South Carolina Law Review

Volume 70
Issue 3 *Volume 70, Issue 3, Spring 2019*

Article 9

Spring 2019

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OPIOID CRISIS AND THE LAW: AN EXAMINATION OF EFFORTS MADE IN KENTUCKY

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I. INTRODUCTION

Pursuant to the National Institute on Drug Abuse, Kentucky ranks among the top ten states with the highest opioid-related overdose deaths.[1] In 2016, there were 989 opioid-related overdose deaths within the Commonwealth of Kentucky.[2] The Kentucky Office of Drug Control Policy recently released a report which stated that opioid-related overdose deaths rose to 1,565 in 2017.[3]

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1. NAT'L INST. ON DRUG ABUSE, KENTUCKY OPIOID SUMMARY 1 (2018), https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/kentucky_2018.pdf.

2. *Id.*

3. JOHN C. TILLEY & VAN INGRAM, COMMONWEALTH OF KY. JUSTICE & PUB. SAFETY CABINET, 2017 OVERDOSE FATALITY REPORT (2018).

This opioid epidemic is not exclusive to Kentuckians. On October 26, 2017, the United States Department of Health & Human Services declared a national public health emergency due to the opioid crisis.[4] However, this epidemic did not occur overnight. It grew from the 1990s through legal prescriptions, such as OxyContin®, illicit opioids (without a prescription), and fentanyl-laced heroin. Because this crisis is far-reaching, it brings with it a multitude of legal, medical, workforce, and social issues.

Attorneys and judges face daily challenges in dealing with opioid addicted clients and participants within the court system. Kentucky has a specialty court system that includes the Kentucky Drug Court.[5] With the rise in opioid use disorder (OUD), petitions in Family Court (or District Court in those counties without Family Court) have increased as children are removed from parents and placed with other relatives or in foster care.[6] Public dollars are scarce, as Kentucky faces a crushing pension system deficit exceeding more than $50 billion.[7]

Part II of this Article provides a brief history of the opioid epidemic. It also addresses an effective type of treatment for those with OUD. Part III assesses the response of the legal profession in Kentucky through the development of specialty courts. Part IV looks at the governmental response to combat OUD in Kentucky, the role of corrections with incarcerated populations, and discusses the tension found at the intersection of the legal profession and the scientific community. Part V concludes.

II. A BRIEF HISTORY OF THE OPIOID EPIDEMIC

A. Ground Zero

Opioids are classified as any drug (naturally occurring, synthetic, or semi-synthetic) that triggers opioid receptors in the brain.[8] Opioids stimulate the brain receptors that release endorphins, which produce pleasurable responses

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4. U.S. DEP'T OF HEALTH & HUMAN SERV., DETERMINATION THAT A PUBLIC HEALTH EMERGENCY EXISTS (Oct. 26, 2017).

5. KY. COURT OF JUSTICE, KENTUCKY DRUG COURT: SAVING COSTS, SAVING LIVES 1 (2017), https://courts.ky.gov/courtprograms/drugcourt/Documents/KYDrugCourtSitesMap.pdf.

6. KY. BAR ASS'N, SPOTLIGHT CLE: THE OPIOID EPIDEMIC IN KENTUCKY 1 (2018).

7. *See* Christopher Burnham, *Kentucky Retirement Systems: A Case Study of Politicizing Pensions*, FORBES (June 29, 2018, 12:34 PM), https://www.forbes.com/sites/christopherburnham/2018/06/29/kentucky-retirement-systems-a-case-study-of-politicizing-pensions/#4fc2e2d9299a.

8. Josh Bloom, *ACSH Explains: What's The Difference Between Opioids And Opiates?*, AM. COUNCIL ON SCI. & HEALTH (2017), https://www.acsh.org/news/2017/10/27/acsh-explains-whats-difference-between-opioids-and-opiates-12041.

and can reduce pain.[9] As the brain receptors become used to the stimulation, tolerance for the opioid increases and less endorphins are produced.[10] Individuals then begin to crave the opioid high once felt at the beginning of their use.[11]

OxyContin® is ground zero for the current opioid epidemic.[12] The drug was first approved by the Food and Drug Administration in 1995 and is a reformulation of oxycodone and a semi-synthetic derivative of the Persian poppy plant.[13] Painkillers of this strength had been prescribed for cancer treatment or hospice care until the mid-1990s when Purdue Pharma began an aggressive campaign describing chronic pain as the "Fifth Vital Sign."[14] The painkiller was marketed for its extended-release qualities over a period of twelve hours.[15] From 1996 to 2000, the pharmaceutical company doubled its sales force in an effort to persuade physicians that pain relief should be a priority in treatment.[16] Representatives were literally giving the drug away to physicians with 7-day and 30-day free trial coupons.[17] By 2001, 34,000 coupons for free trials had been redeemed.[18] From 1997 to 2002, OxyContin® prescriptions for non-cancer-related pain increased from 670,000 to 6.2 million; prescriptions for cancer-related pain increased approximately fourfold.[19] Purdue Pharma representatives made claims that the risk of addiction to OxyContin® was less than one percent.[20] However, individuals were becoming addicted to the medication at an alarming rate, even when they were taking it as prescribed. Many individuals began misusing the drug by crushing it and snorting it or injecting it so to experience a euphoric high.[21] When an individual takes opioids, the central nervous system is depressed,

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9. Benjamin R. Nordstrom & Douglas B. Marlowe, *Medication-Assisted Treatment for Opioid Use Disorders in Drug Court*, 11 NAT'L DRUG CT. INST. 1, 2 (2016).

10. *Id.*

11. *See id.*

12. Joanna Walters, *America's Opioid Crisis: How Prescription Drugs Sparked a National Trauma*, GUARDIAN (Oct. 25, 2017), https://www.theguardian.com/us-news/2017/oct/25/americas-opioid-crisis-how-prescription-drugs-sparked-a-national-trauma.

13. BETH MACY, DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA 20 (2018).

14. *Id.* at 28.

