost-prohibitive, if not impossible, given scarce financial resources.”).

⁸⁰ *See id.* at 171.

⁸¹ Joy, *supra* note 24, at 25 (describing widespread judge and attorney conflicts of interest in municipal courts surrounding St. Louis).

⁸² U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 12–14 (Mar. 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/C23L-F282].

⁸³ *See id.*

expense of the client. For example, Putnam County, West Virginia, currently has no public defender office.⁸⁴ The county likewise as of 2018 had not had a criminal trial in five years.⁸⁵ Necessarily, unless the charges were dismissed by the prosecutor, every single charged defendant in Putnam County between 2013 and 2018 pled guilty—an expedient resolution but only questionably in the best interests of every defendant.⁸⁶

In some states, statutes or other court rules require trial courts to appoint attorneys to represent defendants on direct appeal as well as during pretrial and trial proceedings. In the interest of the court-appointed attorney's caseload in such jurisdictions, such as rural West Virginia, the trial courts will resentence a defendant again and again in order to restart the clock to manipulate the timing of a direct appeal.⁸⁷ The defendant, of course, remains incarcerated throughout this time.⁸⁸ Indeed, under this regime, certain defendants have waited more than five years to have their direct appeal filed with the West Virginia Supreme Court of Appeals,⁸⁹ even when the time to appeal is limited to 120 days under the court rules.⁹⁰ While this flexibility to resentence in small jurisdictions may seem appropriate on its face, patterns of behavior contrary to the interests of defendants seem to be the norm.

Finally, court-appointed attorneys frequently receive minimal oversight for their representation of clients. A state agency counts the submitted billed hours from the attorney.⁹¹ For example, West Virginia's Public Defender Services holds court-appointed attorneys accountable for billing more than twenty-four

⁸⁴ *Public Defender Offices*, W. VA. PUB. DEFENDER SERVS., <https://pds.wv.gov/Public-Defender-Corporations/PublishingImages/PD%20Map.jpg> [https://perma.cc/56RD-A6J5] (map showing location of public defender offices as of October 2019).

⁸⁵ E-mail from Dana F. Eddy, Exec. Dir., W. Va. Public Defender Servs., to Valena Beety, Professor of Law, Sandra Day O'Connor Coll. of Law (Oct. 25, 2019, 10:28 EST) (on file with author).

⁸⁶ *See id.*

⁸⁷ *See, e.g., State v. Peterson*, 799 S.E.2d 98, 100 n.1 (W. Va. 2017) (“Defendant Peterson was convicted in August 2008. On October 30, 2008, the circuit court appointed Defendant Peterson an appellate lawyer, Luke Styer. Mr. Styer failed to file an appeal during the five and a half years that he represented Defendant Peterson. As the circuit court noted in its April 29, 2014, order: ‘Luke Styer, Esq., was appointed to assist Defendant in appealing his conviction for this matter on October 30, 2008. To date, and following numerous resentencing orders, Defendant’s appellate counsel has yet to file an appeal. In the interest of justice, this Court does relieve Luke Styer as counsel of record[.]’”).

⁸⁸ *See id.* at 100.

⁸⁹ *Id.* at 100 n.1.

⁹⁰ W. VA. R. APP. P. 5(f) (“Unless otherwise provided by law, an appeal must be perfected within four months of the date the judgment being appealed was entered in the office of the circuit clerk . . . from which the appeal is taken or the Supreme Court may, for good cause shown, by order entered of record, extend such period, not to exceed a total extension of two months, if a complete notice of appeal was timely and properly filed by the party seeking the appeal.”).

⁹¹ *See, e.g., W. VA. PUB. DEFENDER SERVS., INDIGENT DEFENSE COMMISSION REPORT 20* (2018).

hours a day.⁹² Instead, the true arbiter of the court-appointed attorney's representation is the local judge. Again, judges are themselves repeat players in the local criminal legal system.⁹³ Judges are few in number and often well-known.⁹⁴ In rural communities, one judge may serve multiple counties as part of a circuit.⁹⁵ Combined, a small group of poorly funded repeat players can incapacitate criminal legal systems in rural areas.

