NOTE

RE-DIRECTING THE 50-YEAR-LONG WAR ON DRUGS IN THE UNITED STATES: SAFE INJECTION SITES AS THE NECESSARY WEAPONS

I. INTRODUCTION

Just north of Philadelphia, Pennsylvania, locals from the town of Kensington watched their quaint community transform into the "epicenter of the opioid crisis" in less than forty years.[1] Since 2007, more people report using the non-prescription opioid, heroin, each year in the United States—with an all-time high of 948,000 (reported) opioid users in 2019.[2] The town of Kensington, Pennsylvania accounted for

1. *See* Alfred Lubrano, *How Kensington Got to Be the Center of the Opioid* Crisis, PHILA. INQUIRER (Jan. 23, 2018), https://www.inquirer.com/philly/news/kensington-opioid-crisis-history-philly-heroin-20180123.html&outputType=app-web-view (explaining that Kensington was "a thriving workers' enclave nationally famous for creating hats, cigars, and a stable blue-collar life[]" up until the late 1950s when it became "the epicenter of Philadelphia's opioid crisis"); Bobby Allyn & Michaela Winberg, *Philadelphia Nonprofit Opening Nation's 1st Supervised Injection Site Next Week*, NAT'L PUB. RADIO (Feb. 26, 2020, 12:19 PM), https://www.npr.org/2020/02/26/809608489/philadelphia-nonprofit-opening-nations-first-supervised-injection-site-next-week; Nina Feldman, *Federal Appeals Court Rules Safehouse Supervised Injection Site Would Be Illegal*, WHYY.ORG (Jan. 12, 2021, 2:27 PM), https://phi.org/articles/federal-appeals-court-rules-safehouse-supervised-injection-site-would-be-illegal; *see also* Tom MacDonald, *Gov. Wolf Calls Drug Issue in Philly 'Sad and Depressing' After Tour of Kensington*, WHYY.ORG (Sept. 16, 2021), https://whyy.org/articles/gov-wolf-calls-drug-issue-in-philly-sad-and-depressing-after-tour-of-kensington (quoting Governor Wolf, who explained that no "magic wand" could put an end to the "incredibly sad and depressing" reality of opioid addiction in Kensington); Jennifer Percy, *Trapped by the 'Walmart of Heroin*,*'* N.Y. TIMES MAG. (Oct. 10, 2018), https://www.nytimes.com/2018/10/10/magazine/kensington-heroin-opioid-philadelphia.html ("Like most everyone else, Shiz was in Kensington to buy heroin.").

2. *See Opioids*, NAT'L INST. HEALTH, https://www.drugabuse.gov/drug-topics/opioids (last visited Jan. 10, 2022) ("Opioids are a class of drugs that include the illegal drug heroin, synthetic opioids such as fentanyl, and pain relievers available legally by prescription, such as oxycodone (OxyContin[]), hydrocodone (Vicodin[]), codeine, morphine, and many others."); *see also What is the Scope of Heroin Use in the United States?: How Many People Use Heroin?*, NAT'L INST. DRUG ABUSE, https://www.drugabuse.gov/publications/research-reports/heroin/scope-heroin-use-in-united-states (last visited July 25, 2022) ("In 2021, an estimated 0.2% of 8th graders, 0.1% of 10th graders, and 0.1% of 12th graders reported using heroin in the past 12 months. . . . Among people aged 12 or older in 2020, an estimated 0.2% (or about 691,000 people) had a heroin use disorder in the past 12 months."); Brandon D.L. Marshall et al., *Reduction in Overdose Mortality After the*

three percent of all deaths related to opioids in the United States in 2019, although it only made up 0.0076% of the United States population that year.[3] The opioid problem is not confined to deaths, the millions of loved ones of addicts, or even downstream health care service workers, because in 2019—the last year that full data is available—at least $78.5 billion in American taxpayer dollars were lost to the disease of opioid addiction.[4]

In an effort to prevent addiction, rather than punish it, the town of Kensington residents, backed by their local legislature, sought to open Safe Injection Sites ("SIS") in 2019.[5] Despite utilizing its constitutionally proper police powers to approve "Safehouse," the first (legal) SIS in the United States, the life-saving public health intervention was ultimately shot down by the Court of Appeals for the Third Circuit on appeal, for conflicting with 21 U.S.C. § 856(a)(2) (the "Crack House Statute" or "§ 856(a)(2)").[6] Of the four federal judges who have

