

COMMENT

A WILLFUL CHOICE: THE INEFFECTIVE AND INCOMPASSIONATE APPLICATION OF WISCONSIN'S CRIMINAL LAWS IN COMBATING THE OPIOID CRISIS

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Wisconsin's drug-induced homicide law was intended to prosecute for-profit drug dealers and was rarely charged for several decades after it was enacted in 1986. In recent years, prosecutors have brought hundreds of these homicide charges in response to opioid deaths. Often, these charges are brought against overdose victims' friends and family members—people who are also mired in addiction and who shared or helped obtain the fatal drug. In contrast, Wisconsin's Good Samaritan Overdose Law (GSOL), enacted in 2014, focuses on harm reduction. If a person calls for help when another person is overdosing, the law provides both people with some insulation from prosecution of a range of drug-related charges. These laws approach the problem of overdose death from very different angles: The drug-induced homicide law punishes addicts for their role in overdose deaths, while the GSOL offers addicts protection from prosecution to encourage calls for medical intervention in overdose situations. Unfortunately, the current implementation of the homicide law diminishes the potential of the GSOL to save lives because addicts face the possibility of a homicide charge when they summon help for an overdose victim.

With the rise of lethal synthetic opioids in Wisconsin, the criminal justice system must adjust its current laws and practices to reduce overdose deaths. The criminalization of addiction represented by the drug-induced homicide law thwarts rehabilitation efforts, miring addicts in a cycle of incarceration and drug use that ends with death in too many cases. This Comment proposes a possible solution: separating addicts from for-profit drug dealers in the eyes of the law by implementing a joint-user defense in drug-induced homicide cases. Addicts are more likely to use opioids with other addicts than alone. By removing the possibility of a homicide conviction, addicts will more readily utilize the GSOL and call for medical intervention when a fellow addict is overdosing. Additionally, separating addicts from dealers allows prosecutors to use the drug-induced homicide law as it was intended, while freeing up investigatory and prosecutorial resources for the more complex task of investigating commercial drug dealers and disrupting the drug trade. This approach would begin to align Wisconsin's criminal laws with the state's rehabilitation-focused public health efforts at combating opioid addiction in communities and reducing overdose deaths.

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INTRODUCTION

Over the last two decades, opioid addiction¹ has ravaged American communities.² The overprescribing of opioid painkillers, the importation of heroin and fentanyl, and a dearth of accessible treatment options have

1. This Comment attempts to strike a balance between using accessible terminology and avoiding problematic language. Medical and public health professionals are shifting away from addiction-related language that may have the effect of stigmatizing substance use disorders and are instead advocating for the use of “person-first” language. See Michael P. Botticelli & Howard K. Koh, *Changing the Language of Addiction*, 316 J. AM. MED. ASS’N 1361 (2016); *Words Matter - Terms to Use and Avoid When Talking About Addiction*, NAT’L INST. ON DRUG ABUSE (Oct. 23, 2020), <https://www.drugabuse.gov/nidamed-medical-health-professionals/health-professions-education/words-matter-terms-to-use-avoid-when-talking-about-addiction> [<https://perma.cc/KB9L-F9XH>]. The author of this Comment supports this shift, recognizing that current terminology can “elicit negative associations, punitive attitudes, and individual blame.” NAT’L INST. ON DRUG ABUSE, *supra*. Thus, this Comment avoids terms like “drug abuse” or “drug abuser” but still uses some common terms related to addiction. See Botticelli & Koh, *supra*, at 1361–62 (highlighting the prevalence of potentially problematic language in the titles of addiction journals and the names of government agencies).

2. See NAT’L INST. ON DRUG ABUSE, OPIOID OVERDOSE CRISIS (May 27, 2020), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> [<https://perma.cc/H6S8-URSE>].

contributed to a national crisis that is not confined to any geographic region or social class.³ Over 450,000 Americans have died of opioid-involved overdoses since 1999, and annual opioid deaths have more than quadrupled.⁴ While no part of the U.S. is unaffected, the opioid epidemic has disproportionately impacted some states, including Wisconsin.⁵ Wisconsin has implemented a wide range of tactics in response to the crisis.⁶ The state's nationally recognized public health and community-based efforts focus on effective treatment programs and increased education.⁷ Yet Wisconsin's criminal justice system does not align with these public programs: the criminal laws that intersect with the opioid crisis conflict with one another and are incongruous with the public health goals of the state.⁸

Wisconsin's opioid-related laws resemble laws in other states.⁹ Across the nation, state governments have sought to combat the opioid crisis both by charging more people under largely dormant laws from the 1980s and by enacting new legislation.¹⁰ Homicide laws that hold the drug suppliers liable for overdose deaths, often called "Len Bias laws,"

3. *Id.*

4. CTRS. FOR DISEASE CONTROL & PREVENTION, OPIOID DATA ANALYSIS AND RESOURCES, <https://www.cdc.gov/drugoverdose/data/analysis.html> [https://perma.cc/NM3A-K7KC] (last modified Mar. 19, 2020); Andrea Schmick & Kris Whitman, *Reducing Opioid and Addiction's Impact*, 21 U. OF WIS. SCH. MED. & PUB. HEALTH Q. 5 (2019) (discussing Wisconsin's public health response to the opioid crisis).

5. CTRS. FOR DISEASE CONTROL & PREVENTION, 2018 DRUG OVERDOSE DEATH RATES, <https://www.cdc.gov/drugoverdose/data/statedeaths/drug-overdose-death-2018.html> [https://perma.cc/HFA6-FX9L] (last modified Mar. 10, 2020) (compiling 2018 drug overdose deaths by state).

6. See Schmick & Whitman, *supra* note 4, at 5.

7. See *id.*; NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, ENDING THE OPIOID CRISIS: A PRACTICAL GUIDE FOR STATE POLICYMAKERS 7–8 (2017), <https://drugfree.org/article/ending-the-opioid-crisis-a-practical-guide-for-state-policymakers/> [https://perma.cc/BFH2-7HQR] (select "Download PDF" option) [hereinafter ENDING THE OPIOID CRISIS].

8. Compare LINDSAY LASALLE, DRUG POLICY ALLIANCE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 21–22 (2017), https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf [https://perma.cc/7LFT-V5LQ] (describing the problems with Wisconsin's drug-induced homicide law in the context of the opioid crisis), with ENDING THE OPIOID CRISIS, *supra* note 7, at 7–8.

9. See Nicole Schill, *The Fatal Shortcomings of Our Good Samaritan Overdose Statutes and Proposed Model Statute*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 123, 133–34 (2018); LASALLE, *supra* note 8, at 2.

10. See Valena E. Beety, Alex D. Kreit, Anne Boustead, Jeremiah Goulka & Leo Beletsky, *Drug-Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707, 710 & n.20 (2019); Schill, *supra* note 9, at 126–29.

have existed since the mid-1980s.¹¹ In an effort to reduce opioid deaths, many states have also introduced less punitive alternatives and adopted immunity statutes that offer some level of immunity from prosecution to people who call 911 for overdose victims, along with providing immunity for the overdosed person in many cases.¹² Today, a majority of states have implemented these Good Samaritan Overdose Laws (GSOLs).¹³

This Comment examines Wisconsin's Len Bias law and GSOL in the context of the opioid crisis.¹⁴ In recent years, the scope of Wisconsin's Len Bias law has expanded: the law is now primarily charged against addicts who share drugs with their friends or partners.¹⁵ The line between drug addict and drug supplier is often blurry, but today, opioid addicts are charged under Wisconsin's Len Bias law far more often than large-scale dealers who operate for financial gain.¹⁶ While Wisconsin's GSOL was intended to alleviate fears of prosecution, the law is hampered by the very real possibility of homicide charges in overdose situations and also by its own design.¹⁷ The state's GSOL is unique because, unlike other states' versions, it applies when a user is suffering from an "adverse reaction" to drug intoxication, as well as in overdose situations.¹⁸ However, numerous amendments and judicial interpretations have frustrated the legislature's initial goals.¹⁹ The statute appears to offer

11. Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html> [https://perma.cc/N4P5-S85R] [hereinafter Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*]. Drug-induced homicide laws are often referred to by this name because the overdose death of a basketball player named Len Bias was a catalyst for the federal legislation that has served as a model for similar state laws. *See id.*

12. Schill, *supra* note 9, at 138–39, 148.

13. *Id.* at 133.

14. WIS. STAT. §§ 940.02(2), 961.443 (2017–18).

15. *See* Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, *supra* note 11.

16. Bryan Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, FOX 6 (Feb. 10, 2017), <https://www.fox6now.com/news/high-level-drug-dealers-rarely-charged-with-drug-related-homicides-as-wisconsin-death-toll-reaches-10k> [https://perma.cc/442L-CTK7] [hereinafter Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*]; *see also* LASALLE, *supra* note 8, at 3, 21 (discussing Wisconsin Fox 6's report on drug-induced homicide cases).

17. Schill, *supra* note 9, at 150–51.

18. § 961.443.

19. The drafting file for the original 911 Good Samaritan senate bill reveals an intent to provide broad protections to aiders, including "immunity from prosecution for a crime relating to another person's reaction, such as manufacturing, delivering or distributing the controlled substance that harmed the other person." S. 215–2361, 101st Sess., at 10 (Wis. 2013) (explaining the original intent of S.B. 215 in an email to Senator

broader protection than its counterparts in other jurisdictions, but in practice, this protection is illusory.²⁰

Both the Len Bias law and the GSOL are implicated in the common situation where someone shares drugs and another person overdoses in her presence. However, each law dictates a very different outcome for the person witnessing the overdose.²¹ Circumstances largely outside the witness's control decide whether she will be labeled a killer or a lifesaver by the criminal justice system.²² If she is not also incapacitated, the witness has agency and control over her choice to call 911, but this act is far from determinative of the legal outcome if the witness is charged with a crime when aid arrives.²³ The tension between these two laws forces the drug addict to make an impossible choice when a friend is overdosing in front of her: If she calls 911, her friend might survive, but if her friend passes away before help arrives, she could be charged with homicide.²⁴

This Comment examines the tension between Wisconsin's GSOL and its Len Bias law in the context of the opioid crisis. Part I describes the development of these laws and the history of Wisconsin's opioid crisis. Part II examines the incongruous and conflicting dynamic between these laws in the context of the opioid crisis. Part III suggests an approach that might help alleviate the tension between these laws and help reduce opioid deaths. The tension between the GSOL and the Len Bias law reflects the tension between Wisconsin's harm reduction-focused public

Lehman). An email from State Representative John Nygren's office expressed an interest in narrowing SB 215 to specifically focus on drugs, instead of also including alcohol protections. In addition, the email suggested treatment options and a naloxone provision. "We would also like to include language that will provide deferred prosecution with the option of treatment for persons who call for or receive medical assistance in an overdose situation and language providing individuals, acting in good faith, the legal right to receive, possess, or administer naloxone to an individual suffering from an apparent overdose." Assemb. B. 194-3164, 101st Sess., at 6 (Wis. 2013).

20. See Bev Kelley-Miller, Letter to the Editor, *Letter: Expand Immunity on 911 Good Samaritan Law*, POST CRESCENT (May 6, 2017), <https://www.postcrescent.com/story/opinion/readers/2017/05/06/letter-expand-immunity-911-good-samaritan-law/101195876/> [https://perma.cc/5DGW-KVWT]; Bruce Vielmetti, *Mom Who Overdosed on Her First Heroin Use Is Facing a Felony, While Her Supplier Gets a Break*, MILWAUKEE J. SENTINEL (Oct. 23, 2018), <https://www.jsonline.com/story/news/crime/2018/10/23/opioid-epidemic-good-samaritan-law-no-help-wisconsin-overdose-mom/1651551002/> [https://perma.cc/3QXG-TG74].

21. Addicts regularly use opioids together, which presents an opportunity for medical intervention in overdose situations. See Schill, *supra* note 9, at 146.

22. See Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 738.

23. Schill, *supra* note 9, at 142-48.

24. Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 2019 UTAH L. REV. 833, 837, 839.

health efforts and its punishment-focused criminal justice system.²⁵ Integrating public health-based education programs that focus on rehabilitation and harm reduction into the criminal justice system would eradicate dated understandings of addiction. At present, the criminal justice system contributes to the cycles of addiction that too often end in overdose deaths.²⁶

I. THE CRIMINAL LAWS ADDRESSING WISCONSIN'S OPIOID CRISIS

Wisconsin is in a region that has been particularly tortured by opioid addiction.²⁷ In the Midwest, opioid overdoses jumped 70% between July 2016 and September 2017—compared to a national increase of 30%.²⁸ The history of the state's opioid epidemic shows three distinct waves of opioid-related deaths.²⁹ The first wave began in 1999, when “deaths involving opioids began to rise following an increase in the prescribing of opioids for the treatment of pain.”³⁰ The second wave began in 2010, with an increase in heroin-related deaths that correlated with restricted access to opioid prescriptions.³¹ The most recent wave of deaths began in 2014, when overdose deaths connected to synthetic opioids, such as fentanyl, began to increase.³²

Wisconsin state officials quickly recognized the growing problem and responded. In September 2016, then-Governor Scott Walker issued a public health advisory to bring attention to the growing crisis, emphasizing that the number of residents dying from overdoses in the state had surpassed the number dying “from motor vehicle crashes, as well as suicide, breast cancer, colon cancer, firearms, influenza, or HIV.”³³ The state has received substantial federal grants for opioid

25. *Id.* at 881.

26. *See* Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 736–37.

27. Schmick & Whitman, *supra* note 4, at 5.

28. *Id.* (“In Wisconsin, emergency department visits for opioid overdose increased 109 percent—among the highest in the nation.”).

29. WIS. DEP'T OF HEALTH SERVS., OPIOIDS, <https://www.dhs.wisconsin.gov/opioids/index.htm> [<https://perma.cc/83PH-6J9P>] (last modified May 18, 2020).

30. *Id.*

31. *Id.*

32. *Id.*; *see generally* BEN WESTHOFF, FENTANYL, INC. 28 (2019) (describing how prescribing restrictions and heroin shortages contributed to the shift to fentanyl and other synthetic opioids).