15. *See* Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221 (2009).

16. *Id.* at 222.

17. *Id.*

18. *Id.*

19. *Id.* at 223.

20. *Id.*

21. Walters, *supra* note 12.

impacting crucial functions like respiration and heart rate.[22] Eventually, the central nervous system ceases to work and the individual stops breathing.[23] Users continued trying to recreate this high, increasing their tolerance to the drug and putting them at risk of overdose.

In 2015, Kentucky providers wrote ninety-seven opioid prescriptions per one hundred persons, which equaled 4.47 million prescriptions.[24] Nationwide, in 2015, the average rate was seventy opioid prescriptions per one hundred persons.[25] Though an epidemic was clearly progressing throughout Kentucky and the nation, government agencies and legislative bodies were slow to react to the crisis. The United States government did not label OUD as a public health emergency until the fall of 2017.[26]

If an individual's access to a prescription is terminated—but the underlying nature of the addiction is not treated—that individual will seek out street drug markets. The limiting of the supply of opioids due to governmental regulations means users will have to find their high outside of a physician's office. Individuals switched from using prescribed opioids to illicit opioids purchased on the street or to heroin. This comingling of legal drugs and heroin use—coupled with interdiction efforts—acted as a gateway to the current fentanyl crisis.

Over eighty percent of heroin users in Kentucky become addicted through prescription opioids.[27] Heroin was now being cut with a synthetic drug called fentanyl,[28] a relatively inexpensive and highly potent opioid.[29] Because demand was high but the prescribed opioids were becoming heavily regulated, the solution became labs—usually outside of the United States—that would create batches of heroin with fentanyl to import and sell on the street.[30] Due to the synthetic nature of the drug, users tend to underestimate the potency

22. Nadja Popovich & Ruth Spencer, *States Look to Naloxone to Cure America's Overdose Epidemic*, GUARDIAN (Apr. 7, 2014, 12:48 PM), https://www.theguardian.com/science/2014/apr/07/naloxone-drug-cure-americas-overdose-epidemic.

23. *Id.*

24. NAT'L INST. ON DRUG ABUSE, *supra* note 1, at 1.

25. *Id.*

26. U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 4.

27. *Fighting Drug Abuse*, KY. ATT'Y GEN., https://ag.ky.gov/drugs/Pages/default.aspx (last visited Feb. 12, 2019).

28. DRUG POLICY ALL., MEDIA TIP SHEET: SYNTHETIC OPIOIDS, https://www.drugpolicy.org/sites/default/files/documents/MediaTipSheet_SyntheticOpioids.pdf.

29. *Id.*

30. *Id.*

which can lead to overdose.[31] Deaths attributed to fentanyl increased by 540% in the United States between the years 2013 and 2016.[32]

It is important to understand the opioid epidemic extends beyond the blame of physicians and pharmaceutical representatives. As prescriptions for opioids have dropped nationally, overdose deaths continue to increase.[33] Areas of the United States with low levels of social capital indicate the highest overdose deaths, suggesting environmental factors contribute to death rates.[34] These environmental factors include poverty, poor working and living conditions, and poor health.[35]

B. Medication Assisted Treatment (MAT): Proven to be Effective but Rarely Implemented in Criminal Justice Settings

Research signals medication-assisted treatment (MAT) as one of the most successful tools in the fight against OUD and overdose deaths; yet, it is underutilized.[36] Current MAT options include methadone, naltrexone, or buprenorphine, which reduces the brain's craving for opioids and the withdrawal symptoms that can make individuals incredibly ill.[37]

Opioid agonist medications, like methadone, are semi-synthetic opioids that act very similarly to oxycodone, heroin, morphine, and opium.[38] When the opioid agonist medication is properly prescribed and used, it produces less intoxication and less chance of withdrawal symptoms leading to an overdose.[39] Methadone has been used since 1947 in the treatment of OUD.[40]

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31. *See* Josh Katz & Margot Sanger-Katz, *'The Numbers Are So Staggering.' Overdose Deaths Set a Record Last Year.*, N.Y. TIMES (Nov. 29, 2018), https://www.nytimes.com/interactive/2018/11/29/upshot/fentanyl-drug-overdose-deaths.html.

32. *See id.*

33. Kathryn F. Hawk et al., *Reducing Fatal Opioid Overdose: Prevention, Treatment, and Harm Reduction Strategies*, 88 YALE J. BIOLOGY & MED. 235, 238 (2015).

34. Michael J. Zoorob & Jason L. Salemi, *Bowling Alone, Dying Together: The Role of Social Capital in Mitigating the Drug Overdose Epidemic in the United States*, 173 DRUG & ALCOHOL DEPENDENCE 1, 1 (2017).

35. Nabarun Dasgupta et al., *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH PERSPECTIVES 182, 183 (2018).

36. Hawk et al., *supra* note 33, at 237.

37. *Id.*

38. Nordstrom & Marlowe, *supra* note 9, at 3.

39. *Id.*

40. NAT'L INST. ON DRUG ABUSE, MEDICATIONS TO TREAT OPIOID USE DISORDER 7 (2018), https://www.drugabuse.gov/publications/research-reports/medications-to-treat-opioid-addiction/efficacy-medications-opioid-use-disorder.

Opioid antagonist medications, like naltrexone, are not opioids and do not stimulate the brain in the same way as opioids.[41] Naltrexone requires full detoxification for seven to ten days prior to first use.[42] It is available in pill form or in an injectable form called Vivitrol, which lasts almost thirty days.[43]

Buprenorphine is a partial agonist as it partially stimulates the brain's opioid receptors.[44] It is marketed currently under the names Subutex or Suboxone.[45] It can be combined with naloxone—sometimes referred to as Narcan—and typically used to reverse opioid overdoses,[46] but detoxification must first occur.[47] Buprenorphine was approved for OUD in 2002 and presents a lower risk of overdose and requires fewer governmental regulations than methadone.[48]

There is still much stigma around the use of MAT, stemming from the anti-drug movement in the United States of the 1980s and 1990s. Most members of the medical community are pro-MAT. However, a large contingent of recovery community members and legal professionals find a disconnect between using prescription pills to treat OUD. Critics of MAT believe abstinence is the only form of recovery, and those on MAT medications, even if used as prescribed, are not following rules of the recovery process.