Opening of North America's First Medically Supervised Safer Injecting Facility: A Retrospective Population-Based Study, 377 LANCET 1429, 1434 (2011) ("[T]he proportion of IDUs ["intravenous drug users"] who reported injecting heroin daily was 24% in 2001 and 25% in 2005, whereas daily cocaine injecting was 17% in 2001 and 15% in 2005."); Mason C. Ingram, *The Impact of Syringe and Needle Exchange Programs on Drug Use Rates in the United States* (Apr. 8, 2014) (B.A. thesis, Georgetown University) (on file with author) ("Although the number of current heroin users reported in the 2012 NSDUH results (335,000) comprised a relatively small portion of the American population (approximately 0.1 percent), the number of heroin users has increased nearly *threefold* since 2005, when NSDUH reported only 136,000 current heroin users nationwide.") (internal citation omitted).

3. *See Opioid Overdose Crisis*, NAT'L INST. HEALTH, https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis (last visited July 25, 2022) (explaining that 50,000 people died from opioids in 2019 in the United States); Aubrey Whelan, *Philly Overdose Deaths Rose Again in 2019, Especially in Black and Latino Communities*, PHILA. INQUIRER (May 13, 2020), www.inquirer.com/health/opioid-addiction/philadelphia-overdose-deaths-2019-rise-20200513.html (explaining that 1,150–1,200 people died from opioids in 2019 in Kensington alone); *see also Drug Overdose: Overdose Trends*, DRUG POL'Y ALL., https://drugpolicy.org/issues/drug-overdose (last visited July 25, 2022) ("There were over 100,000 overdose deaths in 2021—a nearly 28.5% surge from the record numbers we saw in 2020. Most of these deaths are preventable, but the 'tough on crime' rhetoric of the decades-long drug war and the stigma associated with drug use have blocked the widespread adoption of life-saving overdose prevention and treatment policies.").

4. *See Opioid Overdose Crisis*, *supra* note 3; *see also What Happens to Drug Addicts in Jail?*, ASPENRIDGE RECOVERY (Mar. 22, 2021), https://www.aspenridgerecoverycenters.com/what-happens-to-drug-addicts-in-jail ("One-fifth of incarcerated people—or 456,000 individuals—are serving time for a drug offense. Another 1.5 million are on probation or parole for drug-related crimes.").

5. *See* Allyn & Winberg, *supra* note 1; *see also Supervised Consumption Services*, DRUG POL'Y ALL., https://drugpolicy.org/issues/supervised-consumption-services (last visited July 25, 2022).

6. United States v. Safehouse (*Safehouse II*), No. CV 19-0519, 2020 WL 906997, at *1, *2-3 (E.D. Pa. filed Feb. 25, 2020), *stay granted*, 468 F. Supp. 3d 687 (E.D. Pa. filed June 24, 2020), *rev'd and remanded*, 985 F.3d 225, 229 (3d Cir. 2021), *cert. denied sub nom.* Safehouse v. Dept. of Just., No. 21-276, 2021 WL 4733378 (U.S. Oct. 12, 2021) (mem.). *See* Brief for Fourteen Cities & Counties et al. as Amici Curiae Supporting Petitioner at 4, 21-24, Safehouse v. Dept. of Just., No.

examined the impact of the Crack House Statute on SIS, to this day, "[t]wo interpret it one way and two interpret it the other."[7] It was, and still is, a "complex," "difficult," and altogether "novel" question of the law.[8]

With so much uncertainty about the constitutionality of the Crack House Statute as applied to SIS, Rhode Island has decided to permit SIS for at least two years under a statewide pilot program, and the State of New York has recently announced its plans to do the same—where two SIS now operate.[9] In fact, notwithstanding the Third Circuit's holding, there are *at least* a half dozen SIS currently operating in the United States[10]: statewide in Rhode Island, under the two-year pilot program,

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21-276 (U.S. Oct. 12, 2021). Although not referred to as such in this Note, "Th[e] [Crack House Statute] may [also] be cited as the 'Anti-Drug Abuse Act of 1986.'" Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 856).

