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## The Overdose/Homicide Epidemic

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## THE OVERDOSE/HOMICIDE EPIDEMIC

Valena E. Beety\*

### INTRODUCTION

Ricky Ashbaugh was thirty-eight years old when he was sentenced to serve the mandatory minimum of twenty years in federal prison for aiding and abetting the distribution of heroin resulting in death.<sup>1</sup> Ricky, who was a longtime drug user living in West Virginia, was convicted of buying \$60 worth of heroin to share with three other people, one of whom died at some point after injecting the drug.<sup>2</sup> Ricky is my client. After the Supreme Court of the United States ruled that a drug-induced homicide conviction requires the government prove that the specific, shared drug caused the death, Ricky challenged his conviction.<sup>3</sup> His pleas for a sentencing reduction were supported by the United States Attorney's Office for the Northern District of West Virginia<sup>4</sup> but were ultimately denied by the district court.<sup>5</sup> Since Ricky was sentenced in 2006, the number of prosecutions for drug-induced homicide has rapidly increased, particularly in Ricky's home: Appalachia.<sup>6</sup>

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1. 18 U.S.C. § 2 (2012); 21 U.S.C. §§ 841(a)(1), (b)(1)(C) (2012).

2. See Unopposed Motion for an Amended Sentence at 2, *Ashbaugh v. United States*, No. 3:05-cr-0060 (N.D. W. Va. Mar. 20, 2017).

3. *Id.* at 3. The decedent had multiple drugs in his system at the time of death. *Id.* at 3 n.3.

4. See *id.* at 4.

5. See Order Denying Unopposed Motion for an Amended Sentence at 5, *Ashbaugh v. United States*, No. 3:05-CR-60-1 (N.D. W. Va. Apr. 18, 2017) (“Not only did the defendant plead to the Count of conviction, he specifically stipulated to the factual conduct which formed the basis for the statutory 20-year minimum. Twelve years later, the parties believe this Court can simply turn its pencil over and erase history. In making its ruling today, this Court is left without words, save for one: DENIED.”).

6. DRUG POLICY ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 2 (2017),

[https://www.drugpolicy.org/sites/default/files/dpa\\_drug\\_induced\\_homicide\\_report\\_0.pdf](https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf)

[<https://perma.cc/B9FL-RZQX>] (“Although data are unavailable on the number of people being prosecuted under these laws, media mentions of drug-induced homicide prosecutions have increased substantially over the last six years. In 2011, there were 363 news articles about individuals being charged with or prosecuted for drug-induced homicide, increasing over 300% to 1,178 in 2016.”).

Appalachia is the center point for the national opioid epidemic. With the rising rates of opioid overdose deaths, political players in rural counties—coroners and district attorneys—are increasingly responding with hard-on-crime reactionary behavior.<sup>7</sup> Rural prosecutors are bringing drug-induced homicide charges—contending that a death was not only an overdose but also a homicide—and placing the blame on the distributor of the drug. In the vast majority of these prosecutions, the distributor is simply a friend or acquaintance who shared the drug with the deceased.<sup>8</sup> Occasionally, a low-level dealer sold the drug.<sup>9</sup> Coroners, appointed to investigate suspicious deaths, are now also increasingly characterizing these unexplained, accidental deaths as homicides.<sup>10</sup>

Prosecutors are zealously bringing drug-induced homicide charges notwithstanding the U.S. Supreme Court’s ruling that the government has the burden of proving the individual drug that was shared was the sole cause of death. On January 27, 2014, the Supreme Court decided *Burrage v. United States*, unanimously holding that a person accused of drug distribution resulting in death under 21 U.S.C. § 841(b)(1)(c) is not liable, and therefore not subject to the twenty-year mandatory minimum sentence, unless the prosecution proves beyond a

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7. 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/64SX-4H4K>] (“In an effort to stem the tide and take drug dealers off the streets, county prosecutors have been filing more drug-induced homicide charges. The nine people charged with the crime in 2017 equaled the total for the six years from 2011 to 2016, according to court records.”).

8. DRUG POLICY ALL., *supra* note 6, at 3 (“The vast majority of charges are sought against those in the best positions to seek medical assistance for overdose victims – family, friends, acquaintances, and people who sell small amounts of drugs, often to support their own drug addiction. Despite police and prosecutor promises to go after upper echelon drug manufacturers and distributors, that rarely happens. Out of the 32 drug-induced homicide prosecutions identified by the New Jersey Law Journal in the early 2000s, 25 involved prosecution of friends of the decedent who did not sell drugs in any significant manner. After analyzing the 100 most recent cases of drug-induced homicide in southeastern Wisconsin (as of February 2017), Wisconsin’s Fox6 reported that nearly 90% of those charged were friends or relatives of the person who died, or the lowest people in the drug supply chain, who were often selling to support their own substance use disorder.”).

9. See *id.*

10. See, e.g., *Lycoming County Coroner Starts Ruling Heroin Overdose Deaths as Homicides*, DAILY LOC. NEWS (Mar. 25, 2016), <http://www.dailylocal.com/article/DL/20160325/NEWS/160329858> [<https://perma.cc/ABJ7-QTA5>] [hereinafter *Lycoming County Coroner*].

reasonable doubt that the drug distributed is the “but-for” cause of death.<sup>11</sup> Specifically, the *Burrage* Court held that the government was unable to prove that the distributed drug was the but-for cause of death when the decedent was on a cocktail of other drugs.<sup>12</sup>

With this high bar, why would prosecutors continue to bring drug-induced homicide charges? Perhaps the charges are politically popular,<sup>13</sup> or the individual moral compass of the prosecutor leads him to narrowly view people addicted to drugs as moral failures and murderers. Or, perhaps the answer is simpler: it is expedient. Most defendants will take a guilty plea to a lesser charge when facing homicide. Facing a mandatory minimum sentence of twenty years in federal court, many defendants will take a plea offer rather than risk trial on drug-induced homicide. State court criminal trials occur in 6% of cases; the number is 3% for federal criminal trials.<sup>14</sup> As Supreme Court Justice Anthony Kennedy noted in 2012 in *Missouri v. Frye*, “[b]ecause ours is for the most part a system of pleas, not a system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.”<sup>15</sup>

Rural governments disproportionately impacted by the opioid crisis may exhibit a pro-prosecution mentality, a reluctance to provide public defender services,<sup>16</sup> and a tendency to identify

11. *Burrage v. United States*, 134 S. Ct. 881, 891 (2014).