There are also existing misconceptions about how MAT is used. For example, drug courts do not provide MAT—they can only approve or deny a participant's use of this type of treatment. Methadone, in order to comply with state and federal regulations, must be distributed from a licensed Opioid Treatment Provider (OTP).[49] Naltrexone (Vivitrol) or buprenorphine (Suboxone) can be prescribed by any health care provider licensed to prescribe medications.[50] Providers do have to obtain a waiver allowing them

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41. Nordstrom & Marlowe, *supra* note 9, at 3.
42. *Id.*
43. *Id.* at 4.
44. *Id.*
45. *Id.*
46. *Id.*
47. NAT'L INST. ON DRUG ABUSE, *supra* note 40, at 11.
48. Michael S. Gordon et al., *A Randomized Controlled Trial of Prison-Initiated Buprenorphine: Prison Outcomes and Community Treatment Entry*, 142 DRUG ALCOHOL DEPENDENCE 33, 34 (2014).
49. *Methadone*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/medication-assisted-treatment/treatment/methadone (last updated Sept. 28, 2015).
50. *See Medication and Counseling Treatment*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/medication-assisted-treatment/treatment#otps (last updated Sept. 28, 2015).

to prescribe this type of drug.[51] As of 2015, there was an OTP in every state of the United States, with the exception of North Dakota and Wyoming.[52] A clinic in both states opened in 2016.[53]

In July of 2016, the Rhode Island Department of Corrections (RIDOC) launched a new, first of its kind, comprehensive MAT program that allowed incarcerated individuals to continue or initiate—as clinically appropriate—Suboxone, methadone, or naltrexone.[54] A 2018 study of the program examined overdose deaths in 2016 and 2017.[55] It linked RIDOC data to overdose death data.[56] After the implementation of the MAT program, there was a 60.5% decrease in the number of overdose deaths among people who had recently been incarcerated and a twelve percent decrease in the number of overdose deaths in the entire state, signaling a population-level effect.[57] This decrease in overdose deaths post-release, following the implementation of the comprehensive MAT program, provides additional evidence that treating individuals while incarcerated and providing aftercare upon release can be a best practice in reducing overdose risk for this specific population.

III. THE RESPONSE OF THE LEGAL PROFESSION IN KENTUCKY

C. Drug Court in Kentucky

Drug courts began in Miami, Florida in 1985 as an alternative to incarceration for nonviolent offenders with substance abuse issues.[58] After the pilot programs indicated a potential reduction in recidivism, Congress

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51. *Certification of Opioid Treatment Programs (OTPs)*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/medication-assisted-treatment/opioid-treatment-programs (last updated Sept. 28, 2015).

52. *Medication and Counseling Treatment*, *supra* note 50.

53. *See Grant Brings Medication Assisted Treatment to Wyoming*, WYO. DEP'T OF HEALTH (Apr. 13, 2016), https://health.wyo.gov/grant-brings-medication-assisted-treatment-wyoming; Jennifer Lu, *First Methadone Clinic in North Dakota to Expand Options for Treating Opioid Addiction*, GRAND FORKS HERALD (July 30, 2016, 5:25 PM), http://www.grandforksherald.com/news/4084809-first-methadone-clinic-north-dakota-expand-options-treating-opioid-addiction.

54. Traci C. Green et al., *Postincarceration Fatal Overdoses After Implementing Medications for Addiction Treatment in a Statewide Correctional System*, 75 JAMA PSYCHIATRY 405, 405 (2018).

55. *Id.*

56. *Id.*

57. *Id.* at 405–06.

58. David R. Lilley, *Drug Courts and Community Crime Rates: A Nationwide Analysis of Jurisdiction-Level Outcomes*, J. CRIMINOLOGY, 2013, at 1, 1.

authorized drug court funding in 1994.[59] One rationale behind the creation of drug courts was judges and attorneys becoming specialized in the problems presented by offenders dealing with addiction. This implies that courts must recognize that all offenders are not alike. Drug courts use the concept of therapeutic jurisprudence, which uses the law as a type of therapeutic agent.[60] This type of process takes time and collaboration from various stakeholders, including, but not limited to, judges, prosecutors, public advocates (known in other jurisdictions as public defenders), private defense attorneys, therapeutic providers, and law enforcement officials. They must work to consider the whole human offender, from their psychology, to their propensity to commit additional criminal acts, and to their physical health. As part of a plea bargain—or as an alternative to incarceration—treatment is offered to defendants.

In Kentucky, there are currently 113 counties with drug courts, out of Kentucky's 120 total counties.[61] These specialty courts began in 1996.[62] Participants must be nonviolent offenders whose main problems involve substance use disorder (SUD).[63] Participants, on average, complete the drug court program within twenty-two to twenty-five months.[64] Since drug courts were established in Kentucky, there has been a reduction in costs experienced by the judicial system.[65] The cost for a participant to receive treatment, drug testing, and case management is $6,069 per year.[66] The cost to house an inmate in Kentucky is $20,047 per year.[67]

The purpose of Kentucky drug court is clear: to reduce drug use and criminal behavior in nonviolent offenders dealing with SUD.[68] This is a non-adversarial approach where the prosecutor and defense attorney work together to formulate a plan for the specific defendant in the case.[69] Participants come to the program through diversion, deferred prosecution, or as a probation

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59. *Id.*

60. David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000).

61. KY. COURT OF JUSTICE, *supra* note 5, at 1.

62. *Id.*

63. KY. SPECIALTY COURTS, KENTUCKY DRUG COURT: 2015 STATEWIDE OUTCOME EVALUATION 1, 1 (2018), https://courts.ky.gov/resources/publicationsresources/Publications/P134_SpecialtyCourtsBrochure.pdf.