C. *Lack of Attorneys in Rural Communities*

The repeat players issue couples with the lack of attorneys in rural communities more broadly.⁹⁶ A small bar provides limited local options for court-appointed criminal cases. Indeed, the Monongalia County Circuit Court in West Virginia recently mandated that all attorneys admitted to the bar for less than two years and living in the county must take court-appointed cases.⁹⁷ Whether it benefits defendants to have more court-appointed attorneys available—but most of whom have very limited trial or practice experience—remains to be seen. Perhaps as rural counties continue to lose population,⁹⁸ mandated service will become one of the only options.

D. *Lack of Intermediary Courts and Oversight for Lower Courts*

Further compounding the issue of independent representation is not only the lack of oversight for court-appointed attorneys, but the potential lack of

⁹² See Debra Cassens Weiss, *Lawyer Accused of Billing Over 24 Hours in a Day Suspended; But Official Said Others Were Worse*, A.B.A. J. (Apr. 26, 2017), http://www.abajournal.com/news/article/lawyer_accused_of_billing_over_24_hours_in_a_day_suspended_but_official_sai [https://perma.cc/Z8F9-8MD2].

⁹³ Olivia & Beety, *supra* note 22, at 121; *supra* Part I.

⁹⁴ Robert G. Foster, *The View from Above*, 80 MICH. B.J. 44, 46 (2001) (“For instance, my first contested campaign for the judgeship cost a sum total of \$997, simply because the candidates were already well known in our small community.”).

⁹⁵ *West Virginia Judicial Circuit Court Map*, W. VA. JUDICIARY, <http://www.courts.wv.gov/public-resources/court-information-by-county.html> [https://perma.cc/2JTS-RWDC].

⁹⁶ Hannah Haksgaard, *Rural Practice as Public Interest Work*, 71 ME. L. REV. 209, 213 (2019) (“The glut of lawyers in urban areas is in sharp contrast to the lawyer shortage in small towns and communities.” (citations omitted)).

⁹⁷ In re: Attorneys Required to Accept Court Appointments (Sept. 26, 2018), <https://moncountybar.us9.list-manage.com/track/click?u=d5cfa913420cd64c73123f1f0&id=ed5d7a4179&e=584a5e81b5> [https://perma.cc/8WP8-KUSM]. On September 26, 2018, the Circuit Court of Monongalia County entered an Administrative Order, which requires “all attorneys who have been admitted to practice in West Virginia for two years or less who are located in and/or practicing in Monongalia County . . . to represent indigent clients by serving on the Court Appointed list for Monongalia County.” *Id.*

⁹⁸ *Shrinking Population in More than a Third of Rural U.S. Counties*, SCIECEDAILY (Feb. 6, 2019), <https://www.sciencedaily.com/releases/2019/02/190206115611.htm> [https://perma.cc/F57X-3X9N].

oversight for lower courts within the legal system. Rural states with a smaller population are the primary remaining states to not have intermediary appellate courts.⁹⁹ West Virginia, a state that is severely impacted by the opioid crisis, has no intermediary appellate court.¹⁰⁰ Every defendant has one appeal to the highest court, the West Virginia Supreme Court of Appeals (WVSCA).¹⁰¹ Until 2010, the WVSCA could issue a one-word order in response to an appeal: “Refused.”¹⁰² The result of these decisions meant a defendant, even if convicted and sentenced to life in prison without parole, would never have true state appellate review. In 1992, the U.S. Court of Appeals for the Fourth Circuit found that this structure did not violate a defendant’s due process rights under the United States Constitution.¹⁰³

In sum, the lack of resources available in rural communities negatively impacts the functioning of local criminal legal systems and the defendants who are processed through it. Urban communities have public defender offices, with trained attorneys who specialize in representing criminal defendants; rural communities have court-appointed attorney systems, where a criminal defendant is represented by someone who may never have had a criminal trial before, or may be far more interested in a will or property dispute case with paying clients.¹⁰⁴ Court-appointed attorneys may either take a few criminal

⁹⁹ Nine states do not have an intermediate appellate court: Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. *Intermediate Appellate Courts*, BALLOTEDIA, https://ballotpedia.org/Intermediate_appellate_courts [<https://perma.cc/ZQ2K-9J9A>].

¹⁰⁰ See Linnsey Evick, *A Door Closed: The Right to Full Appellate Review of Sentences of Life Imprisonment Without Parole in West Virginia*, 112 W. VA. L. REV. 241, 252 (2009).

¹⁰¹ See RORY PERRY, UNDERSTANDING THE WORKLOAD OF THE WEST VIRGINIA SUPREME COURT, W. VA. JUDICIARY 1 (Dec. 2015), <http://www.courtswv.gov/supreme-court/clerk/pdf/CaseloadCharacteristics-2015.pdf> [<https://perma.cc/3V45-57UW>].