12. *Id.* at 889–91.

13. For example, President Trump and the Department of Justice are currently inquiring into charging drug dealers with the death penalty. Jeff Farrell, *Trump Administration ‘Examines Death Penalty for Drug Dealers’ a Part of a Crackdown on Opioids*, INDEPENDENT (Mar. 10, 2018, 10:48AM), <http://www.independent.co.uk/news/world/americas/donald-trump-administration-death-penalty-drug-dealers-execution-policy-review-a8249221.html> [https://perma.cc/NVG4-WXW7].

14. Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html> [https://perma.cc/82GR-RXF4].

15. *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (citations omitted); *see also* Hon. John. L. Kane, *Plea Bargaining and the Innocent*, MARSHALL PROJECT (Dec. 26, 2014, 1:05PM), <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent> [https://perma.cc/Z8UW-SDLZ].

16. Lisa Pruitt, *Law and Order in the Ozarks (Part CX): “Public Defender Domes Calling.”* LEGAL RURALISM (Dec. 14, 2012, 9:39PM), <http://legalruralism.blogspot.com/2012/12/law-and-order-in-ozarks-part-cx-public.html> [https://perma.cc/H6MX-S2GX] (“The county sheriff and county judge have

addiction as a moral failing. I recently observed a sentencing for distribution of a controlled substance resulting in death in Morgantown, West Virginia, and each courtroom actor impressed upon me the commitment to accounting for the opioid crisis.<sup>17</sup> The defense attorney began by speaking of the Opium Wars between England and China, then discussed the failed decades-long War on Drugs, his own representation of individuals for drug offenses for twenty-five years in West Virginia courts, and finally his plea for rehabilitation at a drug center for his current client—a man addicted to heroin. The prosecution, in turn, admitted that heavy sentences are not a deterrent to drug use and abuse, but said this case was not about abuse: the case was about punishment. The defendant deserved to be punished for *failing to stop abusing drugs sooner*. He had been an addict for years even after his brother died from an overdose—wasn't that enough for him to stop using and selling drugs? The heroin he sold was laced with fentanyl, and although the defendant may not have been a drug dealer from Detroit or Pittsburgh, he was the local link in the chain, killing a member of our community. Ultimately the judge gave the defendant the maximum sentences for distribution of a controlled substance resulting in death and for possession with intent to distribute a controlled substance, to run consecutively.<sup>18</sup> His parting words were: “I hope you actually commit to rehabilitation when you leave prison, because all those years later you will still be an addict.” If addiction is so uncontrollable, is punishment truly just? If decades in prison do not end addiction, where is the hope for an end to the opioid crisis? What was my local criminal justice system doing to my community?

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said that the new jail is necessary because the volume of crime is so heavy in the county, and currently many outstanding warrants are not being served because the cost of housing the prisoners elsewhere is too high. But if the volume of crime in the county is so high, how can it be that the county has spent less than \$2K/year on indigent defense.”)

17. See *Morgantown Man Sentenced to Prison for Selling Lethal Dose of Heroin*, 12WBOY (Mar. 5, 2018, 8:18PM), <http://www.wboy.com/news/crime/morgantown-man-sentenced-to-prison-for-selling-lethal-dose-of-heroin/1010744298> [<https://perma.cc/US5H-BY2T>] (recounting sentencing hearing for *West Virginia v. Gary Richmond*, Monongalia County Circuit Court, March 5, 2018).

18. See *id.*

As overdoses increase, so do the number of community members affected by these overdoses. In the callous words of Madison County Chief Deputy Coroner Roger Smith, “It wasn’t an old junkie dying anymore.”<sup>19</sup> According to Coroner Smith, law enforcement previously may have ignored these deaths, while now they know and sympathize with the overdose victims.<sup>20</sup> This growing sympathy for the victim corresponds with a heightened investment in finding a culprit to blame for accidental overdoses.<sup>21</sup>

County coroners are increasingly playing their own role by declaring drug overdoses homicides. In the words of Lycoming County Coroner Charles Kiessling, “Calling these [deaths] accidents is sweeping it under the rug.”<sup>22</sup> Without a clear toxicology report to satisfy *Burrage*, a death certificate designating a homicide—rather than an accident—is valuable support for a drug-induced homicide prosecution. Indeed, coroners and medical examiners increasingly find cause of death—overdose—without eliminating other causes.<sup>23</sup>

The joint effort of county coroners and county prosecutors to bring homicide charges that are unlikely to suffice legally, yet make a point politically about the opioid epidemic, highlights the lack of regulation and lack of impartiality in death investigations, and implies that the goal of a death investigation is a criminal charge. When death certificates are unreliable but are used for prosecutorial purposes, the history of courts’ reliance on faulty forensic evidence continues its dishonest trajectory of mass incarceration. This use furthermore belies the intended purpose of a medicolegal death

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19. Millie Joy Humphrey, *Dead on Arrival: Illinois’ Drug-Induced Homicide Statute*, 14 T.M. COOLEY J. PRAC. & CLINICAL L. 277, 285 (2013).

20. *See id.*

21. *See* Joseph Walker, *Prosecutors Treat Opioid Overdoses as Homicides, Snagging Friends, Relatives*, WALL STREET J. (Dec. 17, 2017, 11:12 PM), <https://www.wsj.com/articles/prosecutors-treat-opioid-overdoses-as-homicides-snagging-friends-relatives-1513538404> [<https://perma.cc/E6EF-FMFU>].

22. *Lycoming County Coroner*, *supra* note 10.