7. *Safehouse II*, 468 F. Supp. 3d at 692, *rev'd and remanded*, 985 F.3d 225 (3d Cir. 2021), *cert. denied sub nom.* Safehouse v. Dept. of Just., No. 21-276, 2021 WL 4733378 (U.S. Oct. 12, 2021) (mem.). *See* United States v. Safehouse (*Safehouse II*), 991 F.3d 503, 506 (3d Cir. 2021); *see also* Jeremy Roebuck & Aubrey Whelan, *Safehouse Takes Its Battle Over a Philly Supervised Drug Injection Site to the U.S. Supreme Court*, PHILA INQUIRER (Aug. 26, 2021), https://www.inquirer.com/news/safehouse-supervised-injection-site-philadelphia-supreme-court-20210826.html ("The decision, by a three-judge panel of the court, overturned an earlier District Court ruling that found the opposite and concluded that 'the ultimate goal of Safehouse's proposed operation is to reduce drug use, not facilitate it.'"); Brief for Fourteen Cities & Counties et al., *supra* note 6, at 5; Petition for a Writ of Certiorari, at 10-11, Safehouse v. Dept. of Just., No. 21-276 (U.S. Aug. 23, 2021) ("The majority disagreed with the district court's construction of [21 U.S.C. § 856(a)] and held that the phrase 'for the purpose of'—as used in paragraph (a)(2)—looks *not* to the defendant's purpose (such as that of Safehouse), but rather, to the purpose of third parties (such as those who come to Safehouse for supervision and treatment).") (internal citations omitted). "The court of appeals' interpretation of [§] 856(a) . . . puts at risk of federal criminal liability an indeterminate array of non-commercial property owners who know of a guest's 'purpose' to use drugs . . . . " *Id.* at 21.

8. *See Safehouse II*, 468 F. Supp. 3d at 692 ("The very nature of th[e] case leaves room for reasonable minds to differ[]"), *rev'd and remanded*, 985 F.3d 225 (3d Cir. 2021), *cert. denied sub nom.* Safehouse v. Dept. of Just., No. 21-276, 2021 WL 4733378 (2021) (mem.). While it is undisputed that the Crack House Statute was not intended to cover state-approved, nonprofit Safe Injection Sites ("SIS"), it *is* disputed that the Crack House Statute prohibits them in 2022. *Id.*

9. *See* Edward Fitzpatrick, *Here's What a Safe Injection Would Look Like*, BOS. GLOBE MEDIA PARTNERS, LLC (July 14, 2021), www.bostonglobe.com/2021/07/14/metro/heres-what-safe-injection-site-would-look-like-rhode-island (explaining that Rhode Island, covered by the United States Court of Appeals for the First Circuit, will allow SIS to operate beginning July 2021, absent judicial intervention to the contrary); Matt Sutton, *New York City to Open Nation's First Ever Overdose Prevention Center Pilots to Save Lives Amid Record Overdoses*, DRUG POL'Y ALL. (Nov. 30, 2021), drugpolicy.org/press-release/2021/11/new-york-city-open-nations-first-ever-overdose-prevention-center-pilots-save; *see also* Katie Mulvaney, *RI Gov. McKee Signs Legislation Allowing Safe-Injection Sites Into Law*, PROVIDENCE J. (July 7, 2021, 6:54 PM), www.providencejournal.com/story/news/2021/07/07/gov-mckee-signs-legislation-allowing-safe-injection-sites-into-law/7891057002 ("Advocates have hailed the [Rhode Island] proposal as a much-needed tool as the state experienced a record 384 accidental overdose deaths in 2020 . . . . ").

10. *See* HEROIN & PRESCRIPTION OPIATE ADDICTION TASK FORCE, KING CNTY., FINAL REP. & RECOMMENDS. 1, 26–27 (Sept. 15, 2016),

beginning in July 2021;[11] the two in New York;[12] the one in Oregon;[13] and the one in Maine.[14]

Federal drug laws in the United States are now at odds with clear evidence that SIS work and have increasing community support.[15] The question remains whether future federal courts will "adhere[] to political decisions already made [statewide]" and alter their decisions when presented with "precisely the types of statistical and testimonial

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kingcounty.gov/depts/health/~/media/depts/community-human-services/behavioral-health-recovery/documents/herointf/Final-Heroin-Opiate-Addiction-Task-_Force-Report.ashx; *see also* Ingram, *supra* note 2 (describing other "closely-studied [underground] S[IS] in New Haven, Connecticut, which boasted reduction of approximately 33 percent in the HIV transmission and/or new infection rate among injection drug users who utilized the [SIS].").