33. STATE OF WIS. DEP'T OF HEALTH SERVS., PUBLIC HEALTH ADVISORY (2016), <https://gcpublihealth.org/wp-content/uploads/2012/02/opioid-public-health-advisory.pdf> [<https://perma.cc/PD2M-UFNS>].

addiction prevention³⁴ and has taken concerted steps to implement drug use prevention programs.³⁵

Wisconsin has received national recognition for its public health initiatives combating the opioid crisis.³⁶ These initiatives focus on harm reduction, education, and prevention and have been recommended to policymakers across the country.³⁷ Wisconsin's effective programs include safe prescribing initiatives,³⁸ public awareness and educational campaigns,³⁹ a prescription drug take-back program,⁴⁰ community-based recovery support services,⁴¹ and changes in state regulations that make medication-assisted treatment more accessible.⁴² The University of Wisconsin Medical School's physician training program was one of the first programs in the United States to train doctors in addiction medicine.⁴³ Today, this program serves as a model for the American Board of Addiction Medicine.⁴⁴ Yet these public health initiatives are largely unavailable to people within the criminal justice system, so once an addict enters the system, his rehabilitation opportunities are severely limited.⁴⁵

In stark contrast to other diseases, "addiction is inherently marked by continual law breaking."⁴⁶ Wisconsin's prison population today provides an unsettling illustration of this close relationship.⁴⁷ Two out of five women and one out of four men admitted to prison have active drug offenses.⁴⁸ 94% of offenders who have died after release from prison had

34. Sophie Carson, *Wisconsin Gets \$17 Million in Federal Grant Money to Fight Opioid Crisis. How It Will Be Used*, MILWAUKEE J. SENTINEL (Sept. 4, 2019), <https://www.jsonline.com/story/news/politics/2019/09/04/wisconsin-awarded-17-million-opioid-crisis-grants-hhs-cdc/2215125001/> [https://perma.cc/WD58-MV5M].

35. WIS. DEP'T OF HEALTH SERVS., WISCONSIN STATE TARGETED RESPONSE TO THE OPIOID CRISIS (STR): 2018–2019 FINAL PREVENTION ACTIVITY REPORT 1 (2019), <https://www.dhs.wisconsin.gov/publications/p02175-18-19.pdf> [https://perma.cc/HFU5-QN8T].

36. ENDING THE OPIOID CRISIS, *supra* note 7, at 6.

37. *See id.*

38. *Id.* at 20.

39. *Id.* at 14.

40. *Id.* at 22.

41. *Id.* at 57.

42. *Id.* at 44.

43. *Id.* at 41.

44. *Id.*

45. *See infra* note 287 and accompanying text for a discussion of the limited rehabilitation options for inmates.

46. Schill, *supra* note 9, at 128.

47. STATE OF WIS. DEP'T OF CORR., DRUG OFFENDER PRISON ADMISSION TRENDS (2000–2016) (2017), <https://doc.wi.gov/DataResearch/DataAndReports/DrugOffenderPrisonAdmissions2000to2016.pdf> [https://perma.cc/JAJ4-3677].

48. *Id.*

an active substance use issue.⁴⁹ These statistics reflect a historical approach of criminalizing drug addiction, which began in the 1980s⁵⁰ but is still prevalent in the criminal justice system today.⁵¹ While the Len Bias law is directly descended from this punitive approach,⁵² the GSOL was born out of a harm-reduction philosophy, in line with public health goals.⁵³ The next sections expand on the background of these two laws.

A. *The Len Bias Law*

In 1986, Len Bias, a college basketball player at the University of Maryland, died from a cocaine overdose at the age of twenty-two.⁵⁴ Following his death, federal legislative committees began drafting the Anti-Drug Abuse Act of 1986, which prescribed a minimum sentence of twenty years and a maximum sentence of life in prison for a person who distributed drugs that resulted in death.⁵⁵ Many states followed suit, codifying versions of the federal law.⁵⁶ Today, thirty-six states have a Len Bias law in effect.⁵⁷ The original purpose of these laws was to hold drug dealers and manufacturers liable for drug deaths,⁵⁸ but with the onset of the opioid crisis, more drug users are being prosecuted under these laws for their connection to other users' overdose deaths.⁵⁹

49. STATE OF WIS. DEP'T OF CORR., OPIOID OVERDOSE DEATHS AND HOSPITALIZATIONS (2018), <https://doc.wi.gov/DataResearch/DataAndReports/OpioidOverdoseReport.pdf> [<https://perma.cc/W46B-RA9P>].

50. Leo Beletsky, Lindsay LaSalle, Michelle Newman, Janine Paré, James Tam & Alyssa Tochka, *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration*, 7 NE. U. L.J. 149, 154 (2015).

51. *Id.* at 154–55.

52. Beletsky, *supra* note 24, at 870.

53. *See supra* note 19 and accompanying text.

54. Michael Weinreb, *The Day Innocence Died*, ESPN, <http://www.espn.com/espn/eticket/story?page=bias> [<https://perma.cc/B5WK-UMU7>] (last accessed Oct. 18, 2020).

55. Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 102, 100 Stat. 3207-2 (1986) (codified as amended at 21 U.S.C. § 841(b)(1)(B) (2012)); *see also* Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, *supra* note 11. The man who allegedly gave Bias the fatal drug was acquitted of charges in Bias's death but was later convicted after a federal investigation revealed he sold over 110 pounds of cocaine over an eighteen-month period. Paul W. Valentine, *Tribble Sentenced to 10 Years for Dealing Cocaine*, WASH. POST (Oct. 16, 1993), <https://www.washingtonpost.com/wp-srv/sports/longterm/memories/bias/launch/triblate.htm> [<https://perma.cc/8XUP-94X7>].

56. Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, *supra* note 11.

57. *Id.*

58. *Id.*

59. *See id.*

Wisconsin's Len Bias law was enacted in 1988 as an amendment to Wisconsin's first-degree reckless homicide statute.⁶⁰ The law was adopted separately from the homicide code revision completed earlier that year.⁶¹ Its original purpose mirrored Congress's intent behind the federal law: to disrupt the drug trade and hold drug dealers responsible for overdose deaths.⁶² The current statute, Section 940.02(2), closely resembles the original law's broad language.⁶³

Under the statute, anyone who delivers, distributes, manufactures, or administers a controlled substance that causes the death of another may be charged with a Class C felony.⁶⁴ The controlled substance does not have to be the only cause of death, nor does it have to be the predominant cause.⁶⁵ In fact, Wisconsin does not have a statutory definition of "cause."⁶⁶ Instead, a "substantial factor" test controls causation: If the drug in question is found to be a substantial factor in causing the death, the causation requirement is met.⁶⁷

Wisconsin's Len Bias law was rarely charged in the first few decades after it was enacted.⁶⁸ As the number of charges has spiked in recent years,⁶⁹ the law has been increasingly applied to drug users who obtain narcotics to consume with friends or acquaintances.⁷⁰ In a recent study of one hundred Wisconsin Len Bias cases, "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

60. Stephanie Grady, "It's Been Used More and More," but Is Wisconsin's Len Bias Law an Effective Deterrent to Opioid Abuse?, Fox 6 Now (Nov. 21, 2016), <https://fox6now.com/2016/11/21/its-been-used-more-and-more-but-is-wisconsins-len-bias-law-an-effective-deterrent-to-opioid-abuse/> [<https://perma.cc/5S6A-BAFZ>].

61. Walter Dickey, David Schwartz & James L. Fullin, Jr., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WIS. L. REV. 1323, 1351.

62. See Grady, *supra* note 60.

63. WIS. STAT. § 940.02(2) (2017-18).

64. *Id.*; *State v. McIntosh*, 552 N.W.2d 898, ¶ 1 (Wis. Ct. App. 1996) (unpublished table decision). Under Wisconsin's current sentencing guidelines, the maximum penalty for a Class C felony is a \$100,000 fine and forty years imprisonment. WIS. STAT. § 939.50(3)(c) (2017-18).

65. See *State v. Laughrin*, No. 2011AP1600-CR, 2012 WL 2094392, at *1-2 (Wis. Ct. App. June 12, 2012).

66. See Dickey, Schwartz & Fullin, *supra* note 61, at 1329.

67. See *Laughrin*, 2012 WL 2094392, at *6-7; *State v. Below*, 799 N.W.2d 95, 101-02 (Wis. Ct. App. 2011) (quoting *State v. Oimen*, 516 N.W.2d 399, 404-05 (Wis. 1994)). The statute's causation requirement is discussed in detail in Section II.B.2.

68. Grady, *supra* note 60; see also Scott Anderson, *Fatal Heroin Dose Leads Man to be Charged Under State's 'Len Bias' Law*, PATCH (Feb. 28, 2017, 8:38 PM), <https://patch.com/wisconsin/waukesha/fatal-heroin-dose-leads-man-charged-under-state-len-bias-law> [<https://perma.cc/9497-ZKEL>].

69. Grady, *supra* note 60; Anderson, *supra* note 68.

70. See Grady, *supra* note 60.

own substance use disorder.”⁷¹ In sum, as it is being charged, the law is no longer targeted at disrupting the drug trade, and the distinction between drug users and drug dealers has disappeared.⁷²

B. *The Good Samaritan Overdose Law*

Public health researchers Deborah Lewis and Timothy Marchell conducted the first study of a 911 Good Samaritan policy in 2006.⁷³ Lewis and Marchell’s study focused on the effect of Cornell University’s amnesty policy on undergraduates who called 911 for help in alcohol overdose situations.⁷⁴ The positive effects of the policy were clear: While student alcohol consumption remained the same, more than twice the number of students called 911 after the university established the policy.⁷⁵ State legislatures adopted similar 911 Good Samaritan policies and adapted them to provide immunity for overdose victims and their aiders.⁷⁶ New Mexico enacted the first GSOL in 2007,⁷⁷ and by 2017, forty states and the District of Columbia had enacted versions of a GSOL.⁷⁸

Wisconsin’s GSOL, enacted in 2014, was part of a legislative response to the opioid crisis.⁷⁹ Generally, amnesty statutes provide one

71. LASALLE, *supra* note 8, at 3.

72. *See id.* at 21. One Wisconsin D.A. was quoted as saying, “A person died, so it doesn’t matter to me whether the person who delivered it is a fellow junkie, is a friend, didn’t sell it but actually gave it to them” in the context of bringing Len Bias charges. *Id.* (“[P]rosecutors are ignoring criminal culpability and blindly charging anyone they can identify.”).

73. Deborah K. Lewis & Timothy C. Marchell, *Safety First: A Medical Amnesty Approach to Alcohol Poisoning at a U.S. University*, 17 INT’L J. DRUG POL’Y 329, 329 (2006).

74. *Id.*

75. *Id.*

76. Schill, *supra* note 9, at 133–34.

77. *Id.* at 126.

78. *Id.*

79. WIS. STAT. § 961.443 (2017–18); 2013 Wis. Act 194. State Representative John Nygren, whose daughter has struggled with opioid addiction, led the charge with opioid-focused legislation. *See* Jessie Opoien, *Led by State Rep. John Nygren, Wisconsin Families Caught in Heroin’s Grasp Fight Back*, CAP. TIMES (Dec. 2, 2015), https://madison.com/ct/news/local/govt-and-politics/led-by-state-rep-john-nygren-wisconsin-families-caught-in/article_640a242f-91d6-5dd6-a8c4-ca46a14304d8.html [https://perma.cc/AUD2-ZZMH]. Nygren introduced his HOPE (Heroin Opiate Prevention and Education) agenda as a first step towards fighting the opioid crisis and received bipartisan support for his initiative. *Id.* In January 2020, Cassandra Nygren, John Nygren’s daughter, received a thirteen-year prison sentence under Wisconsin’s Len Bias law. *See* Benita Mathew, *Cassie Nygren Gets 13 Years in Prison for Role in Overdose Death of Pregnant Woman*, GREEN BAY PRESS GAZETTE (Feb. 20, 2020, 5:30 PM), <https://www.greenbaypressgazette.com/story/news/crime/2020/02/20/cassie-nygren-sentenced-prison-overdose-death-pregnant-woman/4818079002/>

of three levels of protection from criminal liability: mitigating circumstances during sentencing, an affirmative defense after charges are filed, or full immunity from prosecution.⁸⁰ Wisconsin's GSOL intended to provide the highest level of protection—immunity.⁸¹ The law includes a unique provision that provides protection beyond a typical overdose situation: The limited immunity applies if the aider reasonably believes that the aided person is “suffering from an overdose of, *or other adverse reaction to*, any controlled substance”⁸² By including drug reactions beyond the typical overdose, the statute has the potential to offer greater protection to drug users.⁸³

Under Wisconsin's current GSOL, an aider is immune from prosecution for certain crimes, while an aided person must receive deferred prosecution for the same set of crimes.⁸⁴ The statute limits immunity to bail jumping,⁸⁵ possession of drug paraphernalia,⁸⁶ possession of a controlled substance or a controlled substance analog,⁸⁷ and possession of a masking agent.⁸⁸ The law's protection applies only if the listed crimes take place as part of the circumstances surrounding or leading to an aider's rendering of aid to a drug overdose or adversely

[<https://perma.cc/SV2X-WNX9>]. Cassandra gave a friend who was suffering from withdrawal symptoms heroin laced with fentanyl. *Id.*

80. Schill, *supra* note 9, at 138–39. Statutes with the lowest level of protection make the act of calling 911 a mitigating circumstance in criminal prosecution. *Id.* at 139–40. Because guilt is a prerequisite for mitigating circumstances to be applied, there is no protection from arrest or prosecution. *Id.* The second level of protection makes calling 911 an affirmative defense. *Id.* at 140. Here, a defendant may be able to completely escape criminal liability by raising the defense and successfully proving all its elements. *Id.* However, the prosecution may rebut a successfully raised defense with its own evidence. *Id.* at 141. This is one of the few situations in a criminal trial where the burden of proof is shifted to the defendant. *Id.* at 140. Most importantly, this level of protection provides no protection from arrest or prosecution. *Id.* The third level is immunity. *Id.* at 141. Here, a person who calls 911 will not be arrested or charged for the listed crimes. *See id.* at 142.

81. *See supra* note 19 and accompanying text; *see also* Schill, *supra* note 9, at 141–42.

82. WIS. STAT. § 961.443 (emphasis added); 2013 Wis. Act 194.

83. *See* § 961.443; *see also supra* note 19 and accompanying text.

84. § 961.443. Deferred prosecution agreements do not dismiss charges outright; instead, dismissal is contingent on the defendant successfully completing treatment. *See* 2017 Wis. Act 59.

85. WIS. STAT. § 946.49 (2017–18).

86. § 961.573.

87. § 961.41(3g).