23. *See, e.g.*, Frank Main, *Kratom, Health Supplement Targeted by FDA, Linked to 9 Deaths in Cook County*, CHI. SUN TIMES (Mar. 5, 2018, 11:32AM), <https://chicago.suntimes.com/news/kratom-health-supplement-targeted-by-fda-linked-to-8-deaths-in-cook-county/> [<https://perma.cc/PV88-C9LT>] (“According to Cook County medical examiner’s records, there have been nine cases since 2016 in which mitragynine was listed as a cause of death—in each instance along with at least one drug, often opioids such as heroin or fentanyl.”).

investigation according to the National Association of Medical Examiners (NAME): public health.<sup>24</sup>

This Article explores the lack of regulation of coroners, concerns within the forensic science community on the reliability of coroner determinations, and ultimately, how elected laypeople serving as coroners may influence the rise in drug-induced homicide prosecutions in the midst of the opioid epidemic. This Article proposes that the manner of death determination contributes to overdoses being differently prosecuted; that coroners in rural counties are more likely to determine the manner of death for an illicit substance overdose is homicide; and that coroners are provided with insufficient training on interacting with the criminal justice system, particularly on overdose deaths. Death investigations as a whole are not the impartial, scientific endeavors they are portrayed to be; instead, they can be deeply influenced by law enforcement and prosecutors, with medical examiners and coroners serving as part of the “investigative team.” Just as research has demonstrated that forensic analysts working in police-controlled crime labs can be influenced by a team mentality to find evidence supporting a prosecution, such a mentality can likewise be found in death investigations. The lack of impartiality leading to a death certificate or autopsy determination is, however, rarely exposed. In drug-induced homicides, a confluence of a robust system of mass incarceration, political motives, and a wide-sweeping public health crisis lead to incarceration for drug abuse whether or not it is legally supported.

### *I. Overdoses in America*

Every day, nearly one thousand people seek treatment in American emergency rooms for opioid addiction.<sup>25</sup> Every month, more than

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24. Judy Melinek et al., Nat’l Ass’n. of Med. Exam’rs, *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.”).

25. *Prescription Opioid Overdose Data*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 1,

four million Americans misuse opioids.<sup>26</sup> Drug overdose deaths have reached unparalleled levels in the past few years, and opioids—primarily street drugs—are involved in the majority of these deaths.<sup>27</sup> One of the leading causes of death in the United States is now drug-induced death from legal and illicit drug use.<sup>28</sup> More than 60% of overdose deaths are related to abuse of opioids such as heroin and fentanyl.<sup>29</sup>

Most overdose deaths occur in the presence of other people,<sup>30</sup> and many of these deaths could be prevented by the administration of naloxone, an opioid antagonist.<sup>31</sup> Yet overdose witnesses hesitate to call for necessary medical assistance because of their fear of the police and of prosecution.<sup>32</sup> These witnesses may be charged and prosecuted for drug-induced homicide if they shared drugs with the decedent.<sup>33</sup> A growing number of states have implemented so-called

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2017), <http://www.cdc.gov/drugoverdose/data/overdose.html> [<https://perma.cc/RGE5-UP6H>].

26. Ameet Sarpatwari et al., *The Opioid Epidemic: Fixing A Broken Pharmaceutical Market*, 11 HARV. L. & POL'Y REV. 463, 464 (2017).

27. Kelsey Bissonnette, *Anti-Death Legislation: Fighting Overdose Mortality from a Public Health Perspective*, 23 TEMP. POL. & C.R. L. REV. 451, 452 (2014).

28. Humphrey, *supra* note 19, at 278.

29. *Understanding the Epidemic*, CTNS. FOR DISEASE CONTROL & PREVENTION (Aug. 30, 2017), <https://www.cdc.gov/drugoverdose/epidemic/> [<https://perma.cc/FS86-UQVW>].

30. Karl A. Sporer & Alex H. Kral, *Prescription Naloxone: A Novel Approach to Heroin Overdose Prevention*, 49 ANNALS OF EMERGENCY MED. 172, 173 (2007).

31. *See id.*

32. DRUG POLICY ALL., *supra* note 6, at 3 (“The most common reason people cite for not calling 911 in the event of an overdose is fear of police involvement.”).

33. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/9-3.3 (West 2018) (“A person commits drug-induced homicide when he or she violates Section 401 of the Illinois Controlled Substances Act or Section 55 of the Methamphetamine Control and Community Protection Act by unlawfully delivering a controlled substance to another, and any person’s death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance.”); N.J. STAT. ANN. § 2C:35-9 (West 2018) (“Any person who manufactures, distributes or dispenses methamphetamine, lysergic acid diethylamide, phencyclidine or any other controlled dangerous substance classified in Schedules I or II, or any controlled substance analog thereof, in violation of subsection a. of N.J.S. 2C:35-5, is strictly liable for a death which results from the injection, inhalation or ingestion of that substance, and is guilty of a crime of the first degree.”); WYO. STAT. ANN. § 6-2-108 (West 2017) (“A person is guilty of drug induced homicide if: (i) He is an adult or is at least four (4) years older than the victim; and (ii) He violates W.S. 35-7-1031(a)(i) or (ii) or (b)(i) or (ii) by unlawfully delivering a controlled substance to a minor and that minor dies as a result of the injection, inhalation, ingestion or administration by any other means of any amount of that controlled substance.”). Drug-induced homicide statutes include, for example: ALASKA STAT. § 11.41.120(a)(3) (West 2017); COLO. REV. STAT. § 18-3-102(e) (West 2018); FLA. STAT. § 782.04(1)(a)(3) (West 2017); 720 ILL. COMP. STAT. 5/9-3.3 (West 2018); LA. REV. STAT.

Good Samaritan laws, which protect overdose witnesses from prosecution if they call for emergency assistance.<sup>34</sup> But these laws often do not protect witnesses from prosecution for distribution or intent to distribute, let alone immunize them when the distribution results in death.<sup>35</sup> For example, Illinois’s immunity statute specifically excludes from protection any drug-induced homicide charge.<sup>36</sup> Consequently, drug-induced homicide statutes ultimately deter overdose witnesses from calling for life-saving medical assistance.<sup>37</sup>

Drug-induced homicide statutes apply when a defendant delivers a specified controlled substance and someone dies from ingesting the substance. In some states, the defendant can simply have “aided and abetted” the drug use that killed the decedent.<sup>38</sup> These crimes do not require intent on the part of the defendant.<sup>39</sup> As noted by scholar Eric

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ANN. § 14:30.1(3) (West 2017); MICH. COMP. LAWS § 750.317a (West 2018); MINN. STAT. § 609.195(b) (West 2017); N.J. STAT. ANN. § 2C:35-9 (West 2018); 18 PA. STAT. AND CONS. STAT. ANN. § 2506(a) (West 2018); 11 R.I. GEN. LAWS § 11-23-6 (West 2017); TENN. CODE ANN. § 39-13-210(a)(2) (West 2018); VT. STAT. ANN. tit. 18, § 4250(a) (West 2017); WASH. REV. CODE § 69.50.415 (West 2018); WIS. STAT. § 940.02(2)(a) (West 2018); WYO. STAT. ANN. § 6-2-108 (West 2017).