¹⁰² See Press Release, Supreme Court of Appeals of W. Va., Supreme Court Issues Revised Rules of Appellate Procedure for 60-Day Public Comment Period (May 17, 2010), <http://wvbusinesslitigationblog.lexblogplatformthree.com/wp-content/uploads/sites/514/2010/05/Supreme-Court-press-release.pdf> [<https://perma.cc/T9TW-BQAL>].

¹⁰³ Evick, *supra* note 100, at 246; see also *Billotti v. Legursky*, 975 F.2d 113, 115 (4th Cir. 1992). In 2010, facing increasing pressure and initiative by the legislature to create an intermediary appellate court, the West Virginia Supreme Court of Appeals agreed to issue a written opinion for every case that came before it. See Press Release, State of W. Va. Supreme Court of Appeals, *supra* note 102. The West Virginia Supreme Court of Appeals consists of five justices, who routinely receive over a thousand appeals each year. SUPREME COURT OF APPEALS OF W. VA. CLERK’S OFFICE, QUICK REFERENCE FACTS 1 (Jan. 2019), <http://www.courtswv.gov/supreme-court/clerk/statistics/17-18QuickFacts.pdf> [<https://perma.cc/WER8-PVWJ>].

¹⁰⁴ See generally Robin Runge, *Addressing the Access to Justice Crisis in Rural America*, A.B.A. HUM. RTS. MAG. (July 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/access_justice_rural_america/ [<https://perma.cc/JZ6S-Z6FN>] (“[T]he lack of public defenders in rural areas of the United States has a drastic impact on basic constitutional rights. In these rural states, the nearest public defender or prosecutor may be hundreds of miles away.”).

cases on the side or alternatively rely solely on court-appointed criminal cases, being deferential to the judge who appoints them as counsel.¹⁰⁵ Urban communities have trained medical examiners with a scientific background; rural communities have elected coroners with no training or prerequisites.¹⁰⁶ Rural areas simply do not have the same resources: they do not have the same personal capital, financial capital, or educational capital.¹⁰⁷ These can lead to individuals being wrongly incarcerated and wrongly sentenced.

IV. DRUG-INDUCED HOMICIDE CHARGES IN RURAL COMMUNITIES

Within these rural criminal legal systems, prosecutors charge illegal substance users with drug-induced homicide.¹⁰⁸ Drug-induced homicide is the distribution or sharing of an illicit substance with someone who at some point later in time overdoses from the use of that specific illicit substance.¹⁰⁹ Half of people charged with drug-induced homicide are friends or acquaintances of the deceased, sharing the drug themselves.¹¹⁰ Nationally, some states have rushed to create drug-induced homicide charges, largely as a response to the growing overdose numbers and particularly to overdoses by fentanyl.¹¹¹ The sentencing ranges in these statutes can vary from ten years¹¹² to forty years,¹¹³ but all play into the traditional rhetoric of “tough-on-crime” legislation and prosecutions.¹¹⁴ Indeed, they resonate and replicate President Trump’s call for the death penalty for drug distributors.¹¹⁵

As one example, prosecutors in North Carolina reinvigorated and restored their old drug-induced homicide statute, which was originally created to address the crack-cocaine “epidemic” in the 1980s.¹¹⁶ North Carolina has now passed a

¹⁰⁵ See generally Haksgaard, *supra* note 96, at 216 (noting that conflicts in rural areas where lawyers engage in mixed practicing are prevalent).

¹⁰⁶ See Beety, *supra* note 7, at 991–94.

¹⁰⁷ See generally Haksgaard, *supra* note 96 (delineating the different resource availability between urban and rural communities).

¹⁰⁸ *Drug-Induced Homicide*, HEALTH IN JUST., <https://www.healthinjustice.org/drug-induced-homicide-issue> [<https://perma.cc/35BV-UABZ>] (reflecting CDC data that the states with the highest number of Drug-Induced Homicide prosecutions are Pennsylvania and Ohio).

¹⁰⁹ See *Drug-Induced Homicide Defense Toolkit*, *supra* note 4, at 2–3.

¹¹⁰ Beletsky, *supra* note 53, at 873–74.

¹¹¹ See *Drug-Induced Homicide Defense Toolkit*, *supra* note 4, at 5, 6.