88. § 961.69(2). A masking agent is a substance used to fool or “beat” a drug test. *Masking Agents/Adulterants*, MAYO CLINIC LAB'YS, <https://www.mayocliniclabs.com/test-info/drug-book/masking.html>

[<https://perma.cc/QLJ8-U8BM>] (last visited Jan. 23, 2020). Masking agents can produce false negatives on tests, generally through assay interference or urine dilution. *Id.*

affected victim.⁸⁹ Importantly, the aider protection only applies “if the aider’s attempt to obtain assistance occurs *immediately* after the aider believes the other person is suffering from the overdose or other adverse reaction.”⁹⁰

II. THE DEVELOPMENT AND APPLICATION OF THESE LAWS FRUSTRATES WISCONSIN’S GOAL OF REDUCING OPIOID DEATHS

Despite purporting to align with Wisconsin’s public health goals, the state’s criminal justice system has taken a different approach in addressing the opioid crisis.⁹¹ As discussed above, the legislature enacted the Len Bias law and the GSOL with the express goal of reducing drug crimes and addiction-related deaths.⁹² This Part considers the evolution and application of these laws and examines why they are not effective tools in combating the opioid crisis.

First, the legislature’s inconsistent approach in developing these laws leads to discordant prosecutions and convictions.⁹³ The lack of clarity within these laws saddles judges and prosecutors with the impossible task of reconciling two laws that fundamentally undermine one another.⁹⁴ Second, judicial interpretation of the laws has distorted the plain meaning of both statutes, creating new iterations of the statutes without new legislation.⁹⁵ While the causation standard in the Len Bias law⁹⁶ and the constriction of the GSOL’s amnesty⁹⁷ decrease the tension between the two laws, the current implementation of the laws does not successfully mitigate opioid deaths.⁹⁸ Third, the future of these laws must be carefully evaluated because, as the use of lethal synthetic opioids grows in Wisconsin, the death toll threatens to rise.⁹⁹

A. Contradictory Legislative Intent and Direction

The many iterations of the GSOL contrast sharply with the immutable Len Bias law, but the laws are similarly ineffective in reducing opioid deaths.¹⁰⁰ While the Len Bias law represents the

89. § 961.443.

90. 2017 Wis. Act 33, sec. 1g, § 961.443(2)(a) (emphasis added).

91. See *supra* note 19 and accompanying text; LASALLE, *supra* note 8, at 21.

92. See *supra* note 19 and accompanying text; LASALLE, *supra* note 8, at 21.

93. See *infra* Part II.A.

94. See *infra* Part II.A–B.

95. See *infra* Part II.B.

96. See *infra* Section II.B.2.

97. See *infra* Section II.B.1.

98. See *infra* Part II.C.

99. See *infra* Part II.C.

100. See Kelley-Miller, *supra* note 20.

criminalization of addiction that arose in the 1980s,¹⁰¹ the GSOL suggests a shift toward compassion.¹⁰² Yet, by failing to adjust the framework of the Len Bias law to the current drug crisis or address the dramatic increase in charges, the legislature diminishes any chance of effectively reducing overdose deaths with the GSOL.¹⁰³ Conversely, the legislature's relationship with the GSOL has been very active, with multiple amendments that have increased protection in some places while constricting it in others.¹⁰⁴

The volatility of the GSOL is fatal to its purpose because community outreach programs and law enforcement cannot communicate a consistent version of an already confusing law to the public and at-risk individuals.¹⁰⁵ But, at the same time, the collateral dangers associated with drug overdoses, including Len Bias charges, are well understood among drug users.¹⁰⁶ Therefore, addicts who already distrust the criminal justice system are unlikely to use an amnesty policy that keeps changing, especially when the risk of homicide charges is so great.

1. THE CONTINUAL AMENDMENT AND CONFUSION OF THE GSOL

The GSOL was inadequate in its original iteration and has since been weakened past the point of any tangible effectiveness.¹⁰⁷ Even before its limiting amendments, the GSOL was insufficient because the class of protected crimes was limited and critical harm-reduction recommendations were not included.¹⁰⁸ Harm reduction programs work

101. Schill, *supra* note 9, at 128.

102. *Id.* at 126.

103. See 1987 Wis. Act 339, § 102; 1987 Wis. Act 399; 1995 Wis. Act 448, §§ 451–52; 1997 Wis. Act 295; 1999 Wis. Act 57, §§ 8–10; 2001 Wis. Act 109.

104. See 2013 Wis. Act 194; 2015 Wis. Act 264, § 2; 2017 Wis. Act 12, § 179; 2017 Wis. Act 33; 2017 Wis. Act 59, §§ 2251xg–xs, 9452; 2017 Wis. Act 364, § 43.

105. See Amanda D. Latimore & Rachel S. Bergstein, “Caught with a Body” *Yet Protected by Law? Calling 911 for Opioid Overdose in the Context of the Good Samaritan Law*, 50 INT’L J. DRUG POL’Y 82, 83 (2017).

106. *Id.* at 85, 87.

107. See *State v. Williams*, 888 N.W.2d 1, 2 (Wis. Ct. App. 2016); 2013 Wis. Act 194; see also Schill, *supra* note 9, at 150–51.

108. See 911 GOOD SAMARITAN AD-HOC COMM., WIS. STATE COUNCIL ON ALCOHOL & OTHER DRUG ABUSE, 911 GOOD SAMARITAN RECOMMENDATIONS 14 (2013) [hereinafter GSOL RECOMMENDATIONS] (listing the 911 Good Samaritan Ad-hoc Committee’s recommended provisions based on the committee’s research on the most effective GSOL to combat Wisconsin’s opioid crisis). Nicole Schill analogizes GSOLs to needle exchange programs, noting that both are policies of harm reduction. Schill, *supra* note 9, at 134–36. Needle exchange programs allowed addicts to exchange their used needles for clean needles, in an effort to reduce fatalities from blood-borne illness—specifically AIDS. See *id.* at 134. Needle exchanges have helped mitigate AIDS fatalities and slow the spread of HIV and other blood-borne illnesses. See *id.* at 134–36. “Statistics

to mitigate the effects of a serious public health problem “while also acknowledging the inability to eliminate the problem through programs of complete abstinence or zero tolerance.”¹⁰⁹ The policy behind Wisconsin’s GSOL was one of harm reduction, yet, the statute does not reflect that policy.¹¹⁰

Before enacting the statute, the legislature considered recommendations from an ad-hoc committee.¹¹¹ The committee’s report, which relied on public health and medical research, provided twelve recommendations on the GSOL legislation as well as suggestions for law enforcement and community education.¹¹² The legislature adopted the committee’s recommendations to provide limited immunity to aiders.¹¹³ That said, the lawmakers did not include the committee’s recommendations for immunity for aided persons and the option of deferred prosecution in the first version of the law.¹¹⁴ Additionally, the recommendations to include a naloxone provision and treatment intervention to overdose victims did not appear in the statute.¹¹⁵

The Wisconsin Legislature has amended its GSOL five times since it was enacted.¹¹⁶ The original statute did not protect those on probation, parole, or extended supervision, nor did it provide immunity to the aider.¹¹⁷ In 2015, the legislature amended the statute to include some protection for aided persons and for aiders in possession of a masking agent.¹¹⁸ Despite this slight increase in protection, Wisconsin, like other states, has never included the majority of drug-related offenses, including drug-induced reckless homicide, in its GSOL protections.¹¹⁹

have shown that these programs do not encourage drug use nor do they encourage the injecting of drugs.” *Id.* at 136. Yet despite this success, needle exchange programs still deal with “legal, political, and social obstacles . . . many of which now confront [GSOLs].” *Id.* at 134–35.

109. Schill, *supra* note 9, at 136.

110. See 2013 Wis. Act 194; Assemb. B. 447-3164, 101st Sess. (Wis. 2013); see also Schill, *supra* note 9, at 156 (“[GSOLs] are not designed to stop drug use or prevent overdoses, but rather to reduce the number of fatal overdoses.”).

111. See GSOL RECOMMENDATIONS, *supra* note 108, at 1.

112. *Id.* at 9–10.

113. *Id.* at 7; 2013 Wis. Act 194.

114. Compare GSOL RECOMMENDATIONS, *supra* note 108, at 14, with 2013 Wis. Act 194.

115. Compare GSOL RECOMMENDATIONS, *supra* note 108, at 14, with 2013 Wis. Act 194.

116. 2015 Wis. Act 264, § 2; 2017 Wis. Act 12, § 179; 2017 Wis. Act 33; 2017 Wis. Act 59, §§ 2251xg–xs, 9452; 2017 Wis. Act 364, § 43.

117. Kelley-Miller, *supra* note 20.

118. See 2015 Wis. Act 264, § 2; WIS. STAT. § 961.443 (2017–18).

119. See 2013 Wis. Act 194; 2015 Wis. Act 264, § 2; 2017 Wis. Acts 12, § 179; 2017 Wis. Act 33; 2017 Wis. Act 59, §§ 2251xg–xs, 9452; 2017 Wis. Act 364, § 43. As Schill points out, “[m]any [GSOLs] fail to include the most relevant of crimes,

In 2017, the legislature made major changes to the statute in four separate acts.¹²⁰ The 2017 amendments shrank the scope of the GSOL,¹²¹ although some of the changes have yet to take effect.¹²² Act 33 was enacted with a sunset provision to take effect thirty-seven months after the changes were implemented.¹²³ While protection was extended to those on parole, probation, and extended supervision, the new law made the requirements more stringent for an aider to receive immunity.¹²⁴ An objective reasonable person standard replaced the aider's subjective belief that the aided person was overdosing or suffering an adverse reaction.¹²⁵ This amendment also required that the aider actually make contact with law enforcement or emergency services; unsuccessful attempts to make contact were no longer sufficient.¹²⁶ In Act 59, bail-jumping was given limited protection, but the more general protection against the revocation of parole, probation, and extended supervision was repealed, effective mid-2020.¹²⁷ Instead, aided persons will have to complete a treatment program to avoid revocation, but "if a treatment program is unavailable or would be prohibitive financially," aided persons must instead "agree[] to be imprisoned in the county jail for not less than 15 days."¹²⁸ Overall, the GSOL's amendments have created a more narrow and confusing law with limited immunity.¹²⁹

The current GSOL only provides immunity to aiders if they summon independent medical help *immediately*.¹³⁰ While administering naloxone—commonly called Narcan—is not a criminal act,¹³¹ the GSOL provides no immunity if the aider does not *immediately* call for outside

those which would naturally be expected to be present at the scene of an overdose." Schill, *supra* note 9, at 143. The drafting file for Wisconsin's original GSOL senate bill reveals an intention to avoid this common omission, envisioning a law that provided "immunity from prosecution for a crime relating to another person's reaction, such as manufacturing, delivering or distributing the controlled substance that harmed the other person." DRAFTER'S NOTE FROM THE LEGISLATIVE REFERENCE BUREAU, Letter from Peggy Hurley, Legis. Att'y, to John Lehman, Sen. (May 14, 2013) (on file as part of S.B. 215-3261, 101st Sess. (Wis. 2013) drafting bill).

120. 2017 Wis. Act 12, § 179; 2017 Wis. Act 33; 2017 Wis. Act 59, §§ 2251xg–xs, 9452; 2017 Wis. Act 364, § 43.

121. *See* 2017 Wis. Act 12, § 179; 2017 Wis. Act 33; 2017 Wis. Act 59, §§ 2251xg–xs, 9452; 2017 Wis. Act 364, § 43.

122. 2017 Wis. Acts 12, § 179; 2017 Wis. Act 33; 2017 Wis. Act 59, §§ 2251xg–xs, 9452; 2017 Wis. Act 364, § 43.

123. 2017 Wis. Act 33 § 1y.

124. *Id.* § 1g.

125. *Id.* § 1c.

126. *Id.*

127. 2017 Wis. Act 59, § 2251xs.

128. *Id.* § 2251xs.

129. *See supra* Section II.A.1.

130. 2017 Wis. Act 59, § 2251xm.

131. GSOL RECOMMENDATIONS, *supra* note 108, at 14.

help.¹³² Rather than adopt the ad-hoc committee's recommendation to include a naloxone provision in the GSOL, the legislature enacted a naloxone immunity provision in the civil code.¹³³ So, today, if an aider administers naloxone to an overdose victim and later calls 911, the aider will not face any penalty for administering the naloxone itself, but the GSOL's protections become unavailable.

Naloxone is a highly effective and inexpensive medication that can reverse opioid overdoses when administered in time.¹³⁴ Opioid overdoses depress a victim's respiratory rate, causing death slowly.¹³⁵ In theory, this delayed physiological response would limit overdose deaths because bystanders could summon help well before a victim died. But in a state with many rural areas often underserved by emergency services, an ambulance may not arrive in time.¹³⁶ The fear of legal consequences compounds these pragmatic difficulties, decreasing the likelihood of 911 calls and thus increasing the likelihood of fatal overdoses.¹³⁷

The immediacy requirement imposed by the 2017 amendments distances the GSOL from proven harm-reduction mechanisms like naloxone.¹³⁸ When a person is overdosing, potential aiders should not face the choice of either contacting medical help or administering aid

132. 2017 Wis. Act 59, § 2251xm.

133. GSOL RECOMMENDATIONS, *supra* note 108, at 14. The civil provision was enacted in 2014 Wisconsin Act 200 as part of Rep. John Nygren's HOPE agenda. *See* Opoien, *supra* note 79.

134. Schill, *supra* note 9, at 132. Although naloxone can be legally obtained and administered by anyone, the drug and its accessibility are misunderstood. *See* Ashley Luthern, *Under Wisconsin Law, It Should Be Easy to Buy the Drug to Reverse an Opioid Overdose. It's Not*, MILWAUKEE J. SENTINEL (Aug. 23, 2018, 12:15 PM), <https://www.jsonline.com/story/news/local/wisconsin/2018/08/23/wisconsin-pharmacies-unclear-narcan-laws-reduce-opioid-heroin-overdoses/1013650002/> [<https://perma.cc/NJG2-UNRE>]. Even though the Wisconsin Department of Health Services issued a standing order allowing pharmacies statewide to sell naloxone without a prescription in 2018, a survey of over 450 pharmacies in Wisconsin revealed many conflicting and patently incorrect understandings of the requirements to sell naloxone. *See* Opoien, *supra* note 79; *see also* WIS. DEP'T OF HEALTH SERVS., OPIOIDS: STANDING ORDER FOR NALOXONE (2019), <https://www.dhs.wisconsin.gov/opioids/standing-order.htm> [<https://perma.cc/RE3T-32QT>].

135. Schill, *supra* note 9, at 132; *see also* Scott Burris, Leo Beletsky, Carolyn Castagna, Casey Coyle, Cohn Crowe & Jennie Maura McLaughlin, *Stopping an Invisible Epidemic: Legal Issues in the Provision of Naloxone to Prevent Opioid Overdose*, 1 DREXEL L. REV. 273, 277 (2009).