34. DRUG POLICY ALL., *supra* note 6, at 3 (“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.”).

35. *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 ch. 94C, § 34A(d) (West 2018) (stating that “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 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).

36. 720 ILL. COMP. STAT. ANN. 570/414 (West 2018).

37. *See* DRUG POLICY ALL., *supra* note 6, at 3 (“Unfortunately, the only behavior that is deterred by drug-induced homicide prosecutions is the seeking of life-saving medical assistance.”); *see also* Smith, *supra* note 7 (“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, DPA senior staff attorney Lindsay LaSalle said.”).

38. Humphrey, *supra* note 19, at 278–79.

39. Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 776 (2012).

Johnson, “the statutes do not require the government to prove that the defendant was reckless or criminally negligent with respect to the social harm that is the target of the statute. Instead, by way of *mens rea*, they typically require the government to prove only that the defendant knew that he or she was delivering the controlled substance.”<sup>40</sup> Under a proximate cause theory, liability attaches for a death that proximately results from the unlawful activity of distribution.<sup>41</sup> Today, twenty states have drug-induced homicide statutes.<sup>42</sup>

## II. Coroner Versus Medical Examiner Systems

One percent of the U.S. population, or 2.6 million people, die each year.<sup>43</sup> Approximately one million of these deaths are reported to the 2,342 medical examiner’s and coroner’s offices in the United States, and 500,000 are accepted for further investigation and certification.<sup>44</sup> Medical examiners and coroners play a pivotal role in criminal justice and the determination of suspicious or unexpected deaths.<sup>45</sup>

A medical examiner is a physician who is appointed to determine the cause and manner of a person’s death:<sup>46</sup> homicide, suicide, accident, natural, or undetermined.<sup>47</sup> The medical examiner also determines whether an autopsy should be conducted. A medical examiner is often a forensic pathologist who has received training in anatomical or clinical pathology, and received formal training in

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40. *Id.*

41. 720 ILL. COMP. STAT. ANN. § 5/9-3.3(a) (West 2018); *People v. Kidd*, 997 N.E.2d 634, 641 (Ill. App. Ct. 2013).

42. DRUG POLICY ALL., *supra* note 6, at 2.

43. *Deaths and Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 3, 2017), <https://www.cdc.gov/nchs/fastats/deaths.htm> [<https://perma.cc/33L5-GUFX>].

44. NAT’L RESEARCH COUNCIL OF THE NATION ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 243–44 (2009) [hereinafter FORENSIC SCIENCE].

45. *See id.*

46. *Id.* at 256.

47. *Id.* at 244. In Pennsylvania, for example, the coroners can determine the manner and cause of death. DEA PHILA. FIELD DIV., ANALYSIS OF DRUG-RELATED OVERDOSE DEATHS IN PENNSYLVANIA, 2015 at 4 (2016), [https://www.dea.gov/divisions/phi/2016/phi071216\\_attach.pdf](https://www.dea.gov/divisions/phi/2016/phi071216_attach.pdf) [<https://perma.cc/R2J5-GWKD>] (hereinafter OVERDOSE DEATHS IN PENNSYLVANIA) (“In Pennsylvania, the official cause of death (overdose or similar conclusion) is determined by the county coroner or medical examiner.”).

forensic pathology in a fellowship program.<sup>48</sup> Forensic pathology is a “subspecialty of medicine devoted to the investigation and physical examination of persons who die in a sudden, unexpected, suspicious, or violent death.”<sup>49</sup> Forensic pathology is critical to criminal proceedings.<sup>50</sup>

By contrast, a coroner is an elected official with no required medical background who meets statutory requirements such as residency and minimum age.<sup>51</sup> In state counties, coroners often investigate deaths. The coroner, like a medical examiner, determines the manner of death and whether an autopsy is necessary, and, in some jurisdictions, identifies the cause of death.<sup>52</sup> Most coroners have no medical background; the position is political.<sup>53</sup> The push for the coroner system to be replaced by scientifically-trained individuals began in the 1920s, and yet the coroner system remains today in several states.<sup>54</sup> In Indiana, a seventeen-year-old recent high school graduate was appointed coroner.<sup>55</sup> Both laypeople and trained

48. See FORENSIC SCIENCE, *supra* note 44, at 244.

49. *Id.* at 256.

50. See *id.* at 244–45.

51. *Id.* 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 . . .”).

52. Clarissa Bryan, *Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in A Coroner System*, 7 NAELA J. 199, 2010 (2011) (“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.”).

53. See *id.* at 216. The continuation of the coroner system has been repeatedly and increasingly questioned. See, e.g., *id.* (“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.”).

54. See *id.*; see also Alex Breidler, *‘Too Much ‘Power’: Rethinking Sheriff-Coroner Role*, RECORDNET.COM (Dec. 9, 2017, 4:26PM), <http://www.recordnet.com/news/20171209/too-much-power-rethinking-sheriff-coroner-role> [<https://perma.cc/ZH2G-JBJZ>] (“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.”).

55. FORENSIC SCIENCE, *supra* note 44, at 247. (“Jurisdictions vary in terms of the required

medical experts are given the same task: determining how a person died. This determination is vital to any criminal investigation that follows.

Medical examiner and coroner systems vary state by state.<sup>56</sup> In three states—California, Nevada, and Montana—the coroners are sheriffs.<sup>57</sup> In Nebraska, the county prosecutor is also the coroner.<sup>58</sup> In California, San Joaquin’s Sheriff Coroner Steve Moore has been coroner for three terms and is also now the leader of the California State Sheriffs’ Association.<sup>59</sup> His decision to pressure medical examiners to meet with law enforcement daily and change autopsy findings prompted the California State Legislature to consider a bill that would require California counties with more than 500,000 inhabitants to establish independent medical examiner offices run by doctors, eliminating the position of coroner.<sup>60</sup> In mixed systems where coroners determine the manner of death for the death certificate and medical examiners determine the cause of death from a physical autopsy, the results can be at odds.<sup>61</sup> To improve the

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qualifications, skills, and activities for death investigators. . . . Recently a 17-year old high school senior successfully completed the Coroner’s examination and was appointed a Deputy Coroner in an Indiana jurisdiction.”)

56. *Id.* at 243.