64. *Id.*

65. *See id.*

66. *Id.* at 2.

67. *Id.*

68. *Kentucky Drug Court: Paving the Road to Recovery*, KY. CT. JUST., https://courts.ky.gov/courtprograms/drugcourt/Pages/default.aspx (last visited Jan. 18, 2019).

69. *Id.*

condition.[70] Random drug screening occurs throughout the process.[71] The judge interacts with the participant, which opens up dialogue about completion expectations, compliance, and what sanctions would be employed specific to each defendant.[72] Regular hearings are held with the drug court team, and the defendant must comply with the treatment and monitoring protocols put in place.[73] There are three specific phases of drug courts in Kentucky, followed by aftercare: stabilization, education, and self-motivation.[74] In order to complete drug court, participants must complete the three phases along with aftercare, have no current criminal cases pending, have paid all court costs, fees, and/or restitution, and have remained drug free for at least 180 consecutive days.[75]

This last requirement historically posed an interesting problem to those with OUD, as it would exclude the use of MAT. In 2012, a study found fifty-six percent of drug courts allowed the use of MAT.[76] When MAT is used in conjunction with behavioral counseling and other social services, OUD participants have a better chance at a successful treatment.[77] In a study involving criminal justice offenders, extended-release naltrexone was provided to participants and resulted in a rate of opioid relapse lower than what occurs when behavioral counseling uses an abstinence component instead of MAT.[78]

In the face of various studies espousing the benefits of MAT, Kentucky drug courts still required abstinence only protocols. When an opioid user emerges from incarceration or drug rehabilitation, the body's cravings for opioids are still present, but the tolerance for the drug is low or non-existent. As such, when the user relapses, whether it be through prescription pills or heroin, the result can be a fatal overdose. Participants in Kentucky drug courts

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70. KY. SPECIALTY COURTS, PAVING THE ROAD TO RECOVERY: HANDBOOK FOR KENTUCKY DRUG COURT PARTICIPANTS 1, 2 (2016).

71. *Id.* at 7.

72. *See id.* at 1.

73. Harlan Matusow et al., *Medication Assisted Treatment in US Drug Courts: Results from a Nationwide Survey of Availability, Barriers and Attitudes*, 44 J. SUBSTANCE ABUSE TREATMENT 473, 474 (2013).

74. KY. SPECIALTY COURTS, *supra* note 70, at 5–6.

75. *Id.* at 11.

76. Matusow et al., *supra* note 73, at 476.

77. Nordstrom & Marlowe, *supra* note 9, at 2.

78. Joshua D. Lee et al., *Extended Release Naltrexone to Prevent Opioid Relapse in Criminal Justice Offenders*, 374 NEW ENG. J. MED. 1232, 1232 (2016).

faced a choice of being terminated from drug court or going off MAT (usually Suboxone) and facing relapse.[79]

In 2015, a case was filed in federal court in Kentucky titled *Watson v. Kentucky*.[80] Watson was a nurse who became addicted to opioids.[81] Watson wanted to be able to use Suboxone while awaiting prosecution.[82] The federal court ultimately dismissed the case stating it was unable to interfere with criminal proceedings in state court.[83] However, the court did note that Kentucky courts, like other courts, have struggled with OUD.[84] The court specifically stated the following: "Drug addiction has no easy cure. Yet, the debate over best practices is something best left to the doctors and state court judges—both of whom deal with drug addiction much more frequently than federal judges."[85]

The U.S. Department of Justice, Bureau of Justice Assistance, announced in 2015 that if a drug court was receiving federal funding through the Adult Drug Court Discretionary Grant Program, the drug court could no longer deny participants access if they were using MAT.[86]

In 2015, the Supreme Court in Kentucky amended the drug court rules to allow participants to use MAT.[87] Today, Kentucky drug court participants can now request to be placed on MAT, or can continue on an already prescribed MAT regimen, but participants must show a recommendation by a physician indicating the benefit of this type of treatment. Should a Kentucky drug court judge wish to deny the use of MAT for participants, he or she now has to conduct an individualized assessment for the denial.[88] No longer can drug court judges—or judges in any court in Kentucky—require individuals to dose down or wean off MAT. As of June 20, 2017, there were sixteen drug court programs in Kentucky, ranging across twenty counties where participants

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79. *See* Jason Cherkis, *Dying To Be Free*, HUFFPOST (Jan. 28, 2015), https://projects.huffingtonpost.com/projects/dying-to-be-free-heroin-treatment#chapter-one.

80. Civil No. 15–21–ART, 2015 WL 4080062 (E.D. Ky. July 6, 2015).

81. *Id.* at *1.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at *5.

86. U.S. DEP'T OF JUSTICE, ADULT DRUG COURT DISCRETIONARY GRANT PROGRAM 6–7 (2015).

87. Jason Cherkis, *Kentucky Reforms Drug Court Rules To Let Heroin Addicts Take Prescribed Meds*, HUFFPOST (Apr. 17, 2015), https://www.huffingtonpost.com/2015/04/17/heroin-addiction-kentucky_n_7088270.html.

88. James Mayse, *Medication Assisted Treatment for Opioid Addiction Holds Promise, Some Officials Say, But There is Potential for Abuse*, KY. NEW ERA (July 31, 2017), http://www.kentuckynewera.com/news/ap/article_a76858b0-753d-11e7-b3e0-f39c39896c21.html.

were using MAT.[89] The Kentucky Administrative Office of the Courts, the agency overseeing drug courts, reported that approximately seventy participants in those programs used MAT.[90]

D. Family Court in Kentucky

Kentucky has a family court system with the goal of one family, one court. In essence, one family court judge will follow a family throughout all phases of their familial life: adoption, divorce, custody, domestic violence, juvenile status offenses (runaways, truancy, beyond control), dependency, neglect, and abuse (DNA cases), child support, termination of parental rights, paternity, and spousal support. Family court currently operates in seventy one of the 120 counties in Kentucky.[91] The opioid epidemic has impacted families and children statewide. DNA petitions have increased nearly fifty-percent since 2007, up to 26,157 petitions filed in 2017.[92] A DNA petition alleges a minor child or children are dependent, neglected, or abused.[93] These petitions often request the minor child to be placed in out-of-home care, either with a relative or in foster care.