¹¹² Michael Smothers, *Washington Man Gets 10 Years for Drug-Induced Homicide*, PEORIA J. STAR (June 11, 2019), <https://www.pjstar.com/news/20190611/washington-man-gets-10-years-for-drug-induced-homicide> [<https://perma.cc/Y7T5-5T7G>].

¹¹³ See, e.g., 18 PA. CONS. STAT. § 2506 (2014).

¹¹⁴ See Beletsky, *supra* note 53, at 837.

¹¹⁵ Z. Byron Wolf, *Trump Keeps Bringing Up the Death Penalty*, CNN (Dec. 7, 2018), <https://www.cnn.com/2018/12/06/politics/trump-death-penalty-china-criminal-justice/index.html> [<https://perma.cc/DCZ7-NAG9>].

¹¹⁶ Jamie Peck, *Why Heroin Addicts Are Being Charged With Murder*, ROLLING STONE (Aug. 2, 2018), <https://www.rollingstone.com/culture/culture-features/heroin-opioid->

new statute, enacting the heightened charge of “Death by Distribution.”¹¹⁷ Other states, such as Ohio and Pennsylvania, also created new statutes to harshly criminalize the sharing of drugs resulting in an overdose.¹¹⁸

Unfortunately, the politicized image for who is arrested, charged, and convicted for “dealing drugs” diverges dramatically from reality.¹¹⁹ As noted in national news coverage in 2018, individuals with substance use disorder are those most likely to be charged, convicted, and serving long sentences for their addiction.¹²⁰ An overdose is recharacterized as a homicide, with the co-user or low-level “supplier” of the drug to blame.¹²¹ Charges of drug-induced homicide carry strict liability—they do not require any intent on the part of the defendant.¹²² Whether the defendant intended for the decedent to die by taking the drugs is irrelevant to the prosecutor and to the court.¹²³ Whether the decedent died because the drug was laced with fentanyl or because the decedent did not have sufficient tolerance levels is likewise immaterial; despite the rhetoric on fentanyl, the co-user can be charged with homicide in either situation.¹²⁴

Why are police and prosecutors spending time on these drug-induced homicides, when the clearance rates nationally for actual homicides are abysmally low?¹²⁵ Because drug-induced homicide is an easy case in which a prosecutor can obtain a conviction. The declared victim is known, the designated perpetrator is known, the prosecutor can offer a plea to something less than homicide, and the case will be done.¹²⁶ As Justice Kennedy notably

addicts-charged-with-murder-o-d-703242/ [https://perma.cc/LJ5V-FCUZ] (“Some DIH statutes were signed into law during the War on Drugs’ 1980s heyday and are now being dusted off in response to the opioid crisis. Others are more recent, with some targeting the synthetic opioid fentanyl, which is sometimes mixed with or packaged as heroin. To date, 20 states have DIH laws on the books.”).

¹¹⁷ See N.C. GEN. STAT. § 14-18.4 (2019).

¹¹⁸ See *Drug-Induced Homicide*, *supra* note 108 (noting that the two most active states in pursuing drug-induced homicide charges were Ohio and Pennsylvania).

¹¹⁹ See Beletsky, *supra* note 53, at 874.

¹²⁰ See, e.g., Peck, *supra* note 116; Rosa Goldensohn, *They Shared Drugs, Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html> [https://perma.cc/MUT4-D6RA].

¹²¹ See Beletsky, *supra* note 53, at 869–74.

¹²² See Beety, *supra* note 7, at 990–91.

¹²³ See *id.*

¹²⁴ See *Drug-Induced Homicide Defense Toolkit*, *supra* note 4, at 31 (discussing the increased potency of heroin laced with fentanyl and the overdose risk associated with post-sentence reentry into society).

¹²⁵ See Aamer Madhani, *Unsolved Murders: Chicago, Other Big Cities Struggle; Murder Rate a ‘National Disaster’*, USA TODAY (Aug. 10, 2018), <https://www.usatoday.com/story/news/2018/08/10/u-s-homicide-clearance-rate-crisis/951681002/> [https://perma.cc/4VF9-P9MY].