57. Anita Chabria, *Will a Harassment Complaint Against a Sheriff Change How California Treats Its Dead?*, SACRAMENTO BEE (Mar. 3, 2018, 12:01 AM), <http://www.sacbee.com/news/local/article203203089.html> [https://perma.cc/LX4X-8JPD].

58. Bill Kelly, *County Attorneys Trained as Death Investigators*, NET (May 31, 2011, 7:00 PM), <http://netnebraska.org/article/news/county-attorneys-trained-death-investigators> [https://perma.cc/N2CF-QSZV]; *see also* Neb. Rev. Stat. § 23-1820; Neb. Rev. Stat. § 23-1201.01; Neb. Rev. Stat. § 23-1210.

59. *See id.*

60. *See id.*; *see also* S.B. 1303, 2017–2018 Reg. Sess. (Cal. 2018). While many California counties continue to have a sheriff-coroner office, Santa Clara County is another example where the medical examiner’s office split from the Sheriff’s office in 2016 after allegations of “conflict-of-interest concerns in death investigations.” Eric Kurhi, *Santa Clara County: Sheriff, Coroner Offices Headed for Split*, MERCURY NEWS (Aug. 21, 2016, 1:20AM), <https://www.mercurynews.com/2016/08/21/santa-clara-county-sheriff-coroner-offices-headed-for-split/> [https://perma.cc/59RX-ZMW5].

61. Breitler, *supra* note 54 (quoting medical examiner Dr. Judy Melinek: “This is wrong. . . . No autopsy pathologist should have to defend a death certificate or manner of death determination that can’t be substantiated by science.”). California ultimately implemented a statutory provision that coroners consult with medical examiners before issuing a manner of death determination. *See* S.B. 1189, 2015–2016 Reg. Sess. (Cal. 2016). However, sheriff-coroners continue to want to rely on their law enforcement role and insight in determining manner of death, belying any impartiality in the determination. *See* Alex Breiter, *supra* note 54 (“[L]anguage that would have given pathologists

effectiveness of death investigations, the National Commission on Forensic Science (NCFS) recommended greater communication between forensic pathologists and coroner offices.<sup>62</sup>

Even with medical examiners, who are considerably more experienced and trained than coroners, forensic pathology is an under-recognized and underfunded discipline in medicine.<sup>63</sup> Only 10% of U.S. medical schools have forensic pathology faculty members, and most of these faculty members engage in clinical service and teaching rather than research.<sup>64</sup> A 2013 NAME study reported that there are only 450 forensic pathologists nationally.<sup>65</sup> Today, in most states that have a combination of medical examiners and coroners, medical examiners serve the cities and coroners serve the counties.<sup>66</sup>

### III. *Determining Cause of Death in Drug-Related Deaths*

In opioid-related deaths, medical examiners' and coroners' death investigations not only determine the cause of death, but also directly inform public health responses to drug use and abuse.<sup>67</sup> Medical examiners and coroners contribute to our national mortality data with serious public health implications.<sup>68</sup> For example, when medical

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authority to determine the manner of death as well as the cause was stripped from the bill after objections by sheriffs' representatives, who argued that sheriff-coroners should decide the manner of death based not only on the pathologists' findings, but on other aspects of the investigation as well.").

62. See also FORENSIC SCIENCE, *supra* note 44, 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.").

63. *Id.* at 257, 261–62.

64. *Id.* at 261.

65. Melinek, *supra* note 24, at 95.

66. See FORENSIC SCIENCE, *supra* note 44, at 249–50. Pennsylvania, Mississippi, and Minnesota are examples of such states. Randy Hanzlick & Debra Combs, *Medical Examiner and Coroner Systems: History and Trends*, 279 JAMA 870, 871 (1998). This structure means that when a coroner determines an autopsy is necessary, the body is transported to the medical examiner's office, or a consulting forensic pathologist is hired. FORENSIC SCIENCE, *supra* note 44, at 249.

67. See DRUG POLICY ALL., *supra* note 6, at 5.

68. See *Chronic Dysfunction Found in Death Investigations*, NPR (Feb. 8, 2011, 1:00 PM), <https://www.npr.org/2011/02/08/133595702/chronic-dysfunction-found-in-death-investigations> [<https://perma.cc/P4Q3-3EC4>].

examiners inaccurately, but pervasively, determine the cause of death to be heart disease, the mortality numbers for a state and the nation may be diverted from the true causes of death and public health concerns.<sup>69</sup> Medical examiner and coroner data is vital to the development of public health interventions for unnatural deaths, such as those resulting from prescription and illicit drug overdoses.<sup>70</sup>

Importantly, coroners in some jurisdictions determine both the cause and the manner of death in overdose cases. 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.”<sup>71</sup> Some deaths in Pennsylvania have been reported as overdoses with no toxicology reports.<sup>72</sup>

Charles Kiessling Jr., the Lycoming County Coroner and the president of the Pennsylvania State Coroners Association, is an example of a coroner who publicly and pointedly identifies homicide as the manner of death in heroin overdoses.<sup>73</sup> Kiessling told the press, “If you chose to sell heroin, you’re killing people and you’re murdering people. You’re just as dead from a shot of heroin as if someone puts a bullet in you.”<sup>74</sup> Under the NAME standards, an overdose can be determined either an accident or a homicide.<sup>75</sup> In Pennsylvania, Coroner Kiessling’s home state, drug delivery resulting in death carries a maximum sentence of forty years.<sup>76</sup>

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69. *Id.*

70. See DRUG POLICY ALL., *supra* note 6, at 5.

71. OVERDOSE DEATHS IN PENNSYLVANIA, *supra* note 47, at 28. At the time, Pennsylvania ranked eighth in the country for drug overdose deaths, according to the Centers for Disease Control and Prevention. *Id.* at 1.

72. *Id.* at 28.

73. *Lycoming County Coroner*, *supra* note 10.

74. *Id.*

75. Gregory G. Davis, *National Association of Medical Examiners Position Paper: Recommendations for the Investigation, Diagnosis, and Certification of Deaths Related to Opioid Drugs*, 3 NAT’L ASS’N MED. EXAMINERS 77, 81 (2013).

76. *Lycoming County Coroner*, *supra* note 10.