Strategies specific to OUD have been developed and implemented in family court. Kenton County had the highest overdose death rate of any Kentucky county in 2017.[94] In response to the crisis in the community, the Kenton County Family Court uses volunteer mental health professionals to conduct screenings of parents whose children have been removed, or may be facing removal, from the custody of their parents.[95] The volunteer makes a recommendation to the court which can become a court order.[96] Early intervention is important, as family courts must comply with the requirements of the Adoption and Safe Families Act (ASFA), which requires permanency for children to be obtained within a relatively short period of time once placed in out-of-home care. For family reunification, screening can help identify issues that would keep children from being returned to their biological parents

89. *Id.*

90. *Id.*

91. *Family Court*, KY. CT. OF JUST. (2018), https://courts.ky.gov/courts/family court/Pages/default.aspx (last visited Feb. 13, 2019).

92. KY. BAR ASS'N, *supra* note 6, at 1.

93. See KY. REV. STAT. ANN § 600.020(1) (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.), *amended by* Substance Abuse—Treatment Act, ch. 128, sec. 3, § 600.020 (2019) for the definition of an abused or neglected child. See *id.* § 600.020(20) for the definition of a dependent child.

94. TILLEY & INGRAM, *supra* note 3, at 4.

95. KY. BAR ASS'N, *supra* note 6, at 4.

96. *Id.* at 5.

and can develop collaborative strategies to work toward the preservation of that family.

The Kentucky Sobriety Treatment and Recovery Team (START) program works with families where parents have SUD and have had contact with the child welfare system.[97] Family mentors with at least three years of sobriety are connected to families through child protective services workers. The program serves five counties in Kentucky with goals of preserving the family unit and achieving parental sobriety. Research shows children in families served by START were fifty percent less likely to be placed in foster care than children in a control group.[98] The mentors are often within the homes of the families on a daily basis. "In 2015, 77.6% of children in the START program were returned to their biological family at the conclusion of the case."[99]

Family courts often require regular drug tests in DNA cases where drug use is alleged.[100] Family court can order attendance at AA or NA meetings and compliance with drug counseling providers.[101] If a parent refuses to comply with a court order, for example, the failure to report for a drug test, they will face contempt charges.[102] In this respect, incarceration can serve as a means of detoxification.[103] However, family court judges cannot order individuals to discontinue MAT.[104] Compared to families who received no MAT, "families who received six months of MAT were 60% more likely to retain custody of children."[105]

IV. CREATING BEST PRACTICES FOR ATTORNEYS AND JUDGES

E. Measures in Kentucky to Combat OUD

As the opioid epidemic rages on, citizens are expecting governing bodies to take action. This is an issue that touches rural, suburban, and urban populations. It impacts incarcerated populations as well as the general population. As it expands, more individuals are in need of therapeutic

97. *Sobriety Treatment and Recovery Team*, KY. CABINET FOR HEALTH & FAMILY SERVS. (2017), https://chfs.ky.gov/agencies/dcbs/oc/Pages/start.aspx.

98. *Id.*

99. KY. BAR ASS'N, *supra* note 6, at 5.

100. *Id.* at 7.

101. *Id.* at 8.

102. *Id.* at 7.

103. *Id.*

104. *Id.* at 9.

105. *Id.* at 10.

intervention and legal representation. As such, governmental agencies must be collaborative and creative in crafting policy and law to fight this crisis.

In 2004, Kentucky's legislative body, the General Assembly, passed the Matthew Casey Wethington Act for Substance Abuse Intervention (Casey's Law).[106] This law provides for the involuntary treatment of a person who is suffering from alcohol and drug abuse, who presents an imminent threat of danger to self or others as a result of the abuse, and who will reasonably benefit from treatment.[107] The petition for involuntary treatment is filed in district court, requesting either sixty days or 360 days of treatment.[108] The court will review the petition and, if there is probable cause to believe the respondent should be ordered to treatment, will set a hearing date within fourteen days and will order two qualified health professionals (one of whom must be a physician) to evaluate the respondent prior to the hearing date.[109] If the court finds the respondent should be ordered to treatment, it can order treatment for a period not to exceed sixty days or not to exceed 360 days, based on what was requested in the petition.[110] Casey's Law also provides authority to the District Court to order a seventy-two-hour emergency involuntary treatment commitment on the recommendation of a qualified health professional.[111]

In 2012, House Bill One was passed, known as the "pill mill bill." This law addressed ownership of pain clinics, required prescribing physicians to use the KASPER program, required collaboration between licensing boards and law enforcement, and required licensing boards to develop regulations for prescribing controlled substances.

A bipartisan bill was passed in Kentucky in 2015, Senate Bill 192 (known as the "Heroin Bill"), which provided landmark anti-heroin efforts.[112] Senate Bill 192 increased penalties for large heroin traffickers, expanded access to

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106. KY. REV. STAT. ANN. § 222.437 (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.).

107. *Id.* § 222.431 (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.), *amended by* Substance Abuse—Treatment Act, ch. 128, sec. 18, § 222.431 (2019).

108. *Id.* § 222.432 (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.), *amended by* Substance Abuse—Treatment Act, ch. 128, sec. 19, § 222.432 (2019).

109. *Id.* § 222.433(2) (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.), *amended by* Substance Abuse—Treatment Act, ch. 128, sec. 20, § 222.433 (2019).

110. *Id.* § 222.433(3).

111. *Id.* § 222.434(1) (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.), *amended by* Substance Abuse—Treatment Act, ch. 128, sec. 21, § 222.434 (2019).