136. *See* Scott Gordon, *The Fragility of Volunteer EMS Systems in Rural Wisconsin*, WISCONTEXT (Aug. 28, 2017, 11:50 AM), <https://www.wiscontext.org/fragility-volunteer-ems-systems-rural-wisconsin> [<https://perma.cc/9AKY-L3B2>]; Drive Time to Emergency Care (illustration), WIS. OFF. OF RURAL HEALTH (Sept. 2017), <http://worh.org/library/drive-time-emergency-care> [<https://perma.cc/FDU6-UG9T>].

137. *See* Schill, *supra* note 9, at 133.

138. 2017 Wis. Act 33, § 1g.

themselves. A public health-centric approach to the criminal justice system's intersection with the opioid crisis requires that the rehabilitative, harm-reduction purpose of the GSOL is explicit in the law.¹³⁹ The narrowness of Wisconsin's amendments, combined with the absence of an attached naloxone provision, works against the goals of the GSOL and increases the likelihood that the Len Bias law will be charged.¹⁴⁰

As the GSOL's goals become more constricted through amendments, the law loses the slight harm-reducing capacity it originally possessed. Today, a drug user will be loath to summon help in almost any drug-related medical situation. If the aider hesitates or decides to administer naloxone before calling 911, the law's protection no longer applies as the aider did not call *immediately*.¹⁴¹ If the drug user's belief that the aided person is overdosing or suffering from adverse effects does not line up with what a reasonable person would believe, the protection does not apply.¹⁴² And if an aider is on probation, the "protection" could simply be fifteen days in jail.¹⁴³ All told, the current statute is a confusing and inconsistent law with almost no real amnesty and an unpredictable future.¹⁴⁴

2. LEGISLATIVE SILENCE ON THE LEN BIAS LAW

Unlike the GSOL, the application of the Len Bias statute has changed drastically without substantial amendment.¹⁴⁵ The law has undergone several technical amendments since it was enacted,¹⁴⁶ but the substance of the statute is fundamentally the same since as it was at its enactment thirty years ago.¹⁴⁷ The legislature's failure to clarify the intent behind the Len Bias law has allowed judicial interpretation and prosecutorial charging decisions to distort the original goals behind this law.¹⁴⁸ In addition, this shift in the law's application, brought on by the opioid crisis, has extended to other criminal laws used in tandem with

139. *See id.*; Luthern, *supra* note 134.

140. *See* GSOL RECOMMENDATIONS, *supra* note 108, at 14; Latimore & Bergstein, *supra* note 105, at 83; Schill, *supra* note 9, at 133.

141. 2017 Wis. Act 33, § 1g.

142. *Id.* § 1c.

143. 2017 Wis. Act 59, § 2251xp.

144. *See* WIS. STAT. § 961.443 (2017–18).

145. *See* 1987 Wis. Act 339, §§ 68, 77, 87, 92, 98; 1987 Wis. Act 399; 1995 Wis. Act 448, § 244; 1999 Wis. Act 57, § 17; 2001 Wis. Act 109, §§ 954–55, 958.

146. *Compare* 1987 Wis. Act 339, §§ 68, 77, 87, 92, 98, *with* 2001 Wis. Act 109, §§ 954–55, 958.

147. *Compare* 1987 Wis. Act 399, *with* WIS. STAT. § 940.02(2) (2017–18).

148. *See infra* Part II.C.

the Len Bias law or in place of it, further expanding the prosecution of addicts for their role in overdoses.¹⁴⁹

Even as the Len Bias law is applied to more and more drug addicts, the Wisconsin Legislature has failed to take action.¹⁵⁰ Wisconsin “holds the title of most drug-induced homicide prosecution media mentions in the country,” accounting for 20% of all Len Bias cases reported nationally.¹⁵¹ These high numbers correlate with the number of actual charges brought, which have steeply increased in recent years: Wisconsin prosecutors have brought over 500 Len Bias cases since 2000, with over half of those cases brought since 2013.¹⁵² The drastic increase in the scope and targets of the Len Bias law functions as a change in the law, despite the legislature’s inaction.¹⁵³

The Len Bias law is not the only criminal law applied differently in the context of the opioid crisis. The recklessly endangering safety statute, Section 941.30, serves as an inchoate counterpart to the Len Bias law.¹⁵⁴ “Whoever recklessly endangers another’s safety” can be convicted of a Class G felony.¹⁵⁵ If the offense is committed “under circumstances that show utter disregard for human life,” the penalty increases to a Class F felony, which could entail over twelve years in prison.¹⁵⁶ With the introduction of the GSOL and changing attitudes toward drug addiction,¹⁵⁷ one might expect that when an overdose victim survives and the Len Bias law cannot be applied, charges would not be filed. Yet, charging drug users with recklessly endangering safety when an overdose victim survives is a common practice that amplifies the effects of Wisconsin’s Len Bias law.¹⁵⁸

While there is no evidence that the legislature implicitly intended for the party to a crime statute to expand the scope of the Len Bias statute, this joint application reveals the need for clarification from lawmakers.¹⁵⁹ In Len Bias cases where a defendant is charged as a party to the crime,

149. See WIS. STAT. §§ 939.05 (2017–18); WIS. STAT. § 941.30 (2017–18).

150. See LASALLE, *supra* note 8, at 21.

151. See *id.*

152. *Id.*

153. Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, *supra* note 16; see LASALLE, *supra* note 8, at 21.

154. § 941.30; see also WIS. STAT. § 939.32(3) (2017–18). In general, an inchoate or attempted crime requires intent. *State v. Melvin*, 181 N.W.2d 490, 492 (Wis. 1970) (“There is no crime of ‘attempted homicide by reckless conduct’ since the completed offense does not require intent while any attempt must demonstrate intent.”).

155. WIS. STAT. § 941.30(2) (2017–18).

156. § 941.30(1); see also § 939.50(3)(f).

157. GSOL RECOMMENDATIONS, *supra* note 108, at 1.

158. See § 941.30; *State v. Stevenson*, 2016 WI App 18U, ¶ 1, 367 Wis. 2d 349, 876 N.W.2d 178.

159. See § 939.05.

the relationship between the person charged with homicide and the drugs that caused death is often not at all transactional.¹⁶⁰ The 2017 case of Chase Thistle, who was charged as a party to the crime under the statute for the death of his friend, Nick Klamer, highlights this disconnect.¹⁶¹ Klamer asked his father for \$200 to fix his car, but instead, used the money to purchase heroin.¹⁶² Thistle and Klamer used drugs together that night, but both overdosed in separate locations the following morning after injecting the drug a second time.¹⁶³ Only Thistle was found in time to survive.¹⁶⁴ Although Thistle did not touch the \$200, the friends had used the Facebook Messenger app on Thistle's phone to organize the deal.¹⁶⁵ Thistle and three others were prosecuted for Klamer's death.¹⁶⁶ Because he was charged as a party to the crime of drug-induced reckless homicide, Thistle's minimal role in Klamer's death was enough to convict him—even though Thistle neither bought the heroin nor distributed it.¹⁶⁷

As addicts continue to be prosecuted in increasing numbers for addiction-related offenses, the legislature's silence on this massive increase in Len Bias charges could suggest tacit endorsement of the new role that existing law plays in the opioid crisis. In a comprehensive June 2020 report, the Wisconsin Legislative Reference Bureau catalogued the legislation aimed at combating the state's opioid crisis from 2013 to 2020.¹⁶⁸ The report discusses the legislature's response to the opioid epidemic in the 2013, 2014, 2017, and 2019 legislative sessions, noting the GSOL amendments, naloxone legislation, and the Prescription Drug Monitoring Program; and expanding funding for addiction treatment; as

160. See Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, *supra* note 11.

161. Rosa Goldensohn, *You're Not A Drug Dealer? Here's Why the Police Might Disagree*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/overdoses-murder-crime-police.html> [https://perma.cc/5SCP-UMTS] [hereinafter Goldensohn, *You're Not A Drug Dealer? Here's Why the Police Might Disagree*].

162. *Id.*

163. *Id.*; Jonathan Stefonek, *Lodi-Area Man Convicted of Reckless Homicide in Heroin OD Case*, PORTAGE DAILY REG. (Aug. 3, 2017), https://www.wiscnews.com/portagedailyregister/news/lodi-area-man-convicted-of-reckless-homicide-in-heroin-od-case/article_08561247-1dd4-5d2b-8b36-fe401a9fa836.html [https://perma.cc/A5SZ-M2KX].

164. Goldensohn, *You're Not A Drug Dealer? Here's Why the Police Might Disagree*, *supra* note 161.

165. *Id.*

166. See Goldensohn, *You're Not A Drug Dealer? Here's Why the Police Might Disagree*, *supra* note 161; Stefonek, *supra* note 163.

167. See Goldensohn, *You're Not A Drug Dealer? Here's Why the Police Might Disagree*, *supra* note 161.

168. WIS. LEGIS. REFERENCE BUREAU, LRB-04-11, WISCONSIN LEGISLATION TO COMBAT THE OPIOID CRISIS, 2013–20, at 1 (2020).

well as increasing funding for educational campaigns and public awareness programs.¹⁶⁹ The only punitive-focused legislation mentioned in the report involved funding for heroin trafficking.¹⁷⁰

In other words, the legislative report never mentions holding addicts liable for the harm or death of other addicts, nor does the report cite the Len Bias law or related statutes, like recklessly endangering safety, as tools that are being utilized in combating the opioid crisis. A single sentence about the appointment of two Department of Justice attorneys to help with prosecuting drug offenses is the only hint that such charges are increasing.¹⁷¹ At best, the report provides an incomplete impression of how the state's legal system is addressing the opioid crisis.¹⁷²

Considering how closely opioid addiction is tied to criminal offenses, there is certainly an argument that the report gives the public a misleading account of how Wisconsin is addressing the opioid crisis in the criminal justice system.¹⁷³ Wisconsin citizens deserve transparency, and the legislature is well-situated to provide transparent and easily accessible information.¹⁷⁴ Besides, while the legislature is not primarily responsible for the implementation or interpretation of enacted laws,¹⁷⁵ it does not abdicate all accountability to the other branches.¹⁷⁶

B. Judicial Interpretation Has Warped the Purpose of these Laws

Recent judicial interpretation of the Len Bias law has broadened its scope, while limited judicial reading of the GSOL has stifled its protections.¹⁷⁷ The Court of Appeals publishes only a small minority of

169. *Id.* at 2–6, 10–14.

170. *Id.* at 12.

171. *Id.*

172. *Id.* at 5, 9–10, 19.

173. *Compare id.* at 7–8 (noting the DOC pilot drug treatment program for offenders without including information on total number of incarcerated drug addicts or data on annual numbers of drug-related charges), *with* STATE OF WIS. DEP'T OF CORR., *supra* note 47 (detailing the high rates of addiction among inmates and high number of drug-related offenses); *see also infra* note 315 and accompanying text for a discussion of the limited drug treatment options for inmates.

174. Chapter 13, Subchapter IV of Wisconsin Statutes outlines the councils, committees, and nonpartisan legislative agencies that are at the legislature's disposal to support its functions and inform the public. WIS. STAT. §§ 13.80–.96 (2017–18).

175. *Id.*

176. *Id.*

177. Deneen Smith, *Judge Hopes Stiff Sentence Can Deter Opioid Abuse*, KENOSHA NEWS (Mar. 18, 2018), https://www.kenoshanews.com/news/local/judge-hopes-stiff-sentence-can-deter-opioid-abuse/article_792fec61-4778-515b-84a0-9cca35d1bab7.html [<https://perma.cc/8TPY-HPGL>] (describing a judge's harsh sentences and negative perception of treatment resources for drug users convicted under the Len Bias law); Vielmetti, *supra* note 20 (detailing a young mother who was charged

the opinions it renders, so there is not an abundance of binding precedent for the circuit courts to apply.¹⁷⁸ Despite this, courts adhere to a consistent pattern of punitive measures in drug cases.¹⁷⁹ As a result, the safest and most common strategy for drug-addicted defendants is to take a plea deal.¹⁸⁰ Thus, in many cases, the GSOL is not raised, and the elements of Len Bias homicides are not debated.¹⁸¹ However, when cases do go to trial, the current iterations of these laws make convictions extremely likely to occur.¹⁸² The following cases make one thing clear: judicial interpretation of these laws has enlarged the class of addicts who are held criminally liable for opioid offenses through narrowing immunity protections and increasing the reach of the Len Bias law.

1. JUDICIAL NARROWING OF THE GSOL

The Wisconsin Court of Appeals' narrow reading of the GSOL imposes additional limitations on the scope of the law's protection.¹⁸³ *State v. Williams*¹⁸⁴ is the only published case that instructs the lower courts on the scope and application of the GSOL.¹⁸⁵ *Williams* narrowed the scope of the GSOL by putting the burden on the defendant to show that the statute applies in her case at the pretrial stage.¹⁸⁶ Marie Williams was driving an overdosed friend to the hospital when she was involved in a single-car accident.¹⁸⁷ Officers at the scene believed she was under

with a felony instead of receiving a deferred prosecution agreement because a judge determined a later amendment to the GSOL retroactively applied to her case).

178. Wisconsin's procedural requirements for publication of court of appeals opinions heavily restrict the number of published opinions. WIS. STAT. § 809.23 (2017–18). “[O]pinions . . . are published only upon approval by a publication committee consisting of one judge from each appellate district and the chief judge of the court of appeals. The committee meets monthly and approves publication of twenty to twenty-five percent of the decisions. Although any party may petition the publication committee to permit publication of a previously unpublished opinion, such a request is seldom granted.” Carl Norberg, *Some Second and Third Thoughts on an Intermediate Court of Appeals*, 7 WM. MITCHELL L. REV. 93, 110–11 (1981).

179. See LASALLE, *supra* note 8, at 21.

180. Cecilia Klingele, Michael S. Scott & Walter J. Dickey, *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 958 (“[M]ore than 95 percent [of criminal cases] will be resolved through some form of plea arrangement or other disposition in which the actual guilt of the person charged is not subject to full adversarial testing.”).

181. See *id.* at 955–58.

182. *State v. Williams*, 888 N.W.2d 1, 2 (Wis. Ct. App. 2016); *State v. Laughrin*, No. 2011AP1600-CR, 2012 WL 2094392, at *7 (Wis. Ct. App. June 12, 2012); *State v. Clemons*, 476 N.W.2d 283, 285 (Wis. Ct. App. 1991).