¹²⁶ See, e.g., Russell M. Gold et al., *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1614–15 (2017) (“A defendant agrees to plead guilty to one or more criminal charges in return for some sort of concession by the prosecutor. A prosecutor might agree to reduce

stated in *Missouri v. Frye*, our system is “for the most part a system of pleas.”¹²⁷ Within that system, the injustice of systematized guilty pleas in prosecutions that cannot legally stand at trial is readily apparent in drug-induced homicide cases.¹²⁸

A. *Problem of Proof*

Drug-induced homicide charges are actually quite difficult to prove, should they go to trial. Federally, the defendant is *not* accountable for homicide if another drug in the decedent’s system, a combination of drugs, health issues, or supplements, caused the death.¹²⁹ In these cases, the influence of a coroner, forensic pathologist, and toxicologist becomes tremendously important. If the decedent has multiple drugs in their system, it can be nearly impossible to pinpoint which of these drugs caused the actual death and was the “but-for” cause of death, as required by the Supreme Court.¹³⁰ And yet the confluence of court-appointed attorneys, repeat players in rural courthouses, and rural county coroners can lead to disproportionate punishment for rural defendants in these cases.

B. *Coroners in Rural Communities*

Rural America is most reliant on coroner systems. Most, if not all, cities have medical examiners—trained medical practitioners and forensic pathologists—who determine cause and manner of death.¹³¹ Rural counties, except for those in Michigan and Arizona, which have a medical examiner for every county,¹³² either outsource the job to a medical examiner not located in the county or rely on a county coroner.¹³³ A coroner is a locally elected resident

the charge, a so-called ‘charge bargain,’ or she might agree to concessions about the sentence in a ‘sentence bargain.’ In exchange, the prosecutor gains the benefit of a conviction without spending resources on a trial.” (citations omitted).

¹²⁷ *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (citations and internal quotations omitted); see also John L. Kane, *Plea Bargaining and the Innocent*, MARSHALL PROJECT (Dec. 26, 2014), <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent> [<https://perma.cc/Q69Z-QNTD>].

¹²⁸ See Gold et al., *supra* note 126, at 1617 (“Prosecutors have massive leverage to force defendants to plead guilty rather than proceed to trial. This leverage is a product of harsh penalties and overlapping criminal codes.” (citations omitted)).

¹²⁹ *Burrage v. United States*, 571 U.S. 204, 211 (2014).

¹³⁰ See *id.* at 207.

¹³¹ See Beety, *supra* note 7, at 994.

¹³² Randy Hanzlick, *An Overview of Medical Examiner/Coroner Systems in the United States*, NAT’L ACADEMIES, https://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga_049924.pdf [<https://perma.cc/3L9A-RQZL>].

¹³³ See Carl Parrott, *Advantages and Disadvantages of the Coroner System, in MEDICOLEGAL DEATH INVESTIGATION SYSTEM: WORKSHOP SUMMARY 26—27* (2003), <https://www.nap.edu/read/10792/chapter/7> [<https://perma.cc/8SVJ-BKH6>].

who meets the minimum age requirements; no medical background is required.¹³⁴

Overdose deaths in particular expose underequipped death investigation systems in rural areas. Coroners are not performing toxicology reports on all decedents for whom they label the cause of death as “overdose.”¹³⁵ Furthermore, to the extent a toxicology report is run, the test is often a limited and less expensive toxicology test, intended only to detect if a prescription opioid is in the decedent’s system.¹³⁶ This limited toxicology report fails to detect any other illicit substances—or legal substances such as alcohol—that may be in the decedent’s system and may have caused or contributed to the death.¹³⁷ This limited toxicology report, like the coroner’s death certificate declaring the death to be an overdose and a homicide, can be used by the prosecution for drug-induced homicide charges.¹³⁸ These death investigations are not necessarily impartial—and are not necessarily scientific.¹³⁹

¹³⁴ NAT’L RESEARCH COUNCIL, *supra* note 15, at 247 (“Typical qualifications for election as a coroner include being a registered voter, attaining a minimum age requirement ranging from 18 to 25 years, being free of felony convictions, and completing a training program, which can be of varying length. The selection pool is local and small . . .”).

¹³⁵ See Beety, *supra* note 7, at 995 (“In Pennsylvania, where county coroners determine both the manner and cause of death, ‘determining causation related to overdoses is subjective and can vary widely depending on the investigative efforts/abilities of the coroner and the evidence available for review, which results in inherent difficulties in making causation decisions.’ Some deaths in Pennsylvania have been reported as overdoses with no toxicology reports.” (internal citations omitted)).