112. S. 192, 2015 Leg., Reg. Sess. (Ky. 2015).

treatment, provided funding to the Department of Corrections for a pilot program distributing naloxone to inmates in order to prevent relapse, and provided immunity from criminal prosecution of individuals who seek emergency help for overdose victims (known as the Good Samaritan provision).[113] The bill also excepted needles and syringes from classification as drug paraphernalia in an effort to prevent needle sticks to police officers and authorized local health departments to set up safe needle exchange programs.[114] As of 2018, forty-one states nationwide operate syringe exchange programs.[115]

In 2017, House Bill 333 went into effect in Kentucky.[116] This bill limits opioid prescriptions to a three-day supply when dealing with instances of acute pain[117] and increases penalties for trafficking in heroin, fentanyl, and fentanyl analogs.[118]

Nationally, Congress passed the 21st Century Cures Act, which created the Opioid State Targeted Response grant program. Through this grant program, Kentucky received $10.5 million in 2018 to implement a targeted response to the opioid crisis and to expand access to evidence-based opioid prevention, treatment, recovery, and harm reduction services.[119]

Operation UNITE (Unlawful Narcotics Investigation, Treatment and Education) is a non-profit organization in Kentucky, launched in 2003, with a mission to fight the opioid crisis through law enforcement, treatment, and education.[120] The organization serves thirty-two counties in eastern and southern Kentucky, areas crippled by OUD.[121] Since the effort launched in 2003, more than 4,400 Kentuckians have obtained vouchers for treatment facilities.[122] Throughout the service region, drop boxes are available at

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113. *Id.*

114. *Id.*

115. Andrew M. Parker et al., *State Responses to the Opioid Crisis*, 46 J.L. MED. & ETHICS 367, 372 (2018).

116. TILLEY & INGRAM, *supra* note 3, at 1.

117. *Id.*

118. *Id.*; *see also* KY. REV. STAT. ANN. § 218A.1412 (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.), *amended by* Act of Mar. 26, 2019, ch. 130, sec. 2, § 218A.1412 (2019).

119. SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., T1-17-014, STATE TARGETED RESPONSE TO THE OPIOID CRISIS (OPIOID STR) INDIVIDUAL GRANT AWARDS (2017).

120. *Overview*, OPERATION UNITE, https://operationunite.org/about (last visited Mar. 8, 2019).

121. *Id.*

122. *Grant Awarded to Expand Access to Treatment, Recovery*, OPERATION UNITE (Sept. 21, 2018), https://operationunite.org/2018/09/grant-awarded-to-expand-access-to-treatment-recovery.

agencies to collect medications.[123] From 2012 through 2018, the drop boxes collected more than 13.65 tons of prescription and over the counter medications.[124] Operation UNITE and the Kentucky Justice and Public Safety Cabinet collaborated to offer a statewide "KY Help Call Center" in December 2017.[125] As of August 2018, more than 2,400 calls had been made to speak with a live specialist about OUD treatment options in Kentucky.[126]

Kentucky's Attorney General, Andy Beshear, has brought eight lawsuits against pharmaceutical manufacturers and distributors for the marketing of opioids in Kentucky.[127] A suit brought against Purdue Pharma, the maker of OxyContin®, settled for $24 million in late 2015 under the prior Attorney General, Jack Conway.[128] Eight million dollars of the settlement went to fifteen substance abuse centers in Kentucky to aid in treatment efforts.[129]

F. Efforts Made by the Department of Corrections

Overdose and OUD disproportionately impacts certain populations of individuals. Between 1996 and 2006, the number of adults incarcerated in United States jails and prisons rose by thirty-three percent to 2.3 million inmates, and the number of inmates with SUD increased forty-three percent to 1.9 million inmates.[130] A 2010 report by the National Center on Addiction and Substance Abuse found that only eleven percent of inmates were receiving treatment for their substance abuse issues.[131]

The Kentucky Department of Corrections, Division of Substance Abuse Services, provides treatment programs to inmates, parolees, and probationers through traditional incarceration, halfway houses, and recovery centers throughout the Commonwealth. The agency examined substance abuse

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123. *Med Drop Box Sites*, OPERATION UNITE, https://operationunite.org/investigations/med-drop-box-sites (last visited Mar. 8, 2019).

124. *Id.*

125. OPERATION UNITE, UNITE INITIATIVES (2018), https://operationunite.org/wp-content/uploads/2018/10/Initiatives-Overview-10-3-18.pdf.

126. *Id.*

127. *Litigation Against Pharmaceutical Industry*, KY. ATT'Y GEN., https://ag.ky.gov/fighting-drug-abuse/litigation (last visited Feb. 14, 2019).

128. Deborah Yetter, *Andy Beshear Storms out After GOP Lawmaker Grills Him over Purdue Pharma Settlement*, COURIER J. (Oct. 12, 2017, 5:41 PM), https://www.courier-journal.com/story/news/2017/10/12/andy-beshear-grilled-on-purdue-pharma-settlement/747021001.

129. *Fighting Drug Abuse*, KY. ATT'Y GEN., https://ag.ky.gov/drugs/Pages/default.aspx (last visited Mar. 8, 2019).

130. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION i (2010).