#### IV. *Prosecutor and Police Involvement in Death Investigations*

Importantly, it is the position of the NAME that “medical examiner and coroner independence is an absolute necessity for professional death investigation.”<sup>77</sup> Nevertheless, prosecutor and police involvement in death investigations is often unrestricted.<sup>78</sup> The police and prosecutors may supply information to the coroner at the crime scene that affects the manner of death determination, or likewise attend the autopsy and contribute background information to the medical examiner who is responsible for making his own objective cause and manner of death determinations.<sup>79</sup> When the police officer tells the medical examiner the suspected cause of death, the medical examiner may rely on this information in determining the manner of death. This information may be influential regardless of its reliability.

As one example of determining cause and manner of death, imagine an individual is found dead at the bottom of a cliff with injuries indicating a fall. Was the deceased in a fight and pushed off the cliff? Was the deceased alone and drinking? Or did the deceased have a history of suicide attempts? Homicide, accident, and suicide could all be deduced from the same autopsy evidence, depending on the information provided outside of the autopsy.<sup>80</sup> In the most

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77. Melinek, *supra* note 24, at 94.

78. See, e.g., DRUG POLICY ALL., *supra* note 6, at 25 (noting that the U.S. Attorney’s Heroin and Opioid Task Force in the Northern District of Ohio “developed specific protocols to treat fatal heroin overdoses as crime scenes, with investigators and prosecutors going to every scene to gather evidence”); see also Mark A. Broughton, *Homicide Defense Strategies: Leading Lawyers on Understanding Homicide Cases and Developing Effective Defense Techniques*, ASPATORE, 2014 WL 1573043, at \*12 (May 2014) (“It is also not surprising to find that the coroner was present at the autopsy. The coroner may be employed by the local sheriff and may not be an independent officer or a separately elected official; he or she may be paying the pathologist to perform the autopsy and all the other autopsies in the county. Also present at the autopsy may be the investigating officers and all sorts of other law enforcement agents. Prior to conducting the autopsy these investigating officers will have ‘briefed’ the pathologist about to perform the autopsy about their investigation and what they believed to have occurred. In this regularly occurring scenario, you can be certain what the resultant findings will be: homicide.”).

79. Interview with Dr. LeRoy Riddick, forensic pathologist and former Alabama medical examiner (Jan. 24, 2018).

80. Interview with Dr. Joseph A. DelTondo, medical examiner, forensic pathologist, Assistant Professor of Pathology and Director of Autopsy Services, West Virginia University (Oct. 12, 2017).

extreme example of police influence on cause and manner of death determinations, Mississippi medical examiner Stephen Hayne would simply provide the autopsy findings requested by the prosecution and the police.<sup>81</sup> Hayne is best known for providing autopsy results when he had not even conducted the autopsy.<sup>82</sup>

#### *V. Drug-Induced Homicide Charges: Driven by Politics and the Opioid Epidemic*

Drug-induced homicide charges are brought by prosecutors focused on an alternative solution to the opioid epidemic: greater rates of incarceration.<sup>83</sup> The prosecutors identify the criminal defendant as a killer, responsible for murdering community members by distributing drugs, even when that defendant is simply another person addicted to the same drugs. Prosecutors responded similarly to the crack-cocaine epidemic in the 1980s, without success.<sup>84</sup> The heavy sentences of the 1980s and 1990s—the continuation of the War on Drugs—has done little to stem the tide of drug use thirty-five years later. This unilateral focus on the defendant as a killer, and punishment through incarceration, is enhanced by confirmation bias and tunnel vision.

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81. K.C. Meckfessel Taylor et al., *CSI Mississippi: The Cautionary Tale of Mississippi's Medico-Legal History*, 82 *Miss. L.J.* 1271, 1286–87 (2013).

82. *See id.* at 1282, 1286. For other examples of false findings provided by medical examiners, see Ryan Gabrielson, *Second Chances Shows Flaws in Death Investigations*, NPR (Feb. 7, 2011), <https://www.npr.org/2011/02/07/133562389/second-chances-shows-flaws-in-death-investigations>.

83. Walker, *supra* note 21 (“In some states, such laws were rarely enforced until recently. Benjamin J. Agati, a veteran prosecutor in the New Hampshire Attorney General’s office, has helped train police departments throughout the state in how to build cases under the state’s drug-induced homicide law, which carries a maximum penalty of life in prison. The law was enacted in the late 1980s but was rarely applied before the surge in opioid deaths, Mr. Agati says.”).

84. *Id.* (“The prosecutions often employ tough-on-crime legislation born of the crack-cocaine epidemic of the 1980s and 1990s.”).

*A. Confirmation Bias and Tunnel Vision Among Police, Prosecutors, and Coroners*

“Tunnel vision” is generally understood as “that ‘compendium of common heuristics and logical fallacies,’ to which we are all susceptible, that lead actors in the criminal justice system to ‘focus on a suspect, select and filter the evidence that will “build a case” for conviction, while ignoring or suppressing evidence that points away from guilt.’”<sup>85</sup> In criminal investigations, tunnel vision can lead police and prosecutors to focus on one theory of the crime and filter all evidence in the case through the lens of that theory.<sup>86</sup>

All crime investigations are driven by a theory of the crime, influenced by preconceptions and expectations. Confirmation bias limits one’s viewpoint through “selective information search and biased interpretation of available information.”<sup>87</sup> In other words, confirmation bias leads people to seek information that confirms, rather than disproves, their working theories.<sup>88</sup> Selective information processing simply means people value or disvalue information based on whether that information supports their theory.<sup>89</sup>

If police and prosecutors theorize that overdoses are murders, confirmation bias suggests that their focus will be on finding the “perpetrator” and establishing evidence to sustain a homicide conviction. The prosecutors and police look for specific inculpatory evidence: the drugs were given or sold to the decedent; the death was an overdose; and a manner of death finding by the medical examiner

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85. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (quoting Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002)).

86. *Id.*; see also Myrna Raeder, *What Does Innocence Have to Do With It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327.

87. Sherry Nakhaeizadeh et al., *The Emergence of Cognitive Bias in Forensic Science and Criminal Investigations*, 4 BRIT. J. AM. LEGAL STUD. 527, 537 (2015) (“Selective information search within legal perspectives occurs when an individual examines information or evidence to incriminate a suspect based on a personal hypothesis, and ignores the search for evidence that could exonerate or lead to an alternative hypothesis.”) (emphasis omitted).

88. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593 (2006).