¹³⁶ See Martha J. Wunsch et al., *Opioid Deaths in Rural Virginia: A Description of the High Prevalence of Accidental Fatalities Involving Prescribed Medications*, 18 AM. J. ADDICTION 1, 2, 9 (2009) (describing the ability for examiners to tailor toxicological examinations); see also Joseph A. Prahlow et al., *Drug Overdose Deaths and Toxicology Tests: Let’s Talk*, C. AM. PATHOLOGISTS TODAY (Dec. 2018), <https://www.captodayonline.com/drug-overdose-deaths-and-toxicology-tests-lets-talk/> [https://perma.cc/U43P-2GRC] (“Despite a thorough investigation and the attention given to [the circumstances of a death], questions about the cause of death may persist in some cases. A collaborative effort among the [medical examiner and coroner] community, clinicians, hospital pathologists, and laboratories—especially when there is suspicion of drug-related involvement—is critical in ensuring that these deaths are categorized accurately and the certification of death is appropriate.”).

¹³⁷ See Beety, *supra* note 7, at 987.

¹³⁸ See *id.* at 999 (explaining confirmation bias as the selective gathering of information, so that “[a]ny evidence that would be inconsistent with the defendant as a murderer—for example, evidence that the shared drug may not have been the but-for cause of the decedent’s death—is dismissed as irrelevant or unreliable” (citations omitted)).

¹³⁹ Bryan, *supra* note 16, at 210 (“Lay coroners rely heavily on the external condition of the deceased and any available medical records when determining cause and manner of death. At best, this approach is divorced from the scientific method (which requires a standardization of methods of investigation and the use of reliable modes of testing and inquiry) and relies too heavily on instinct, practical experience, or the completeness of medical records. At worst, it is completely ad hoc and involves a large potential for bias if the county coroner knows the deceased or their family.”).

In reality, coroners are absolutely overwhelmed by the mass overdose deaths occurring in their counties. While medical examiner offices are recognized by the National Response Plan as responsible for managing the deceased from a hazardous event and receive (or are entitled to) specialized training for mass overdoses, coroners receive no such training.¹⁴⁰ A Bureau of Justice Statistics Special Report on Medical Examiners and Coroners' Offices noted the disparate and inadequate educational and training requirements and resources.¹⁴¹ Without resources, and in a political as well as health crisis, coroners are in a difficult situation facing an impossible task of scientifically documenting deaths with no funds, no scientists, and little political capital. Many coroners recognize how under-trained and under-staffed their offices are and affirmatively seek support.¹⁴²

V. DEFENDANTS PUNISHED BY RURALITY

While the narrative continues of a largely White, prescription drug “epidemic” with a public health response, the reality exposes the roles of poverty, race, continuing tough-on-crime attitudes, and our system of pleas. Drug-induced homicide charges, in particular, elucidate how defendants are punished by their rurality. Prosecutors can bring these drug-induced homicide charges in rural communities by relying on coroner-layperson findings of “homicide” and “overdose” and then using this “scientific evidence” for plea negotiations in the existing plea system.¹⁴³ While a medical examiner in an urban or suburban area may have the funding to perform a full toxicology report, coroners in rural areas often do not have that capacity. The courtroom players are captured in rural communities, with a defense attorney often beholden to the judge—and sometimes prosecutors beholden to the court as well. This cycle of pleas, and faulty evidence to reinforce pleas, is particularly harmful against rural people of color. As noted above, rural people of color often live in areas of persistent poverty,¹⁴⁴ with underfunded systems, part-time prosecutors, and court-appointed attorneys captured by the prerogatives of the appointing judge.¹⁴⁵ Drug-induced homicide charges are disproportionately charged

¹⁴⁰ NAT'L RESEARCH COUNCIL, *supra* note 15, at 260.

¹⁴¹ *Id.* at 247.

¹⁴² See Bryan, *supra* note 1139, at 216 (“A dearth of medical training, methodology, and consistency of approach in investigative methods exists among lay coroners.”). Coroners have requested additional training in their work as well as financial support for addressing the opioid crisis. See NAT'L RESEARCH COUNCIL, *supra* note 15, at 247 (“Some coroners have suggested establishing a ‘Coroner College.’”).

¹⁴³ See Beety, *supra* note 7, at 985.

¹⁴⁴ See *supra* Part II.A.