131. *Id.* at ii.

outcomes of those state offenders participating in substance abuse treatment programs in the 2016 Criminal Justice Kentucky Treatment Outcome Study (CJKTOS). In the study, 355 randomly selected participants entering treatment programs participated in an intake assessment and a follow-up twelve months post release.[132] Of the participants, 55.2% reported opioid use in the twelve months prior to incarceration.[133] The study found heroin use to be increasing among state offenders, as 28.9% of participants reported heroin use in the twelve months prior to incarceration.[134] This is an increase from fiscal year 2007 when 7.4% of participants reported the use of heroin in the twelve months prior to incarceration.[135] Illicit opioid use (not including heroin, methadone, or buprenorphine) peaked at 50.2% in fiscal year 2010 and decreased to forty-four percent in 2016 as reported by participants.[136] The study found that, for every one dollar spent on substance abuse treatment for inmates, parolees, or probationers, Kentucky obtained a $4.46 cost offset.[137] Upon follow-up, 52.1% reported not using illicit substances within that twelve-month post release period.[138]

Senate Bill 192 provided funding to the Department of Corrections to provide injectable naltrexone (Vivitrol) to those inmates at risk for heroin and/or heroin relapse upon release from custody.[139] Through the use of this injectable drug, inmates begin to prepare themselves for community reentry.[140] The inmate must be enrolled in a jail or prison evidence-based substance abuse program in order to qualify for the injection.[141]

In 2017, Kentucky's General Assembly passed Senate Bill 120, which created new sections of Chapter 439 to require the Department of Corrections to implement a reentry drug supervision program for certain parolees or inmates impacted by SUD. This program was to be in place no later than March of 2018, with the goal of a reduction in recidivism through oversight and behavioral modification.[142] This program is currently being piloted in two

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132. DEP'T OF CORR., CRIMINAL JUSTICE KENTUCKY TREATMENT OUTCOME STUDY 2 (2016).

133. *Id.* at 8.

134. *Id.* at 9.

135. *Id.*

136. *Id.*

137. *Id.* at 18.

138. *Id.* at 2.

139. *Substance Abuse Treatment Modalities*, KY. DEP'T. CORR., https://corrections.ky.gov/Divisions/sap/Pages/modalities.aspx (last visited Feb. 14, 2019).

140. *Id.*

141. *Id.*

142. KY. REV. STAT. ANN. § 439.651(1) (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.).

counties in Kentucky.[143] Individuals address substance abuse through a team-based approach made up of a department hearing officer, a parole officer, a reentry liaison, a social service clinician, a public defender or private counsel, and a representative from a community mental health center who will provide SUD treatment to participants.[144]

A program at the Kenton County Detention Center has developed a program for inmates with SUD. Participants complete a six-month process involving cognitive behavioral therapy, work requirements, and group and individual therapy.[145] A 12-step support system is employed and participants have access to medical treatment to address withdrawal symptoms.[146] Prior to leaving the program, inmates are given an injection of Vivitrol, which allows inmates time to seek treatment once they leave the detention center.[147] As of 2018, there were approximately seventy inmates participating in this program.[148] Upon release, inmates are given resources on halfway houses, additional Vivitrol treatment, and SUD prevention programs.[149]

G. The Intersection of Law and Science

Anyone who begins to look closely at OUD and its intersection with the court system can quickly see tension between the two. The motivations and goals of each system are quite different. When they begin to intersect, disagreements about the best path forward arise. Lawyers and judges within the criminal justice system would be the first to state that they are not social workers nor medical physicians. The defined goals of criminal justice are punitive in nature. When and if rehabilitation occurs, this can seem to be a happy coincidence. This Article submits, however, that there needs to be a blending between the two systems in order to achieve any reduction in opioid overdose deaths.

Scientists rely on studies to create best practices in the medical community. Lawyers and judges rely on legal principles found in the judicial system to create precedent. These two professions have differing opinions on how to best handle individuals who not only are addicted, but who relapse

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143. *Substance Abuse Treatment Modalities*, *supra* note 139.

144. *Id.*

145. John Gregory, *Helping Inmates Overcome Addiction*, KET (June 25, 2016, 9:30 AM), https://www.ket.org/opioids/helping-inmates-overcome-addiction.

146. *Id.*

147. *Id.*

148. Quentin Johnson, *Case Study: County-Level Responses to the Opioid Crisis in Northern Kentucky*, 46 J.L. MED. & ETHICS 382, 384 (2018).

149. *Id.*

following various treatment protocols. Relapse is "a return to drug use" after an attempt to stop using the drug.[150] OUD is a chronic relapsing disorder.[151] It is important to educate those with OUD, and those supporting them either through familial, medical, or legal connections, that relapse is an important part of recovery. It should not be viewed as a personal shortcoming, spiritual flaw, or disrespect for a court process.

Scientific evidence strongly indicates the following best evidence-based, harm reduction practices: Law Enforcement Assisted Diversion (LEAD), allowing MAT to be used in all courts and in prisons and jails, screening for OUD, the distribution of naloxone in an effort to reverse overdoses, and syringe exchange programs to lower the risk of HIV and Hepatitis C among intravenous OUD drug users.

The failure of traditional criminal justice approaches, such as arrest and incarceration, has spurred the collaboration of law enforcement officials with public health professionals to provide meaningful treatment opportunities for offenders.[152] LEAD programs are developing across the country in an effort to have law enforcement at the forefront of combatting OUD. The first LEAD program was established in Seattle, Washington in 2011.[153] Its purpose is to allow law enforcement officials discretion to divert SUD offenders away from the criminal justice system and into substance abuse treatment programs.[154] As of March, 2019, twenty states have operating LEAD programs.[155] A LEAD program is in the development process in Louisville, Kentucky.[156] Law enforcement officials are uniquely placed in the position to help rehabilitate these offenders. LEAD programs involve three phases: entry into the program with diversion from traditional criminal justice processes, case management using evidence-based harm reduction strategies, and coordination of involvement with the legal system.[157] A study analyzing LEAD on recidivism

150. NAT'L INST. ON DRUG ABUSE, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION 5 (2018).

151. Lee et al., *supra* note 78, at 1233.

152. Howard K. Koh et al., *A Smarter War on Drugs*, 320 JAMA 2301, 2301 (2018).

153. *What is LEAD?*, LEAD NAT'L SUPPORT BUREAU, https://www.leadbureau.org/about-lead (last visited Feb. 14, 2019).

154. VERA INST. JUSTICE, A NEW NORMAL: ADDRESSING OPIOID USE THROUGH THE CRIMINAL JUSTICE SYSTEM 3 (2017), https://www.vera.org/publication_downloads/new-normal-opioid-use-criminal-justice-system/new-normal-opioid-use-criminal-justice-system.pdf.