89. See generally *id.* at 1588–1613.

or coroner that links the two: homicide. When a medical examiner or coroner writes “homicide” on the death certificate, prosecutors gain supportive evidence to charge the distributor with drug-induced homicide. Any 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<sup>90</sup>—is dismissed as irrelevant or unreliable.<sup>91</sup> Confirmation bias occurs where prosecutors, police, or medical examiners and coroners selectively gather information to confirm a finding of homicide—validating the expected finding and underlying beliefs, and ignoring evidence of accidental or natural death.<sup>92</sup>

Cognitive bias also impacts coroners and medical examiners in their death investigations when prosecutors and police are routinely involved in forensic work and present at crime scenes. Police and prosecutors can, for example, influence a death investigation by sharing character evidence with coroners and medical examiners that has nothing to do with the death.<sup>93</sup> The “context effect,” discussed in forensic sciences, occurs where unnecessary contextual information is given to the analyst and is influential to the assessment.<sup>94</sup> Forensic analysts, and likewise medical examiners and coroners, often have access to far more information about a case than is necessary for the determinations at hand.<sup>95</sup>

Particularly in an area such as death investigation—which faces forensic challenges, a lack of funding, and a lack of trained and

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90. *Burrage v. United States*, 134 S. Ct. 881, 887–91 (2014).

91. Findley & Scott, *supra* note 85, at 292.

92. Nakhaeizadeh et al., *supra* note 87, at 537.

93. Jennifer L. Mnookin, *The Courts, the NAS, and the Future of Forensic Science*, 75 BROOK. L. REV. 1209, 1230–32 (2010).

94. Nakhaeizadeh et al., *supra* note 87, at 537. Availability bias—“the ease with which its occurrence can be brought to mind”—may also play a role in coroner decisions. See Kelly K. Dineen, *Addressing Prescription Opioid Abuse Concerns in Context: Synchronizing Policy Solutions to Multiple Complex Public Health Problems*, 40 LAW & PSYCHOL. REV. 1, 41–42 (2016) (“Availability bias may also extend to the decisions made by coroners and physicians in selecting a cause of death on death certificates. The significant publicity around opioid related deaths may increase the attribution of death to *opioid* poisoning rather than one of the multiple other drugs or alcohol present in the systems of most victims.”).

95. Mnookin, *supra* note 93, at 1230–32.

competent practitioners—the medical examiner or coroner may be more easily influenced by the police and prosecutors in determining the cause or manner of death.<sup>96</sup> “Forensic scientists, aware of the desired result of their analyses, might be influenced—even unwittingly—to interpret ambiguous data or fabricate results to support the police theory.”<sup>97</sup> This “feedback loop” results in supporting the initial assessment of murder.<sup>98</sup> “Tunnel vision has been shown to have an effect in the initial stages of criminal investigations[,] and this is a significant issue because all subsequent stages of the investigation will potentially be impacted by the information generated at this initial stage.”<sup>99</sup> Once the police and prosecutors have a cause of death determination of overdose and a manner of death determination of homicide, these findings then support the prosecution going forward, regardless of the reliability of the death investigation findings. As noted by scholar Keith Findley, “[t]unnel vision both affects, and is affected by, other flawed procedures in the criminal justice system.”<sup>100</sup>

Coroners have a history of biasing coroner inquests and influencing juries to find justified killing verdicts for police officers charged with killing citizens through excessive use of force.<sup>101</sup> Indeed, this practice led to the demise of the coroner inquest system in major cities in the late 1960s.<sup>102</sup> In rural counties, the coroner may be more likely to see himself as part of the law enforcement team sharing the same goals as the police and prosecutors, which results in a situation known as “role effects.” Rural counties are more likely to have fewer prosecutors, and coroners rather than medical

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96. Paul MacMahon, *The Inquest and the Virtues of Soft Adjudication*, 33 YALE L. & POL’Y REV. 275, 306 (2015) (“Often, however, even those coroners who are elected directly are likely to be deeply embedded in law enforcement—too deeply embedded to provide independent oversight.”).

97. *See id.* at 293.

98. *See id.* (“All of this additional evidence then enters a feedback loop that bolsters the witnesses’ confidence in the reliability and accuracy of their incriminating testimony and reinforces the original assessment of guilt.”).

99. Nakhaeizadeh et al., *supra* note 87, at 539.

100. Findley & Scott, *supra* note 85, at 292.

101. MacMahon, *supra* note 96, at 306.

102. *See id.*

examiners.<sup>103</sup> When coroners who lack medical training are elected to office and work directly and repeatedly with a handful of police and prosecutors, such coroners may understand their role as supporting the law enforcement team investigating a murder.<sup>104</sup> Indeed, some of the investigative staff for the coroner may be comprised of former police officers<sup>105</sup> or, in the case of Nevada, Montana, and California, the coroner may also be the sheriff.<sup>106</sup> A determination of homicide by the coroner or medical examiner is supportive evidence for the prosecution of drug-induced homicide. Insufficient training of coroners on how to interact with members of the criminal justice system in an impartial manner, particularly on overdose deaths, may also heighten the influence of police and prosecutors on coroner decisions.<sup>107</sup> To this end, California passed a statute in 2016 to “prohibit law enforcement personnel directly involved in the death of an individual who died due to involvement of law enforcement activity from being involved with any portion of the postmortem examination or being inside the autopsy suite during the performance of the autopsy.”<sup>108</sup>

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103. Robert D. Felder, *A Coroner System in Crisis: The Scandals and Struggles Plaguing Louisiana Death Investigation*, 69 LA. L. REV. 627, 646–47 (2009).

104. See Findley & Scott, *supra* note 85, at 314. People are motivated to consolidate their beliefs in a manner that strengthens their initial perspective. *Id.* Numerous studies have demonstrated that expectations and motivations can affect how events, people, and evidence are perceived. *Id.* For example, in studies where subjects were told in advance that a person had particular personality characteristics, they had the tendency to see those qualities in that person regardless of whether those characteristics were present or not. *Id.*

105. MacMahon, *supra* note 96, at 304.

106. See *supra* note 57 and accompanying text; see also, e.g., S.B. 1189, 2015–2016 Reg. Sess. (Cal. 2016) (“Existing law authorizes the board of supervisors of a county to consolidate the duties of certain county offices in one or more of specified combinations, including, but not limited to, sheriff and coroner, district attorney and coroner, and public administrator and coroner.”).