183. *Williams*, 888 N.W.2d at 2.

184. *Id.* at 1.

185. *Id.* at 2.

186. *Id.*

187. *Id.* at 3.

the influence of opioids and cited her for operating a vehicle while intoxicated.¹⁸⁸ While searching the vehicle, they discovered prescription pills that did not belong to her, including the opioid pain reliever Percocet.¹⁸⁹ The State charged Williams with one count of possession of a controlled substance, one count of possession of narcotic drugs (as a party to the crime), one count of possession of drug paraphernalia (as a party to the crime), and four counts of bail jumping.¹⁹⁰

Williams clarified that Wisconsin's GSOL fits somewhere in between the second and third levels of amnesty protection instead of the in highest level—actual immunity—as the legislature intended.¹⁹¹ First, the court held that the question of whether GSOL immunity applies in a given case is decided pretrial by a judge instead of at trial by the fact finder.¹⁹² Second, the court held that the defendant has the burden of proving she is entitled to immunity by a preponderance of the evidence.¹⁹³ The court noted that the legislature intended the statute to encourage drug users to call for aid for their fellow users without fear of prosecution, commenting that “immunity is an extraordinary protection.”¹⁹⁴ While the court conceded that there should be no prosecution where the conditions of the statute are clearly met,¹⁹⁵ it held the State may initiate prosecution wherever it is unclear if the conditions are met.¹⁹⁶ This standard only requires that the State make an argument for uncertainty in order to proceed with prosecution.¹⁹⁷

Despite reciting the clear legislative purpose behind the law, the court pivoted away from a finding of true immunity from prosecution, stressing “the significant public interest in prosecuting drug crimes.”¹⁹⁸ The court stressed that this did not make the GSOL an affirmative defense because the defendant's burden of proving that the law applies occurs at a pretrial hearing rather than before the fact-finder at trial.¹⁹⁹ Yet, by the time such a hearing occurs, the defendant has already been charged with a crime and prosecution has commenced.²⁰⁰ In sum, in finding that only

188. *Id.*

189. *Id.*

190. *Id.* at 2–3; *see also* WIS. STAT. §§ 961.41(3g)(b), (3g)(am) (2017–18); WIS. STAT. § 961.573(1) (2017–18); WIS. STAT. § 946.49(1)(b) (2017–18).

191. *Compare State v. Williams*, 888 N.W.2d 1, 6–7 (Wis. Ct. App. 2016), with *supra* note 19 and accompanying text.

192. *Williams*, 888 N.W.2d at 2.

193. *Id.*

194. *Id.* at 6.

195. *Id.* at 4; *see also* WIS. STAT. § 961.443 (2017–18).

196. *Williams*, 888 N.W.2d at 5.

197. *See id.*

198. *Id.* at 6.

199. *Id.* at 2, 4.

200. *Id.* at 5.

a judge has the power to dismiss any proceedings underway when the GSOL is raised, the court downgraded the law's protection, which is in tension with the drafters' intention to provide true immunity.²⁰¹ This holding circumvents the plain language of the statute, which already provides the necessary direction by listing the crimes that may not be charged.²⁰² Instead of following that direction, *Williams* puts the defendant at the mercy of a judge who may weigh extra-statutory factors in determining whether the GSOL applies.²⁰³

The *Williams* court only selectively deferred to the plain language of the statute, finding that Williams was not immune from prosecution for bail-jumping.²⁰⁴ At the time of the accident, Williams was out on bond for a felony.²⁰⁵ Three of the four bail-jumping counts related to her allegedly "intentionally fail[ing] to comply with the terms of her bond" by committing the three drug-related crimes in the case.²⁰⁶ Williams moved to dismiss the first three bail-jumping charges because they arose out of the drug charges, which were dismissed under the GSOL.²⁰⁷

The GSOL, in effect at the time of this case, offered immunity for Williams' drug charges,²⁰⁸ and the Wisconsin Supreme Court precedent suggested that if immunity is offered for the underlying crime that led to a bond violation, bail-jumping charges cannot be maintained.²⁰⁹ Nevertheless, the *Williams* court found that precedent still "strongly suggests" that if the State presents "sufficient evidence at the bail jumping court trial, and the circuit court ma[kes] its own, independent and proper finding at that trial," bail-jumping charges stemming from dismissed drug charges may be sustained.²¹⁰

201. *Id.* at 5; *supra* note 19 and accompanying text; *see also* Schill, *supra* note 9, at 141–42.

202. *Williams*, 888 N.W.2d at 5; WIS. STAT. § 961.443 (2017–18).

203. *Williams*, 888 N.W.2d at 6.

204. *Id.* at 8. At the time the case was reviewed, the GSOL did not include immunity for bail-jumping. WIS. STAT. § 961.443.

205. *Williams*, 888 N.W.2d at 3.

206. *Id.*

207. *Id.* at 3, 8.

208. The State charged Williams with two counts of drug possession under WIS. STAT. § 961.41(3g) and one count of possession of drug paraphernalia under WIS. STAT. § 961.573. *Id.* at 2. Since Williams was an "aider" who was driving her overdosing friend to the hospital, the GSOL offered immunity for those charges. *Id.* at 3; WIS. STAT. § 961.443(1)–(2).

209. *Williams*, 888 N.W.2d at 11 (Reilly, P.J., concurring) (citing *State v. Hansford*, 580 N.W.2d 171, 179 (Wis. 1998)).

210. *Id.* at 10.

Because many drug addicts have prior criminal records and are on probation or bond,²¹¹ *Williams* effectively ensured that no one on bond could use the GSOL's protections.²¹² Soon after this decision, the legislature responded by amending the GSOL to include immunity from bail jumping, suggesting that perhaps the decision in *Williams* did not comport with the purpose behind the statute.²¹³ Still, the legislature did not disturb the rest of the decision.²¹⁴ Defendants continue to be charged with the crimes listed in the statute and still have the burden of proving that they are entitled to immunity under the law.²¹⁵

2. THE EXPANSION OF THE LEN BIAS LAW

The current application of the Len Bias law suggests that Wisconsin courts view sharing opioids as reckless conduct in every case, regardless of the amount or of the relationship between the decedent and the defendant. This perspective is logical—opioids are deadly—but it is also problematic in the context of the current opioid crisis as it ignores the complexities of opioid addiction.²¹⁶ The majority of drug overdose deaths involve multiple drugs.²¹⁷ Opioid users are more likely to use with friends or family than alone, which often means one person buys the drugs and

211. Duane C. McBride, Curtis J. VanderWaal & Yvonne M. Terry-McElrath, *The Drugs-Crime Wars: Past, Present, and Future Directions in Theory, Policy, and Program Interventions*, in TOWARDS A DRUGS AND CRIME RESEARCH AGENDA FOR THE 21ST CENTURY 97, 104 (2003); *Trends in Substance Use Disorders Among Males Aged 18 to 49 on Probation or Parole*, NAT'L SURVEY ON DRUG USE & HEALTH (March 16, 2014), [http://www.samhsa.gov/data/sites/default/files/sr084-males-probation-parole/sr084-males-probation-parole.htm](http://www.samhsa.gov/data/sites/default/files/sr084-males-probation-parole/sr084-males-probation-parole/sr084-males-probation-parole.htm) [https://perma.cc/AVU6-FGFK].

212. *Williams*, 888 N.W.2d at 8–9.

213. 2017 Wis. Act 59, § 2251xm.

214. *Id.*

215. See *State v. Sawall*, Case No. 2019AP335-CR, slip op. at 4–5 (Wis. Ct. App. April 15, 2020) (reversing the circuit court's determination that GSOL deferred prosecution applied and finding the defendant was not an aided person under the GSOL). The court of appeals' narrow reading of the GSOL prevented Sawall from accessing treatment and remanded his case for prosecution, despite evidence that he was clearly suffering from an adverse drug reaction at the time of the 911 call. *Id.* at 5–6. A person called 911 after seeing Sawall acting erratically and removing his clothing in 30-degree weather. See Brief of Plaintiff-Appellant at 4, *State v. Sawall*, Case No. 2019AP335-CR (Wis. Ct. App. July 26, 2019). Officers told him that they were going to transport him to the police station so he could arrange a ride home, but instead arrested him when they found heroin in his pocket. *Id.* at 3–4. Sawall continued nodding off and vomited several times before he received medical attention. *Id.* at 4.

216. Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 713.

217. See Erin Schumaker, *Almost All Overdose Deaths Involve Multiple Drugs, Federal Report Shows*, HUFFPOST (Dec. 12, 2018, 8:30 AM), https://www.huffpost.com/entry/multiple-drugs-overdose-deaths-report_n_5c0fe121e4b06484c9ff3b2f [https://perma.cc/96P9-CTAB].

shares with the others.²¹⁸ Yet, in practice, the Len Bias law does not account for grades of culpability before sentencing.²¹⁹ An addict who shares his prescription opioid with a friend going through withdrawal is indistinguishable from a commercial drug dealer who cut her heroin with fentanyl: a court would find that both people's conduct satisfied the elements of the statute if it contributed to an overdose death.²²⁰

Judicial interpretation of Wisconsin's Len Bias law serves as an impediment to reducing opioid deaths and maximizing the harm-reduction capabilities of laws like the GSOL.²²¹ The degradation of the law's elements has left prosecutors with very little to prove.²²² The plain language of the Len Bias law does not distinguish between users and dealers,²²³ and neither do courts.²²⁴ In sum, courts have tailored the Len Bias law to fit the nature of opioid addiction in order to convict addicts.²²⁵

There is a compelling argument that the causation element in Len Bias laws should be read as but-for causation, which the federal version requires.²²⁶ In *Burrage v. United States*,²²⁷ Justice Scalia clarified the causation requirement for the federal counterpart, holding that the government must prove but-for causation to convict someone under the

218. Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 713.

219. Wis. STAT. § 940.02(2) (2017–18); LASALLE, *supra* note 8, at 21 (noting how in Wisconsin today, “prosecutors are ignoring criminal culpability and blindly charging anyone they can identify” under the Len Bias law).

220. *Id.*; see also Terrell Boettcher, *Hayward Woman Pleads Guilty to Delivering Oxycodone; Homicide Charge Amended*, SAWYER CNTY. REC. (Aug. 19, 2015), https://www.apg-wi.com/sawyer_county_record/hayward-woman-pleads-guilty-to-delivering-oxycodone-homicide-charge-amended/article_5160ac9c-4696-11e5-8769-fbb186a03462.html [<https://perma.cc/DL7N-587X>] (reporting Rebecca Kerner's guilty plea to a lesser offense after she was charged with first-degree reckless homicide for giving prescription pain medication to a friend suffering from back pain, which resulted in her friend's overdose death); *Woman Charged in Her Brother's Accidental Drug Overdose*, FOX 11 NEWS (Aug. 2, 2019), <https://fox11online.com/news/local/woman-charged-in-her-brothers-accidental-drug-overdose> [<https://perma.cc/QC7J-Z82T>] (reporting that a woman was charged with reckless homicide after her brother accidentally overdosed on pain medication she bought in Mexico).

221. *State v. Laughrin*, No. 2011AP1600-CR, 2012 WL 2094392, at *7 (Wis. Ct. App. June 12, 2012); *State v. Clemons*, 476 N.W.2d 283, 285 (Wis. Ct. App. 1991).

222. See *State v. Johnson*, No. 2015AP1514-CR, 2016 WL 5171984, at *4 (Wis. Ct. App. Sept. 22, 2016) (per curiam). In *Johnson*, the circuit court referred to the Len Bias law as “a strict liability crime.” *Id.*

223. Wis. STAT. § 940.02.

224. Bryan Polcyn, *The Legacy of Len Bias: Police Treating Overdoses as Homicides*, FOX 6 (Oct. 31, 2013), <https://fox6now.com/2013/10/31/the-legacy-of-len-bias-police-treating-drug-ods-as-homicides/> [<https://perma.cc/3P8B-CW9Y>] [hereinafter Polcyn, *The Legacy of Len Bias: Police Treating Overdoses as Homicides*].

225. LASALLE, *supra* note 8, at 21; Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, *supra* note 16.

226. Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 725.

227. 571 U.S. 204 (2014).

Len Bias law.²²⁸ The Court described the causation element as requiring that the drug at issue be able to stand alone as a cause of death, ruling that “contributing factor” causation was insufficient.²²⁹ But-for causation “is easily met in most traditional homicide prosecutions,” but it is often difficult to prove in overdose deaths.²³⁰ Drug users share drugs, and it is often a combination of drugs acquired from different sources that result in an overdose death.²³¹ A but-for causation requirement still holds truly culpable actors liable for their actions in overdose deaths but also accommodates the reality that culpability and suffering are often shared by the defendant and the decedent in a Len Bias case.

The Len Bias law requires that the defendant’s administering of a narcotic be a “substantial factor” in the death of the victim, but judicial interpretation of the causation requirement in Len Bias cases does not resemble the substantial factor standard in other Wisconsin cases and is at odds with the state’s policy goals and modern understandings of addiction.²³² In non-Len Bias cases, the substantial factor standard fulfills the policy goal of holding defendants liable to the extent that they are culpable.²³³ The standard does not function as effectively in Len Bias cases where causation can be much weaker and can lead to harsh penalties that do not correspond to culpability.

The leading substantial factor causation case, *State v. Below*,²³⁴ is commonly cited in Len Bias cases. Yet *Below* and its progeny are factually dissimilar to most Len Bias cases. In *Below*, a man who had brutally beaten his daughter challenged his conviction on the grounds that the medical staff’s role in taking her off life support was an intervening cause of death.²³⁵ The court disagreed, finding that the record showed that *Below*’s beating had caused an irreversible brain injury that set off “an unstoppable chain of events” leading to his daughter’s inevitable death.²³⁶ Brain death and post-trauma medical intervention are common

228. *Id.* at 218–19. In *Burrage*, the defendant was charged with heroin-induced homicide after the decedent was found with multiple drugs in his system. *Id.* at 206–07. The Court found that there was insufficient evidence to find the heroin that *Burrage* sold the decedent was an independent cause of death. *Id.* at 215.

229. *Id.* at 217–18.

230. Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 723.

231. Schumaker, *supra* note 217.

232. *State v. Laughrin*, No. 2011AP1600-CR, 2012 WL 2094392, at *7 (Wis. Ct. App. June 12, 2012); *State v. Below*, 799 N.W.2d 95, 101–02 (Wis. Ct. App. 2011); *State v. Serebin*, 350 N.W.2d 65, 71 (Wis. 1984).