¹⁴⁵ See Haksgaard, *supra* note 96, at 216 (“Many rural attorneys will work as part-time prosecutors while simultaneously running a private practice. Other rural attorneys will take frequent court appointments to serve as defense counsel (particularly in counties without a full-time public defender) while simultaneously running a private practice.” (citations omitted)).

against people of color where the victim is White, and people of color are more severely sentenced for drug-induced homicide than White defendants.¹⁴⁶ Although the elements of drug-induced homicide may not have been established if the case went to trial and a full autopsy was performed (with released results), the poverty and resulting shortcuts in rural systems are damning to defendants.

VI. SOLUTIONS PARTICULAR TO DRUG-INDUCED HOMICIDE CHARGES IN RURAL COMMUNITIES

In the midst of an overdose, friends or acquaintances gathered around the person may wait for minutes or hours, not knowing what to do and fearing to call 9-1-1.¹⁴⁷ This tragedy plays out repeatedly because many people who overdose are not using the controlled substance alone.¹⁴⁸ Many overdoses are witnessed,¹⁴⁹ and we fortunately have an antidote to overdoses: naloxone.¹⁵⁰ The individual simply needs time to have the naloxone administered—but that time ticks away as eyewitnesses fail to call for help for fear of being prosecuted themselves.¹⁵¹

A. *Extend Good Samaritan Laws*

Good Samaritan laws were created to shield eyewitnesses from prosecution for drug-related crimes when they called for help.¹⁵² The laws aim to incentivize

¹⁴⁶ Beletsky, *supra* note 53, at 874.

¹⁴⁷ See, e.g., Katie Smith, *2017 Record Year for McHenry County Drug-Induced Homicide Charges*, NW. HERALD (Jan. 13, 2018), <http://www.nwherald.com/2018/01/07/2017-record-year-for-mchenry-county-drug-induced-homicide-charges/ase93do> [<https://perma.cc/B3MT-FEW9>] (quoting Drug Policy Alliance senior staff attorney Lindsay LaSalle) (“Critics of drug-induced homicides and similar charges say the law is too frequently used against people best positioned to seek medical help for overdose victims—family, friends, acquaintances and small-time dealers who often sell to finance their own habit . . .”); see also Amanda D. Latimore & Rachel S. Bergstein, “*Caught With a Body*” *Yet Protected by Law? Calling 911 for Opioid Overdose in the Context of the Good Samaritan Law*, 50 INT’L J. DRUG POL’Y 82, 87 (2017).

¹⁴⁸ See Rowan P. Ogeil et al., *Pharmaceutical Opioid Overdose Deaths and the Presence of Witnesses*, 55 INT’L J. DRUG POL’Y 8, 10 (2018).

¹⁴⁹ See *id.*

¹⁵⁰ *Understanding Naloxone*, Harm Reduction Coalition, <https://harmreduction.org/issues/overdose-prevention/overview/overdose-basics/understanding-naloxone/> [<https://perma.cc/3QUL-8ESD>].

¹⁵¹ DRUG POL’Y ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 3 (2017), https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf [<https://perma.cc/6NR8-WRV9>] (“The most common reason people cite for not calling 911 in the event of an overdose is fear of police involvement.”).

¹⁵² *Id.* (“Recognizing this barrier, forty states and the District of Columbia have passed ‘911 Good Samaritan’ laws, which provide, in varying degrees, limited criminal immunity for drug-related offenses for those who seek medical assistance for an overdose victim.”).

eyewitnesses to call 9-1-1, but these laws do not generally protect eyewitnesses from serious prosecutions such as distribution of an illicit substance or drug-induced homicide.¹⁵³ Good Samaritan laws act as a shield against only low-level charges, such as simple possession.¹⁵⁴

For this reason, to stop deaths in the opioid crisis, state legislatures should extend Good Samaritan laws to cover distribution of illicit substances and drug-induced homicide. By truly providing protection for eyewitnesses, less people will die in our overdose crisis.