107. See Clarissa Bryan, *Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in a Coroner System*, 7 NAT’L ACAD. ELDER L. ATTY’S J. 199, 216 (2011) (“A dearth of medical training, methodology, and consistency of approach in investigative methods exists among lay coroners.”). Coroners themselves are requesting additional training in their work as well as financial support for addressing the opioid crisis. FORENSIC SCIENCE, *supra* note 44, at 247 (“Some coroners have suggested establishing a ‘Coroner College.’”).

108. S.B. 1189, 2015–2016 Reg. Sess. (Cal. 2016).

### B. *Outside Influence*

Sadly, outside influence on death investigations is not simply a matter of subconscious biases and groupthink. A survey of NAME members revealed that 70% of respondents had been subjected to outside pressures to influence their findings and, when medical examiners resisted these pressures, many suffered negative consequences.<sup>109</sup> Twenty-two percent of responding pathologists had “experienced political pressure to change death certificates from elected and/or appointed political officials.”<sup>110</sup> This political pressure occurred in the form of verbal or written communications, threats, terminations, intimidation, media exposure, and even legal actions.<sup>111</sup>

The NAME standards state that death investigators “must investigate cooperatively with, *but independent from*, law enforcement and prosecutors. The parallel investigation promotes neutral and objective medical assessment of the cause and manner of death.”<sup>112</sup> Furthermore, “[t]o promote competent and objective death investigations[,] [m]edico-legal death investigation officers *should operate without any undue influence from law enforcement agencies and prosecutors.*”<sup>113</sup> Indeed, the 2009 National Academy of Sciences Report, *Strengthening Forensic Science in the United States: A Path Forward*, specifically recommended medical examiners’ offices be separated from police departments to make them truly independent.<sup>114</sup> Simply put, “the best science is conducted in a scientific setting as opposed to a law enforcement setting.”<sup>115</sup> As the Minnesota Supreme Court opined when reversing a conviction where

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109. Melinek, *supra* note 24, at 94.

110. *Id.* Roughly 10% of respondents were asked to sign autopsy reports and death certificates that were not consistent with the findings in the original autopsy report. *Id.*

111. *Id.*

112. *Id.* (referencing NAME’s Forensic Autopsy Performance Standards).

113. *Id.* (referencing NAME’s Forensic Autopsy Performance Standards).

114. FORENSIC SCIENCE, *supra* note 44, at 23. The Report recommended the same independence and separation for state crime labs. *Id.* (“Scientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed. Administratively, this means that forensic scientists should function independently of law enforcement administrators.”).

115. *Id.*

the prosecutor interfered with the defense expert forensic pathologist, “some police and prosecutors tend to view government-employed forensic scientists . . . as members of the prosecution’s ‘team.’”<sup>116</sup>

A few legislatures have specifically focused their attention on the undue influence of law enforcement on death investigations of police-involved homicides. As noted earlier, California enacted specific legislation precluding an officer involved in a civilian death from attending the autopsy or being a part of the death investigation.<sup>117</sup> Such exclusion seems like common sense, and yet it may not limit the involvement of other law enforcement in the death investigation. Recently, San Joaquin County’s longtime Chief Medical Examiner and forensic pathologist resigned because of routine interference from the sheriff–coroner, who allegedly used his political office to protect law enforcement officers and routinely “pressured the medical examiners to label officer-involved deaths as accidents rather than homicides.”<sup>118</sup> Additional examples exist of coroners issuing death certificates declaring police-involved homicides “accidents,” succumbing to undue pressure from law enforcement, or being law enforcement themselves and making the team decision.<sup>119</sup>

### C. *The Perceived Higher Value of Scientific Evidence*

As observers and scholars have noted, scientific evidence has a different weight and status with jurors than non-scientific evidence because it is viewed as impartial and impervious to bias.<sup>120</sup> When a medical examiner or coroner rules a death a homicide, that finding is

116. *State v. Beecroft*, 813 N.W.2d 814, 834 (Minn. 2012).

117. S.B. 1189, 2015–2016 Reg. Sess. (Cal. 2016).

118. *Physicians Call for Immediate Separation of Sheriff and Coroner’s Office*, CAL. MED. ASS’N (Dec. 8, 2017), <https://www.cmanet.org/news/detail/?article=physicians-call-for-immediate-separation-of> [https://perma.cc/7L65-FTEH].

119. *See, e.g., Breitler, supra* note 54 (“Former Sheriff Baxter Dunn had just resigned after a federal corruption probe. His office had also faced scrutiny for the 2003 asphyxiation death of a jail inmate during a struggle with sheriff’s deputies; it took five months for Dunn to issue a certificate determining the death had been an accident. It was Dunn—as elected sheriff–coroner—who had authority over the investigation of a death involving his own staff.”).

120. Nakhaeizadeh et al., *supra* note 87, at 542.

taken as an independent determination separate and apart from the roles of the police and prosecutor in the criminal investigation. Similarly, when an autopsy report identifies homicide as the manner of death, the report becomes scientific evidence of a higher status than most of the nonscientific evidence that the prosecution will present against the defendant at trial.<sup>121</sup>

And yet the required certainty for the cause and manner of death for a death certificate is only that the probability of accuracy exceeds 50%.<sup>122</sup> Likewise, medical examiners' certainty regarding the cause and manner of death is highly variable. In drug-induced homicide cases, the shared drug may be a contributory cause of death or a proximate cause of death, but not the but-for, singular cause of death necessary for a drug-induced homicide conviction to meet the *Burrage* standards. The but-for test created in *Burrage* requires a medical expert to confirm that the decedent would still be alive if he had not taken the drug given to him by the accused.<sup>123</sup> However, in the vast majority of drug cases, as in most cases, the defendant takes a guilty plea, and the legal sufficiency of the state's case is never challenged. The state is often never even required to prove that but for the shared drug, the decedent would still be alive.

#### CONCLUSION

Drug-induced homicide prosecutions are on the rise and may be a politically popular move for both coroners and prosecutors in rural counties severely impacted by the opioid epidemic. 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. Whether

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121. See FORENSIC SCIENCE, *supra* note 44, at 85–88.

122. *Id.* at 244.

123. See *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

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the state can provide a medical expert who can reliably establish that the decedent's death was caused specifically by the individual drug shared by the defendant often becomes moot due to the inordinately high rate of guilty pleas in our criminal justice system. With the findings never challenged, prosecutors sink state funds into homicide charges, which have no proven ability to mitigate the opioid epidemic. Similar to harsh drug penalties in the crack-cocaine epidemic of the 1980s, hyperincarceration is not a solution to addiction.