233. *Cranmore v. State*, 271 N.W.2d 402, 427–28 (Wis. Ct. App. 1978) (finding that removal from life support was not an intervening factor in the death of the officer shot by defendants).

234. 799 N.W.2d 95 (Wis. Ct. App. 2011).

235. *Id.* at 101.

236. *Id.* at 98, 100–01.

themes in cases that apply the substantial factor standard.²³⁷ Courts note that medical intervention does “not break the chain of causation between the defendants’ acts and the consequent death.”²³⁸ This rationale also appears in felony murder cases, where defendants can be held liable for their role in a death that occurs “while committing or attempting to commit” one of the serious crimes listed in the statute.²³⁹

When examined closely, Len Bias cases involving drug users often do not involve the same level of culpability that was found to set off the chain of events in *Below*.²⁴⁰ In *State v. Laughrin*,²⁴¹ the court used the substantial factor standard to uphold the trial court’s decision to deny a pretrial plea withdrawal in a Len Bias case.²⁴² The defendant was charged with reckless homicide after giving a Suboxone pill to M.K., who later overdosed from a combination of Suboxone and clonazepam, a prescription sedative that she acquired elsewhere.²⁴³ Laughrin agreed to a plea deal after the State told him that he caused the victim’s death.²⁴⁴ He later tried to withdraw his plea after learning the combination of drugs caused the victim’s death.²⁴⁵

A single pill of Suboxone alone does not create a substantial risk of death, “even in people not tolerant to opioids.”²⁴⁶ In other words, Laughrin’s single Suboxone pill could not have caused M.K.’s death on its own.²⁴⁷ Yet the appellate court found that the evidence “strongly support[ed] the allegation that giving Suboxone to M.K. under the circumstances was a substantial factor in causing her death.”²⁴⁸ In order for a Suboxone pill to cause a fatal overdose, additional respiratory depressants, such as clonazepam, need to be present in the victim’s system.²⁴⁹ While Laughrin’s pill was a factor in M.K.’s death, it did not

237. *Cranmore*, 271 N.W.2d at 427; *State v. Block*, 489 N.W.2d 715, 718 (Wis. Ct. App. 1992) (The possibility of “any medical negligence in connection with procedures undertaken in response to a life-threatening situation created by the defendant does ‘not break the chain of causation.’”).

238. *Below*, 799 N.W.2d at 102.

239. *State v. Oimen*, 516 N.W.2d 399, 409 (Wis. 1994); see also WIS. STAT. § 940.03 (2017–18) (listing battery, sexual assault, kidnapping, false imprisonment, and burglary among the crimes that can result in felony murder charges).

240. *State v. Laughrin*, No. 2011AP1600-CR, 2012 WL 2094392, at *7 (Wis. Ct. App. June 12, 2012).

241. 2012 WL 2094392 (Wis. Ct. App. June 12, 2012).

242. *Id.* ¶¶ 19–21.

243. *Id.* ¶¶ 2–3, 6.

244. *Id.* ¶ 4.

245. *Id.* ¶ 5.

246. *Id.* ¶¶ 5–6.

247. *Id.*

248. *Id.* ¶ 21 (emphasis added).

249. *Id.* ¶ 6.

set off a “chain of causation” that could only have ended in death as in *Below*.²⁵⁰

The encompassing reading of causation in the Len Bias law mirrors the judicial interpretation of the delivery element. Early in the statute’s history, courts strained the element of “delivering” or “administering” to an illogical degree, essentially eliminating the delivery requirement altogether.²⁵¹ Despite Wisconsin’s framework for statutory interpretation, which requires that statutes be interpreted “reasonably, to avoid absurd or unreasonable results,”²⁵² Len Bias cases often result in arguably unreasonable, and certainly inequitable, outcomes. In *State v. Clemons*,²⁵³ for example, the defendant stole a bottle of methadone from the methadone clinic in which he was enrolled.²⁵⁴ He then placed the methadone in a milk carton in the center console of his car and picked up a friend.²⁵⁵ The friend asked what was in the carton, and when Clemons responded that it was methadone, the friend grabbed the container and drank from it, overdosing soon after.²⁵⁶ Clemons was charged and convicted under the Len Bias law.²⁵⁷

A clear example of the view that reciprocal drug use is automatically reckless, *Clemons* shows how this limited understanding of addiction affects a court’s interpretation of the Len Bias law. On appeal, the *Clemons* court noted that “it is possible to deliver a substance without ever having possessed it,” analogizing Clemons’s case to a doctor writing a patient an illegitimate prescription.²⁵⁸ The difference between the doctor and Clemons is that there would be much more compelling evidence that the doctor had the requisite mens rea for reckless homicide.²⁵⁹

250. *Id.*; *State v. Below*, 799 N.W.2d 95, 101 (Wis. Ct. App. 2011).

251. *See, e.g., State v. Clemons*, 476 N.W.2d 283, 285 (Wis. Ct. App. 1991).

252. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 681 N.W.2d 110, 124 (Wis. 2004).

253. 476 N.W.2d 283 (Wis. Ct. App. 1991).

254. *Id.* at 284.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 285.

259. *Id.* The *Clemons* court failed to acknowledge that doctors who write patients illegitimate prescriptions are often charged under federal law given the comprehensive federal regulation framework, as well as the correlation between illegitimate prescribing and insurance fraud. *See* Peri Novick, *Healers or Dealers: The Effect of Doctors Committing Health Care Fraud on the Opioid Epidemic*, 3 INT’L COMP., POL’Y & ETHICS L. REV. 453, 460–63 (2020) (describing the hierarchy and framework of laws and regulations controlling this issue); Alyssa M. McClure, *Illegitimate Overprescription: How Burrage v. United States Is Hindering Punishment of Physicians and Bolstering the Opioid Epidemic*, 93 NOTRE DAME L. REV. 1747, 1749 (2018); 21 U.S.C. §§ 801–904 (1988); *see also* OFF. OF DIVERSION CONTROL, DRUG ENF’T ADMIN., PRACTITIONER’S MANUAL ii, 1, 3–4 (2016),

Traditionally, Wisconsin's conception of reckless homicide requires not only that the actor create an unreasonable and substantial risk of death, but also that the actor *be aware* of the risk he is creating.²⁶⁰ The legislature has made it clear that the element of awareness is subjective—the actor himself must understand the risk he is creating.²⁶¹ In the hypothetical posed by the *Clemons* court, the requisite awareness is clear: a doctor who writes an illicit opioid prescription would deliver a mechanism for acquiring and consuming narcotics with the requisite knowledge of opioid effects and risks.²⁶²

The awareness inquiry is less straightforward when the actor himself is an addict. Opioid addiction is, by nature, incredibly risky.²⁶³ Yet, studies show that chronic addiction alters cognitive mechanisms and results in decision-making deficits.²⁶⁴ Addicts dissociate from the negative implications and likely outcomes of their behavior while remaining focused on the short-term “rewards.”²⁶⁵ Quite simply, addicts often do not understand the risks connected to their behavior.

The elements of the Len Bias law must be carefully and narrowly interpreted to ensure that defendants possess a mens rea that corresponds with the standard for criminal recklessness. The decision in *Clemons* shows that, under the current law, a person may be convicted of drug-

<https://www.oregon.gov/omb/licensing/Documents/mddodpm/mddo-practitioners-manual.pdf> [<https://perma.cc/YQ2F-TNM4>]. The court's analogy is even less applicable in today's opioid crisis as few “pill mill” doctors are held responsible for opioid overdose deaths. McClure, *supra*, at 1749 (commenting on prosecutors' high burden of proof under federal law and the lack of other enforcement efforts aimed at doctors); Novick, *supra*, at 473–75 (noting that much of the litigation today focuses on the fraud aspect of illegitimate prescription practices). Recent articles illustrate how rarely doctors are found criminally liable for overdose deaths, raising the question of whether “the thought is still that it can't be the doctor's fault” Novick, *supra*, at 475; *see also* McClure, *supra*, at 1747–48.

260. *State v. Neumann*, 832 N.W.2d 560, 581–82 (Wis. 2013). The Wisconsin Supreme Court has recognized that the element of “scienter constitutes the rule in our criminal jurisprudence and is generally presumed even absent express statutory references.” *State v. Weidner*, 611 N.W.2d 684, 688 (Wis. 2000); *State v. Collova*, 255 N.W.2d 581, 584 (Wis. 1977) (citing *State v. Alfonsi*, 147 N.W.2d 550, 555 (Wis. 1967)).

261. *Neumann*, 832 N.W.2d at 581–82.

262. *See Clemons*, 476 N.W.2d at 285. If *Clemons* were charged under the federal Len Bias law, the divergent federal interpretation could easily dictate a different outcome. *See* 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C) (1988); *Burrage v. United States*, 571 U.S. 204, 217–19 (2014); *United States v. Harden*, 893 F.3d 434, 446–49 (7th Cir.), *cert. denied*, 139 S. Ct. 394 (2018) (basing a defendant's culpability on his responsibility for his actions that led to the death—in this case, for playing a role in a drug trafficking outfit).

263. Schill, *supra* note 9, at 124.

264. Luke Clark & Trevor W. Robbins, *Decision-Making Deficits in Drug Addiction*, 6 TRENDS IN COGNITIVE SCI. 361, 361 (2002).

265. *Id.* at 362.

induced reckless homicide even if he does not play any role in the delivery of the fatal narcotic, aside from his proximity to the narcotic, and even if he did not have the requisite mental state for reckless homicide.²⁶⁶ Clemons's addiction seems to directly influence his conviction: if Clemons had not stolen the methadone, but instead acquired it legally, would the outcome of his case have been the same?²⁶⁷ The view that addicts sharing drugs is per se criminally reckless taints every element of the Len Bias law, creating unpredictable and harsh results.²⁶⁸

C. The Future of Wisconsin's Opioid Crisis Amid the Current Criminal Laws

The criminal justice system will continue to play a role in opioid overdose deaths if it does not adjust its approach to addiction-related crimes. As public health advances and civil legislation has made strides in tackling prescription drug misuse and heroin trafficking,²⁶⁹ other illicit opioids are becoming more prevalent.²⁷⁰ In 2017, 916 people died from opioid overdoses in the state.²⁷¹ In 2018, the number of opioid-related deaths dropped slightly in Wisconsin with only 839 people dying from overdoses that involved an opioid.²⁷² The encouraging decrease correlates with a national decline in opioid deaths, attributed “almost entirely to a dip in deaths from prescription opioid painkillers.”²⁷³ Nonetheless, both in Wisconsin and nationally, the rate of overdose deaths involving synthetic opioids continues to increase.²⁷⁴ The current criminal justice

266. *Clemons*, 476 N.W.2d 283.

267. The evidence affecting the elements of the Len Bias offense would remain the same, as Clemons's theft of the drug was a separate offense. *Id.* at 284–86.

268. *See, e.g., id.* at 285–86.

269. *See generally* WIS. LEGIS. REFERENCE BUREAU, *supra* note 168.

270. Nana Wilson, Mbabazi Kariisa, Puja Seth, Herschel Smith & Nicole L. Davis, *Drug and Opioid-Involved Overdose Deaths — United States, 2017–2018*, 69 MORBIDITY & MORTALITY WKLY. REP. 290 (2020).

271. Will Maher, *Poverty Fact Sheet: Wisconsin's Opioid Crisis*, INST. FOR RSCH. ON POVERTY & MORGRIDGE CTR. FOR PUB. SERV., <https://www.irp.wisc.edu/wp/wp-content/uploads/2019/05/Fact-Sheet-17-2019-WI-Opioid-Crisis.pdf> [<https://perma.cc/E9FZ-QNGA>] (2019).

272. WIS. DEP'T OF HEALTH SERVS., WISH: OPIOID OVERDOSE DEATHS 2000–2018, <https://www.dhs.wisconsin.gov/wish/opioid/data.htm> [<https://perma.cc/HNU4-3G9K>] (last modified July 5, 2020).

273. Abby Goodnough, Josh Katz & Margot Sanger-Katz, *Drug Overdose Deaths Drop in U.S. for First Time Since 1990*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/interactive/2019/07/17/upshot/drug-overdose-deaths-fall.html> [<https://perma.cc/7GHY-BNBS>].

274. NAT'L INST. ON DRUG ABUSE, WISCONSIN: OPIOID-INVOLVED DEATHS AND RELATED HARMS, <https://www.drugabuse.gov/drug-topics/opioids/opioid-summaries->

system is facing this new threat unprepared, armed with ineffective, overly punitive tools and mechanisms, and is further unmoored by the uncertain, polarized political climate.

The third wave of the opioid crisis could be the deadliest.²⁷⁵ Synthetic opioids, which are more potent, and thus, more deadly,²⁷⁶ are now widespread in Wisconsin.²⁷⁷ Synthetic opioids combine perhaps the worst qualities of prescription opioids and heroin: they are synthesized in labs abroad, making the production of large quantities an inexpensive endeavor.²⁷⁸ And, like heroin, the vast majority of synthetic opioids are produced illegally and thus unregulated.²⁷⁹ But the unique qualities of these drugs are perhaps the most terrifying: they are incredibly potent—a few micrograms can be fatal²⁸⁰—and new versions are constantly being developed,²⁸¹ making targeted legislation, detection, and enforcement efforts incredibly difficult.

Synthetic opioid overdoses will continue to occur in high numbers if the criminal laws that address drug use are not reoriented to encompass public health goals. The criminal justice system's traditional punishment and deterrence goals are appropriate in many categories of crimes, but when they are the exclusive considerations in the charging and sentencing of addiction-connected crimes, they are not effective in mitigating the harm caused by opioid deaths.²⁸²

The criminal justice system often treats addiction-related offenses similarly to other, more serious, violent crimes,²⁸³ which distorts the

by-state/wisconsin-opioid-involved-deaths-related-harms [https://perma.cc/GW7A-DF7N] (last updated Apr. 3, 2020) (including statistics for both Wisconsin and the United States).

275. WESTHOFF, *supra* note 32, at 25 (“Never . . . has an opiate—or any other drug, for that matter—killed so many annually as the fentanyl epidemic.”).

276. See Julie K. O’Donnell, John Halpin, Christine L. Mattson, Bruce A. Goldberger & R. Matthew Gladden, *Deaths Involving Fentanyl, Fentanyl Analogs, and U-47700 — 10 States, July–December 2016*, 66 MORBIDITY & MORTALITY WKLY. REP. 1197 (2017).