B. Training for Coroners

Funding is not presently allocated to bring medical examiner systems to all rural counties, although the states that have accomplished this task are commendable. Two-thirds of federal grant funding generally is directed to urban areas instead of rural areas,¹⁵⁵ and rural counties continue to lose population.¹⁵⁶ That said, states realistically can commit to better and lengthier training for coroners, particularly on mass overdoses and the opioid crisis in general. This training would improve the reliability of public health statistics and, ideally, also heighten the independence of coroners from local law enforcement and criminal prosecutions. As one example, in Kentucky the medical examiners conduct a yearly training for the coroners and are available as mentors or simply to answer questions as they arise among coroners.¹⁵⁷ While not without its flaws, this

¹⁵³ See, e.g., COLO. REV. STAT. ANN. § 18-1-711 (West 2018) (specifying that immunity will only apply to possession and use of a controlled substance); 720 ILL. COMP. STAT. ANN. 570/414 (West 2018) (limiting immunity to possession of small amounts of drugs: “less than 3 grams of a substance containing heroin,” for example); MASS. GEN. LAWS ANN. ch. 94C, § 34A(d) (West 2018) (“Nothing contained in this section shall prevent anyone from being charged with trafficking, distribution or possession of a controlled substance with intent to distribute.”); N.M. STAT. ANN. § 30-31-27.1 (West 2018) (limiting immunity to use or possession of controlled substances); N.Y. PENAL LAW § 220.78 (McKinney 2018) (specifying that immunity will not apply to class A-I felonies); WASH. REV. CODE ANN. § 69.50.315 (West 2018) (limiting immunity to possession crimes only).

¹⁵⁴ Latimore & Bergstein, *supra* note 147, at 83; see also Kristen Underhill, Columbia Law Sch., Address at the Association of American Law Schools Annual Meeting: Good Samaritan Laws for Reducing Overdose Mortality (Jan. 4, 2018) (event description available at https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=SesDetails&ses_key=cbd2d3c2-b37b-40e8-9ceb-e7d9cd88b3da [<https://perma.cc/SC96-89EA>]).

¹⁵⁵ See W.K. KELLOGG FOUND., FEDERAL INVESTMENT IN RURAL AMERICA FALLS BEHIND 5 (2004), <https://www.wkkf.org/~media/BBDB12471BCA4802898B80658C283442.ashx> [<https://perma.cc/LG69-TDKM>].

¹⁵⁶ See *Shrinking Population in More than a Third of Rural U.S. Counties*, *supra* note 98.

¹⁵⁷ See generally Office of the State Medical Examiner, KY. JUSTICE & PUB. SAFETY CABINET, <https://justice.ky.gov/Pages/Kentucky-Medical-Examiners-Office.aspx> [<https://perma.cc/MFR2-9I37>] (“Recognized as national leaders in their respective fields, the scientific staff members of the Kentucky Office of the Medical Examiner assist Kentucky coroners and law enforcement agencies in all aspects of death investigation.”).

system does ensure more training for coroners, as well as connect coroners with medical examiners who have substantial scientific training.¹⁵⁸

VII. CONCLUSION

The scientific core of a drug-induced homicide charge exposes the everyday dysfunction of rural criminal courts and the lack of engagement with, or individual attention to, the cases presented daily. Drug-induced homicide charges are treated exactly the same as other cases which do not hinge on scientific evidence: in the majority of these cases, the defendant takes a guilty plea.¹⁵⁹ In rural communities, prosecutors may meet with defendants to arrange a plea, with no public defender yet assigned.¹⁶⁰ In rural communities, part-time prosecutors may be beholden to the town and the judges for continuing their yearly contracts.¹⁶¹ In rural communities, court-appointed defense attorneys, with no oversight, may be most concerned with maintaining a status quo in which the court continues to assign cases to that attorney.¹⁶² And in rural communities, scientific evidence may not even be gathered, let alone analyzed by the prosecution or shared with the defense.¹⁶³ Underlying these cases is a coroner system where an untrained layperson determines the cause of death.¹⁶⁴ Until rural criminal justice systems attract and receive more attention, guidance, and funding, these problems will persist.

¹⁵⁸ NAT'L RESEARCH COUNCIL, *supra* note 15, at 248 (“The disconnect between the determination a medical professional may make regarding the cause and manner of death and what the coroner may independently decide and certify as the cause and manner of death remains the weakest link in the process.”).

¹⁵⁹ BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (Jan. 2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/HVW5-TADQ>].

¹⁶⁰ *See* SIXTH AMENDMENT CTR., *supra* note 25, at 33.

¹⁶¹ *See generally* Romero, *supra* note 75 (stating that cities must sometimes hire prosecutors on a part-time basis and the hiring decision may be made by city officials and local judges).

¹⁶² *See supra* Part III.B.

¹⁶³ *See* Beety, *supra* note 7, at 985.

¹⁶⁴ *See* Robbins, *supra* note 15, at 931–32.