155. *LEAD: Advancing Criminal Justice Reform in 2019*, LEAD NAT'L SUPPORT BUREAU, (last visited Mar. 8, 2019).

156. *Id.*

157. Susan E. Collins et al., *Seattle's Law Enforcement Assisted Diversion (LEAD): Program Effects on Recidivism Outcomes*, 64 EVALUATION & PROGRAM PLAN. 49, 49 (2017).

rates in Seattle found that those participating in the LEAD program had sixty percent lower odds of arrest following the entry evaluation than those processed with traditional law enforcement mechanisms.[158]

Additionally, Kentucky State Police (KSP) created the Angel Initiative in 2016 to help connect citizens to treatment resources.[159] Any individual can come into a KSP post in order to find treatment options without any questions being asked.[160] To date, seventy-three individuals have been placed in treatment.[161] This program does not include individuals who are detained or already charged with a criminal offense. The citizen must request assistance prior to having this type of contact with law enforcement.

The earlier an offender in the criminal justice system, or a parent with OUD in Family Court, can be identified as someone in need of treatment, the better. Strategies can be defined and implemented in order to meet the offender's specific needs. When criminal offenders are incarcerated at the jail, they undergo screening from pretrial services to identify their risk level as to if they will return to court for subsequent proceedings and if they are at a risk to reoffend. Pretrial services can label an offender as low, low-moderate, moderate, moderate-high, or high risk. At arraignment—the phase of the criminal justice system where the defendant hears their rights and the charges against them—pretrial services will convey the risk level to the judge who then decides on bond conditions for pretrial release. Using a screening tool for OUD at this phase of the criminal justice proceeding would be a best practice to connect offenders to treatment possibilities and to prevent overdose risk.[162] It would be beneficial not only to jails, but also to judges and attorneys as a tool in resolving the underlying issue in the case and to prevent the defendant from recidivating.[163]

KRS 533.251 allows for pre-trial diversion for a felony offender presenting with SUD and charged with a Class D felony, as long as various conditions are met.[164] The defendant can be ordered into a program specific to their needs, not to exceed 365 days.[165] The felony case will be held in

158. *Id.* at 52.

159. *Angel Initiative*, KY. ST. POLICE, https://kentuckystatepolice.org/angel-initiative (last visited Feb. 14. 2019).

160. *Id.*

161. *Id.*

162. Lauren Brinkley-Rubinstein et al., *Criminal Justice Continuum for Opioid Users at Risk of Overdose*, 86 ADDICTIVE BEHAVS. 104, 106 (2018).

163. *Id.*

164. See KY. REV. STAT. ANN. § 533.250 (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.) for specific qualifying criteria.

165. *Id.* § 196.285(3) (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.).

abeyance by the court until the defendant completes the treatment program.[166] Should the defendant successfully comply with all court conditions, and complete SUD treatment, the charge will be listed on the defendant's record as dismissed-diverted and will not be considered a conviction.[167] This type of identification of SUD in Class D felonies could be made at the pretrial services phase for any offender, allowing all court actors to collaborate on a plan that will allow for rehabilitation of the defendant, as well as potentially punitive sanctions for the criminal action.

As discussed above, all courts in Kentucky must now allow individuals to use MAT.[168] Though the MAT regimen may carry with it a stigma in some legal circles, research has clearly defined its strengths in combatting relapse and overdose.[169] Additionally, the education surrounding the benefits of naloxone as an effort to reduce overdose deaths is crucial in bridging the gap between the scientific community and the members of the legal profession. Naloxone is currently used at jails and prisons in Kentucky, but it should be on hand in courtrooms as well. Each law enforcement official in Kentucky should be trained on how to use naloxone. Kentucky State Police currently provides Narcan training to all KSP Troopers.[170] Troopers across the Commonwealth had to administer Narcan twenty-three times in 2017.[171] It is crucial that inmates with OUD—prior to release from custody—are given a drug like Vivitrol. A Washington state study shows the risk of death from a drug overdose in the first two weeks following release from custody is 12.7 times higher than the risk of overdose death for a member of the general population.[172]

The last best practice is the promotion of Kentucky's syringe exchange program. Fifty-four of Kentucky's 120 counties are identified by the Centers for Disease Control and Prevention to be at highest risk for developing outbreaks of HIV and Hepatitis C due to intravenous drug use.[173] It is important to educate the citizenry on the availability of syringe exchange

166. *Id.* § 533.251 (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.).

167. *Id.* § 533.258(1) (West, Westlaw through emergency effective legislation through Chapter 181 of the 2019 Reg. Sess.).

168. Cherkis, *supra* note 87 and accompanying test.

169. Brinkley-Rubinstein, *supra* note 162, at 105.

170. *Angel Initiative*, *supra* note 159.

171. *Id.*

172. Ingrid A. Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENG. J. MED. 157, 161 (2007).

173. *Vulnerable Counties and Jurisdictions Experiencing or At-Risk of Outbreaks*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/pwid/vulnerable-counties-data.html (last visited Feb. 14, 2019).

programs and their importance in reducing outbreaks. There are currently fifty-four Kentucky counties operating Harm Reduction Syringe Exchange programs.[174] These programs should continue to expand statewide.

V. CONCLUSION

It is crucial that evidence-based harm reduction strategies are included within legislation and agency policies addressing OUD. With overdose deaths continuing to rise, state officials must work closely with members of the scientific community to create inter-disciplinary treatment protocols. The criminal justice system, and the legal profession generally, must work toward solutions addressing the root causes of OUD—like poverty, poor health, and substandard working conditions—as well as toward a firm understanding of how public health issues closely intertwine with legal issues. Kentucky stakeholders must step away from their areas of expertise and work together with professional partners in order to create a comprehensive, streamlined response to the opioid epidemic.

174. *Kentucky Syringe Exchange Programs*, KY. CABINET FOR HEALTH & FAMILY SERVS., https://chfs.ky.gov/agencies/dph/dehp/hab/Pages/kyseps.aspx (last visited Feb. 14, 2019).

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