277. See Maher, *supra* note 271, at 2.

278. See SEAN O’CONNOR, U.S.-CHINA ECON. & SEC. REV. COMM’N, DENTANYL: CHINA’S DEADLY EXPORT TO THE UNITED STATES 5–6, 8 (Feb. 1, 2017), <https://www.uscc.gov/files/000734> [https://perma.cc/NYZ7-K4EF].

279. *Id.*

280. *Id.* at 3; WESTHOFF, *supra* note 32, at 40–41.

281. See O’CONNOR, *supra* note 278, at 10.

282. See WESTHOFF, *supra* note 32, at 40.

283. See, e.g., *State v. Clemons*, 476 N.W.2d 283 (Wis. Ct. App. 1991). A fatal overdose death in Milwaukee where multiple defendants were charged under the Len Bias law highlights how the scope of the Len Bias law remains unaffected by the GSOL. See Ashley Luthern, *Man Gets 40 Years for Overdose Deaths*, MILWAUKEE J. SENTINEL (Feb. 13, 2015), <http://archive.jsonline.com/news/crime/man-gets-40-yers-for-selling-heroin-tied-to-2-deaths-b99444466z1-291895881.html/>

purposes behind the Len Bias law and the GSOL. Additionally, the stigma and misinformation that accompany opioid use are present in the courtroom.²⁸⁴ These problems are not limited to Wisconsin—there is a nationwide struggle to understand the roots of opioid addiction, and misinformation often obscures important advances in addiction research and treatment.²⁸⁵ But, in sum, the trajectories of the GSOL and the Len Bias law point away from the public health goals of the state.

Despite evidence that the “tough-on-drugs” approach from the 1970s and 1980s is ineffective in reducing the prevalence of drugs and drug-related deaths,²⁸⁶ some still advocate for harsher penalties for drug offenses.²⁸⁷ For example, President Trump has suggested that the death penalty is an effective and appropriate sentence for drug dealers.²⁸⁸ He

[<https://perma.cc/GNF9-9FKN>] [hereinafter *Luthern, 40 Years*]; *UWM Student Charged in Connection to Overdose Death*, Fox 6 (Aug. 19, 2013), <https://fox6now.com/2013/08/19/uwm-student-charged-in-connection-with-heroin-overdose-death/> [<https://perma.cc/UV4V-XF3T>] [hereinafter *UWM Student Charged*]; *State v. Johnson*, No. 2015AP1514-CR, 2016 WL 5171984, at *1–2 (Wis. Ct. App. Sept. 22, 2016) (per curiam). Tim Stanczyk overdosed in his nephew’s room at the University of Wisconsin-Milwaukee after buying heroin from Telly Johnson, a career drug dealer. See *UWM Student Charged*, *supra*. His nephew, Tyler Schmidt, first tried to administer Suboxone in an attempt to reverse the overdose and then called 911, but Stanczyk did not survive. *Johnson*, 2016 WL 5171984, at *1. Later the same month, another person fatally overdosed on heroin purchased from Johnson. *Luthern, 40 Years, supra*. Despite their vastly different roles in Stanczyk’s death, both Johnson and Schmidt were charged under the Len Bias law. See *Johnson*, 2016 WL 5171984, at *1; *UWM Student Charged, supra*. Schmidt eventually plead guilty to two counts of delivering heroin, and the GSOL was never implicated, despite Schmidt’s 911 call being noted on the record at Johnson’s trial. See *Johnson*, 2016 WL 5171984, at *1; *Luthern, 40 Years, supra*.

284. See LASALLE, *supra* note 8, at 21–22; see also Smith, *supra* note 177; *State v. Williams*, 888 N.W.2d 1, 2 (Wis. Ct. App. 2016).

285. Schill, *supra* note 9, at 131.

286. ALVARO PIAGGIO & PRACHI VIDWANS, THE COST AND CONSEQUENCES OF THE WAR ON DRUGS: REPORT 49 (2019), https://hrf.org/wp-content/uploads/2019/05/WoD_Online-version-FINAL.pdf [<https://perma.cc/YM9J-AXWF>].

287. John Bacon, *Death Penalty for Drug Dealers? Count Trump In*, U.S.A. TODAY (Mar. 11, 2018), <https://www.usatoday.com/story/news/nation/2018/03/11/death-penalty-drug-dealers-count-trump/414535002/> [<https://perma.cc/BT6H-DZT8>]; see also Beletsky, LaSalle, Newman Paré, Tam & Tochka, *supra* note 50, 170–71 (discussing why incarceration causes more drug-related deaths).

288. Kristen Han, *What Trump Is Learning from Singapore—And Vice Versa*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/opinion/trump-singapore.html> [<https://perma.cc/3H3C-3SYS>]. Although Singapore has long claimed that the country has some of the lowest rates of drug offenses in the world, “the government does not publish reliable data on drug use, making this statement impossible to independently verify.” Rick Lines, *Trump Take Note—Why Singapore’s Claim that the Death Penalty Works for Drug Offenses Is Fake News*, CONVERSATION (Mar. 19, 2018),

has reportedly invited government officials from Singapore to the White House to discuss “their approach to drug trafficking, including their use of capital punishment.”²⁸⁹ This belief that a heavy-handed criminal justice approach to drug offenses can reduce the harm caused by drugs in communities is echoed by some in Wisconsin.²⁹⁰ Combined with the increased prevalence of Len Bias charges and plea deal resolutions, the state could see more convictions and longer penalties for drug-related offenses in the near future.

Prosecutors rarely have a burden to meet in Len Bias cases in Wisconsin. Because most defendants take plea deals, the State rarely has to prove the elements of the crime beyond a reasonable doubt to secure a conviction.²⁹¹ Today, plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”²⁹² Under political and societal pressures, prosecutors often overcharge the Len Bias law, and defendants then plead down to a lesser charge.²⁹³ In Wisconsin’s aggressive plea system, dated understandings of drug addiction affect drug users charged under the Len Bias law.²⁹⁴

<https://theconversation.com/trump-take-note-why-singapores-claim-that-the-death-penalty-works-for-drug-offences-is-fake-news-92305> [https://perma.cc/J9ME-PXNR]. And even this flawed data shows that Singapore’s drug use has increased between 2003 and 2017. See Han, *supra*.

289. See Han, *supra* note 288.

290. Some Wisconsin judges support increasing punishments for drug offenses. See Smith, *supra* note 177; *State v. Williams*, 888 N.W.2d 1, 2 (Wis. Ct. App. 2016). A circuit court judge echoed President Trump’s sentiment that Singapore’s drug trafficking penalties were successful. Deneen Smith, *12 Year Prison Sentence for Man Connected to Drug Overdose Death*, KENOSHA NEWS (July 21, 2017), https://www.kenoshanews.com/news/local/12-year-prison-sentence-for-man-connected-to-drug-overdose-death/article_945d95f9-d87b-5294-a309-3b520e1a6777.html [https://perma.cc/NRR2-D6CN]. At the same hearing, the judge framed the drug crisis in similar terms to the 1980s administrations, commenting that drug use “is ultimately a choice of will . . . we’ve also gotten away from this concept in the modern era, but the choice is between good and evil.” See *id.*

291. See Klingele, Scott & Dickey, *supra* note 180, at 958 and accompanying text.

292. *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

293. See LASALLE, *supra* note 8, at 21; Paige Williams, *The Wrong Way to Fight the Opioid Crisis*, NEW YORKER (Feb. 3, 2020), <https://newyorker.com/magazine/2020/02/10/the-wrong-way-to-fight-the-opioid-crisis> [https://perma.cc/N5TB-JXTB].

294. See LASALLE, *supra* note 8, at 21; Pamela Oliver, *Drug Homicide Prosecutions Make Overdose Problems Worse*, UNIV. WIS.-MADISON SOCIO.: RACE, POL., JUST. (last visited Sept. 25, 2020), <https://www.ssc.wisc.edu/soc/racepoliticsjustice/2017/12/08/drug-homicide-prosecutions-make-overdose-problems-worse/> [https://perma.cc/2G9L-7C8K]; Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, *supra* note 16.

Even when a Len Bias case goes to trial, the burden of proving that the defendant's conduct was reckless and that the shared drug was a substantial factor in the death is a low bar.²⁹⁵ Drug users are not distinguished from large-scale dealers,²⁹⁶ nor does the GSOL provide any meaningful protection.²⁹⁷ Unless the law is clarified or changed, the increase in synthetic opioid-induced deaths can only mean that Len Bias prosecutions of opioid addicts will also increase.

Len Bias charges often lead to extended sentences for drug addicts after they agree to a plea,²⁹⁸ as well as after a guilty verdict at trial.²⁹⁹ Wisconsin's sentencing scheme gives judges broad discretion in adopting appropriate sentences.³⁰⁰ With increasing recognition of the benefits of drug courts within the state and more widespread accurate information about addiction, this flexibility can provide tailored solutions in individual cases, giving addicts the best chance at recovery while still protecting the public.³⁰¹ On the other hand, judicial discretion can be problematic when it is exercised by a judge guided by incorrect or disproven beliefs about addiction and the tendencies of addicts. A study of Wisconsin counties "that have charged at least ten drug-induced homicide cases since 2000" highlights how much sentences can vary.³⁰²

295. See *supra* Section II.B.2.

296. See *State v. Clemons*, 476 N.W.2d 283, 285 (Wis. Ct. App. 1991); Goldensohn, *You're Not A Drug Dealer? Here's Why the Police Might Disagree*, *supra* note 161. *But see* Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 713.

297. See Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 731–32; Vielmetti, *supra* note 20.

298. See, e.g., Valena E. Beety, *The Overdose/Homicide Epidemic*, 34 GA. ST. U. L. REV. 983, 985–86 (2018); Thomasi McDonald, *How the 'Len Bias Law' of 1988 Is Being Used to Get Longer Prison Sentences Today*, RALEIGH NEWS & OBSERVER (Oct. 31, 2017), <https://www.newsobserver.com/news/local/crime/article181955441.html>.

299. See Vielmetti, *supra* note 20.

300. *State v. Trigueros*, 701 N.W.2d 54, 58 (Wis. Ct. App. 2005) ("Trial courts . . . are not required to blindly accept or adopt sentencing recommendations from any source."); see also WIS. STAT. § 973.017 (2017–18); *State v. Gallion*, 678 N.W.2d 197, 208–09 (Wis. 2004).

301. Riley Vetterkind, *DOJ Announces Counties Set to Receive Funds to Expand or Establish Drug Courts*, WIS. STATE J. (Nov. 19, 2019), https://madison.com/wsj/news/local/govt-and-politics/doj-announces-counties-set-to-receive-funds-to-expand-or-establish-drug-courts/article_b68c4e4c-3326-5b4a-ae9-d166a410d668.html [<https://perma.cc/4GJ4-5UKJ>] (announcing state funding for three new drug courts as well as increased funding for seven counties with existing programs); Stephanie Domitrovich & Jeffrey M. Jentzen, *Best Practices and Recommendations: Judicial and Medical Perspectives on Cases Involving Addiction to Opioids*, 57 JUDGES J. 24, 25 (2018) ("[T]he current best practices of dealing with drug addictions should be similar to handling those with mental illnesses . . ."). See also *Effective Justice Strategies: Problem-Solving Courts*, WIS. CT. SYS. (last updated Sept. 9, 2020), <https://www.wicourts.gov/courts/programs/altproblemsolving.htm> [<https://perma.cc/P66V-EUZC>].

302. See LASALLE, *supra* note 8, at 21.

For example, in Ozaukee County, courts “handed out the lengthiest sentences with an average of 11 years in prison.”³⁰³ But, in more lenient counties, where drug-induced homicide cases are often dropped down to a lesser charge,³⁰⁴ the lowest average sentence, in Manitowoc County, is still three years in prison for those originally charged with drug-induced homicide.³⁰⁵

Yet, Wisconsin’s current judges work within the framework of the existing legal institution, and faulting them for working within this framework ignores the larger systemic problem: prejudices against drug addicts exist within the structure of the legal system itself—the result of a process that has taken place gradually over many decades.³⁰⁶ Opioid addiction is a disease that can be effectively treated—moralizing and politicizing its causes and solutions are unproductive distractions.³⁰⁷ If drug addicts continue to be condemned, not only by the people handling their cases but also by the legal institution itself, the cycle of incarceration followed by reoffending behavior, which leads to subsequent incarceration, will only be disrupted by intervening overdose deaths.³⁰⁸

III. REFRAMING THE OPIOID CRISIS AS A PUBLIC HEALTH CRISIS WITHIN THE CRIMINAL JUSTICE SYSTEM

The punitive approach to combating the drug crisis does not work.³⁰⁹ When President Nixon first launched the War on Drugs, he spoke of

303. *Id.*

304. *Id.*

305. *Id.*

306. *See State v. Henyard*, No. 2019AP548-CR, 2020 WL 3815550, at *7–9 (Wis. Ct. App. July 8, 2020) (finding there was no judicial bias in a case where a judge’s public statements about the opioid crisis, which included “the key to addressing the growing opiate problem—and drug problems in general—is to put more people in prison” and “the war on drugs needs to be fought more aggressively,” were made about drug addiction generally and not against the individual defendant); *State v. Burks*, 921 N.W.2d 530, ¶¶ 11, 21 (Wis. Ct. App. 2018) (The court upheld the twenty-year sentence of an “aspiring heroin dealer[]” for delivery of less than 3 grams of heroin that contributed to a multiple-drug overdose death. The sentencing judge concluded that “there needs to be some significant punishment to make sure that that is conveyed to the people who want to be big time drug dealers”), *review denied*, 923 N.W.2d 159; *Barren v. State*, 198 N.W.2d 345, 347 (Wis. 1972) (“[T]his court has recognized that a witness who is addicted to drugs is less likely to be truthful.”); *Edwards v. State*, 181 N.W.2d 383, 385 (Wis. 1970) (A witness’s truthful admissions of heroin use and addiction could correctly be introduced for impeachment purposes because “[i]t is generally recognized heroin addicts are often liars”).

307. *See Domitrovich & Jentzen*, *supra* note 301, at 25; *Williams*, *supra* note 293.

308. Beletsky, LaSalle, Newman, Paré, Tam & Tochka, *supra* note 50, at 170–71.

309. PIAGGIO & VIDWANS, *supra* note 286, at 45.

fighting and defeating “[p]ublic enemy number one.”³¹⁰ Mandatory minimum sentences and three-strikes laws resulted in mass incarceration of poor minorities³¹¹ but did little to mitigate drug use.³¹² The tension between the Len Bias law and the GSOL stems from the established punitive approach to drug offenses colliding with the more recent, harm-reduction-based approach.

In order for these laws to work more effectively, this Comment proposes a solution: The legislature and the criminal justice system need to distinguish between opioid addicts who share or broker drugs and for-profit dealers involved in the drug trade. Specifically, the system should recognize a joint-user defense when drug addicts are charged under the Len Bias law and similar statutes. Recognizing the disparate levels of culpability between addicts and career drug dealers allows addicts to access medical help under the GSOL without the fear of murder charges while also allowing law enforcement and prosecutors to allocate resources for the more complex task of prosecuting commercial drug dealers. This solution recognizes that addiction is a disease and gives addicts more opportunities to address their illness.

A. Separating Drug Dealers from Drug Users

A common refrain is that people who sell drugs that kill people deserve to be punished.³¹³ This sentiment ignores the reality that the current application of the Len Bias law focuses on the victims of the opioid crisis and allows commercial drug dealers to escape prosecution.³¹⁴ The belief that lightening up on criminal penalties will encourage drug use and make the problem worse is a remnant of 1980s policy that has since been discounted.³¹⁵ Today, the Len Bias law is applied to the closest link in the chain of distribution, an application that

310. WESTHOFF, *supra* note 32, at 231.

311. See PIAGGIO & VIDWANS, *supra* note 286, at 47, 49; WESTHOFF, *supra* note 32, at 231.

312. See WESTHOFF, *supra* note 32, at 231.

313. See Smith, *supra* note 177; LASALLE, *supra* note 8, at 21; Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 738 (“[A] majority of drug-induced homicide cases prosecute mere users who shared drugs with a friend or family member, not members of the drug trade.”). GSOLs have generated similar controversy due to the belief that immunity should not be offered to people who helped create the situation that requires aid. Schill, *supra* note 9, at 155–56. Anne Schulze’s case is a perfect example of why this mindset is problematic: she was not afforded protection under Wisconsin’s narrow GSOL, and her drug dealer escaped liability while she was prosecuted. See Vielmetti, *supra* note 20.

314. Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, *supra* note 16.

315. LASALLE, *supra* note 8, at 2.

is unfaithful to the law's original purpose and unsuccessful in mitigating drug addiction.³¹⁶

Additionally, prosecuting and incarcerating drug addicts actually increases overdose fatalities.³¹⁷ Because Wisconsin prisons do not have opioid-based medication-assisted treatment programs, addicts go into withdrawal when they are incarcerated.³¹⁸ They lose their tolerance to opioids but do not receive the necessary treatment to reduce cravings.³¹⁹ When they are released, they are at an extremely high risk of opioid overdose.³²⁰ “[T]heir brain chemistry’s cravings, combined with the

316. See Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, *supra* note 16; LASALLE, *supra* note 8, at 21.

317. Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 736–37; *see also* Beletsky, LaSalle, Newman, Paré, Tam & Tochka, *supra* note 50, at 170–71.

318. See WIS. DEP’T OF CORR., OPIOID ADDICTION TREATMENT PILOT PROGRAM PLAN 2 (2015); Beletsky, LaSalle, Newman, Paré, Tam & Tochka, *supra* note 50, at 157. The FDA has approved three drugs for the treatment of opioid addiction. *Information About Medication-Assisted Treatment (MAT)*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/drugs/information-drug-class/information-about-medication-assisted-treatment-mat> [<https://perma.cc/9EZx-8WK8>] (last updated Feb. 14, 2019). Two medications are opioid-based, methadone and buprenorphine (Suboxone), and the third, naltrexone (Vivitrol), is not an opioid. Ashley Luthern, *Dane County Jail Is Treating Heroin, Opioid Addictions with Vivitrol. Here’s What Other Wisconsin Counties Can Learn*, MILWAUKEE J. SENTINEL (Aug. 17, 2018, 11:32 AM), <https://www.jsonline.com/story/news/crime/2018/08/16/how-dane-county-jail-treats-heroin-opioid-addiction-vivitrol-wisconsin/996080002/> [<https://perma.cc/5CU7-T3NT>]. Wisconsin prisons that offer medication-assisted treatment only offer naltrexone injections. See WIS. DEP’T OF CORR., *supra*, at 3. Naltrexone requires a ten-day period of sobriety before it can be administered and immediately induces severe opioid withdrawal if the patient still has opioids in his system. See Luthern, *supra*. A recent study showed that naltrexone patients are less likely to begin treatment (stay sober for the required 10 days) and at risk of relapse and overdose in the withdrawal period—unlike patients treated with buprenorphine, who can commence treatment without full withdrawal. See NAT’L INST. ON DRUG ABUSE, *MEDICATIONS TO TREAT OPIOID USE DISORDER RESEARCH REPORT* (June 2018), <https://www.drugabuse.gov/publications/research-reports/medications-to-treat-opioid-addiction/efficacy-medications-opioid-use-disorder> [<https://perma.cc/42NV-6NPJ>]; Joshua D. Lee, Edward V. Nunes Jr., Patricia Novo, Ken Bachrach, Genie L. Bailey, Snehal Bhatt, Sarah Farkas, Marc Fishman, Phoebe Gauthier, Candace C. Hodgkins, Jacquie King, Robert Lindblad, David Liu, Abigail G. Matthews, Jeanine May, K. Michelle Peavy, Stephen Ross, Dagmar Salazar, Paul Schkolnik, Dikla Shmueli-Blumberg, Don Stablein, Geetha Subramaniam & John Rotrosen, *Comparative Effectiveness of Extended-Release Naltrexone Versus Buprenorphine-Naloxone for Opioid Relapse Prevention (X:BOT): A Multicentre, Open-Label, Randomised Controlled Trial*, 391 LANCET 309, 314, 316 (2018). However, once treatment is underway, naltrexone injections and buprenorphine appear to be similarly effective. See NAT’L INST. ON DRUG ABUSE, *supra*. Naltrexone is more expensive, making treatment compliance difficult for recently released prisoners without a stable income or health insurance. See Luthern, *supra* (“A monthly dose of Vivitrol can cost between \$500 and \$1,000.”).

319. See Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 736–37.

320. See *id.* at 737.

emotional and social trauma of reentry,” can easily induce recently released convicts to consume opioids at doses they can no longer tolerate.³²¹

This solution requires the criminal justice system to separate the drug users who are currently considered a link in the drug distribution chain from drug dealers.³²² Drug users who buy drugs to share with others are generally “paid” in a portion of the drugs, and the only purpose of the transaction is to support their addictions.³²³ Lee Hoffer, a medical anthropologist, calls these users “drug brokers,” arguing that they differ from dealers because they do not invest in large quantities of drugs and break down drugs into smaller packages for resale.³²⁴ User-to-user drug exchanges should be treated differently under the law because they do not entail the same level of criminal behavior as large-scale drug deals.³²⁵ In many cases, the only motive is alleviating withdrawal symptoms.³²⁶

B. The Joint-User Defense

A simple way to implement this separation is to allow a joint-user defense.³²⁷ The absence of a joint-user defense to Wisconsin’s Len Bias law is confounding because, in many overdose situations, addicts are using with friends and family members.³²⁸ Thus, Len Bias convictions

321. See *id.*

322. See Lee Hoffer & Shah Jamal Alam, “Copping” in *Heroin Markets: The Hidden Information Costs of Indirect Sales and Why They Matter*, 7812 LECTURE NOTES COMPUT. SCI. 83, 84 (2013). While still differentiating drug users from the people who orchestrate large scale drug operations, the system needs to treat opioid addicts as a single class of people with a common illness. See Rebecca McCray, *Treating Addiction as a Disease, Not a Crime*, AM. C.L. UNION (May 23, 2012, 4:05 PM), <https://www.aclu.org/blog/smart-justice/sentencing-reform/treating-addiction-disease-not-crime> [https://perma.cc/BB39-YMFV]; Maher, *supra* note 271, at 1 (showing a correlation between economic challenges and opioid use in Wisconsin counties); Krystina Murphy, *Racial Disparities in Opioid Addiction Treatment in Black and White Populations*, ADDICTION CTR. (Oct. 15, 2019), <https://www.addictioncenter.com/news/2019/10/racial-disparities-opioid-addiction-treatment/> [https://perma.cc/Z98Y-VA6N] (finding that white people are thirty-five times more likely to visit hospitals for MAT than people of color).

323. See Hoffer & Alam, *supra* note 322, at 84.

324. See *id.*

325. *Id.* at 84, 91 (“[L]ogics supporting the war on drugs . . . are fundamentally defective.”).

326. See Pedro Mateu-Gelabert, Milagros Sandoval, Peter Meylakhs, Travis Wendel & Samuel R. Friedman, *Strategies to Avoid Opiate Withdrawal: Implications for HCV and HIV Risks*, 21 INT’L J. DRUG POL’Y 179, 179, 181 (2010).

327. See Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 713.

328. See Goldensohn, *You’re Not A Drug Dealer? Here’s Why the Police Might Disagree*, *supra* note 161; Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 709.

often do not bring closure to a victim's loved ones in the same way that convictions in traditional homicide cases might. Indeed, in many cases, Len Bias convictions only amplify their suffering.³²⁹

In jurisdictions where it is accepted, a successful joint-user defense defeats the distribution element of a Len Bias offense.³³⁰ When people jointly acquire drugs for their own use, "intending only to share it together, their only crime is personal drug use."³³¹ Because a joint-user defense argues against the distribution element of drug-induced homicide, "it can potentially be grounds for dismissing the charges."³³²

Fortunately, there are voices in Wisconsin's criminal justice system advocating for this distinction. When the GSOL was first proposed, Tim Keifer, a former prosecutor turned defense attorney, cautioned that not extending immunity to co-users who supplied drugs could deter people from calling 911.³³³ Attorney Daniel Adams wrote a memo to the circuit judge before his client, Shawn Gray, was sentenced in a Len Bias case, noting the troubling rise in Len Bias prosecutions.³³⁴ Adams argues that if the State's use of the law to prosecute opioid users was an effective deterrent to drug use, this tactic "should result in a bending of the curve of opioid overdoses."³³⁵ He pinpoints "the flawed premise" behind this use of the Len Bias law that differentiates it from other serious crimes: there is no easily distinguishable line between offender and victim.³³⁶ In fact, the State had prosecuted the overdose victim in Gray's case and "incarcerated [her] up until just days before her overdose death."³³⁷

The state legislature should adjust the Len Bias law because prosecutors and judges require legislative direction to identify the law's intended targets.³³⁸ At a minimum, a joint-user defense should be implemented to effect the law's original purpose of prosecuting for-profit drug dealers and disrupting the drug trade.³³⁹ Until Wisconsin's approach

329. See Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, *supra* note 11; Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, *supra* note 16.

330. See Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 713.

331. *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977).

332. See Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 713.

333. Polcyn, *The Legacy of Len Bias: Police Treating Overdoses as Homicides*, *supra* note 224.

334. Sentencing Memorandum, *State v. Gray*, No. 2017CF001570 (Wis. Cir. Ct. June 17, 2019), <http://defensewisconsin.com/wp-content/uploads/2019/06/Grey-Sentencing-Memo-Len-Bias-Homicide.pdf> [<https://perma.cc/2KUK-MMDL>].

335. *Id.*

336. *Id.*

337. *Id.*

338. See Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, *supra* note 16.

339. See *Burrage v. United States*, 571 U.S. 204, 217–18 (2014); Polcyn, *The Legacy of Len Bias: Police Treating Overdoses as Homicides*, *supra* note 224.

to the Len Bias law changes, the GSOL will be ineffective and the overdose death toll will continue to increase.

CONCLUSION

This Comment does not invent novel alternatives to the current approach taken by Wisconsin's criminal justice system. Instead, it recommends that the criminal justice system align itself with the state's successful public health initiative by acknowledging that addiction is a disease and adjusting criminal laws to protect both the public and those who suffer from opioid addiction.³⁴⁰ The opioid crisis is a complex problem, and the state has made commendable public health strides to mitigate it.³⁴¹ Part II.D proposes a specific solution to relieve the tension between the Len Bias law and the GSOL. But to fully address the opioid crisis, increased education is necessary within the criminal justice system and in Wisconsin communities affected by drug addiction.³⁴²

Communities with active addiction problems need assurance that the criminal justice system will support their harm-reduction efforts. The judiciary should adopt a best practices approach to cases involving drug addicts, taking direction from medical evidence. District attorneys should explore alternatives to prosecution and learn the discrete challenges their communities are facing with opioid addiction. Police departments should work in tandem with their local prosecutors to implement policies that distinguish addicts from members of the drug trade.

Outreach and education within the community is a vital component of the social change necessary to mitigate the current opioid epidemic.³⁴³ A lack of public information has impeded GSOLs nationwide.³⁴⁴ In a study conducted after Pennsylvania's GSOL was passed, "no participants . . . were aware of the law, and most described both fear of police and unwillingness to call 911."³⁴⁵ Campaigns in New York and Washington have seen success in increasing the public's knowledge of amnesty policies.³⁴⁶ Lack of public awareness may be a considerable obstacle for

340. ENDING THE OPIOID CRISIS, *supra* note 7, at 5–6.

341. *See id.* at 6.

342. *See* Domitrovich & Jentzen, *supra* note 301, at 25; LASALLE, *supra* note 8, at 21.

343. Schill, *supra* note 9, at 154; Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 737–38 ("Unfortunately, the public has relatively low awareness and understanding of [GSOLs]. On the flip side, there is strong media coverage of drug-induced homicide policy, arrests, and prosecutions.").

344. *See* Schill, *supra* note 9, at 154.

345. Latimore & Bergstein, *supra* note 105, at 83.

346. Schill, *supra* note 9, at 154.

Wisconsin's GSOL.³⁴⁷ If agencies in the Wisconsin criminal justice system joined forces with public health initiatives, many lives would be saved.³⁴⁸

The opioid crisis has embedded itself in Wisconsin, and the criminal justice system's current approach does not mitigate opioid-induced deaths.³⁴⁹ To comprehensively address the problem, the state's criminal justice system must undergo a paradigmatic shift, moving the focus of criminal prosecutions involving opioid addicts from deterrence through punishment to harm reduction and rehabilitation.³⁵⁰ In the end, "[l]ives should matter more than criminal convictions."³⁵¹

347. See Latimore & Bergstein, *supra* note 105, at 83; Schill, *supra* note 9, at 154; Beety, Kreit, Boustead, Goulka & Beletsky, *supra* note 10, at 737–38.

348. See ENDING THE OPIOID CRISIS, *supra* note 7, at 5–6.

349. LASALLE, *supra* note 8, at 21; Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, *supra* note 16.

350. See Schill, *supra* note 9, at 158.

351. *Id.* at 137.