11. *See* Fitzpatrick, *supra* note 9.

12. *See* Sutton, *supra* note 9 (explaining how Mayor Bill De Blasio's decision to open the first-ever Overdose Prevention Center pilots in New York closely followed the then-newly published CDC provisional overdose data, which showed "more than 100,000 deaths during the first year of COVID-19"); *see also* Jennifer Vazquez, *Supervised Drug Injection Sites to Open in NYC in Hopes of Preventing Overdoses*, NBC N.Y. (Mar. 9, 2022, 1:24 PM), www.nbcnewyork.com/news/local/supervised-drug-consumption-sites-to-open-in-nyc-in-hopes-of-preventing-overdoses/3425273 ("These services will be coming online at a critical time, according to the city, which reports that during 2020, over 2,000 individuals died of a drug overdose in New York City, the highest number since reporting began in 2000.").

13. *See* Carly Roberts, *How Supervised Injection Sites Can Help Address the Overdose Crisis*, HARV. L. PETRIE-FLOM CTR. (Mar. 26, 2021), blog.petrieflom.law.harvard.edu/2021/03/26/supervised-injection-sites-overdose-crisis.

14. *See id.*

15. *See America's New Drug Policy Landscape: Two-Thirds Favor Treatment, Not Jail, for Use of Heroin, Cocaine*, PEW RSCH. CTR. (Apr. 2, 2014), www.pewresearch.org/politics/2014/04/02/philadel-new-drug-policy-landscape; *see also* Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. (Apr. 12, 2017), www.cato.org/policy-analysis/four-decades-counting-continued-failure-war-drugs ("S[IS] have the potential to save taxpayers millions of dollars, as heavy drug users are more likely to rely on public assistance programs. A clean syringe costs less than half a dollar, while treatment for HIV costs between $385,200 and $618,900."); Ricky N. Bluthenal et al., *Collateral Damage in the War on Drugs: HIV Risk Behaviors Among Injection Drug Users*, 10 INT'L J. DRUG POL'Y 25, 27 (1999) (explaining how "[d]rug prohibition in and of itself contributes significantly to making injection drug use risky by driving drug users underground where they are reluctant to seek health care . . . . "); *Political Parties on Drug Use*, AM. ADDICTION CTRS., drugabuse.com/featured/political-parties-on-drug-use (Feb. 9, 2022) ("Eighty-three percent of individuals from all political parties agreed [in 2022] that the U.S. should emphasize rehabilitation over incarceration for nonviolent drug crimes."); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 39 n.18 (1998) (explaining how in 1995, over half of American respondents gave the United States government a reported grade of "D" or "F" for its purported success in dealing with drug crimes and for its then-present drug policy initiatives); *War on Drugs*, HISTORY.COM (Dec. 17, 2019), www.history.com/topics/crime/the-war-on-drugs ("Public support for the war on drugs has waned in recent decades. Some Americans and policymakers feel the campaign has been ineffective or has led to racial divide. Between 2009 and 2013, some 40 states took steps to soften their drug laws . . . . ").

evidence" on the successful implementation of SIS in other countries *and in the United States*.[16]

This Note will argue for an amendment to the Crack House Statute in lieu of public-health alternatives for nonviolent drug crimes.[17] Part II will discuss the background of the opioid crisis in the United States and abroad, and compare and contrast domestic efforts to curtail opioid addiction, codified in the Crack House Statute, with efforts abroad, surrounding legal harm reduction.[18] Part III will discuss the constitutional concerns associated with the Crack House Statute as applied to SIS and other state and local harm reduction programs, and emphasize the unfairness in federally proscribing what is locally permissible.[19] Part IV will set forth the benefits of amending the Crack House Statute to narrowly reflect the legislative intent of its framers, and to moreover reflect global support for harm reduction alternatives to mass-incarceration and heightened sentencing schemes looming from the War on Drugs, with respect to nonviolent drug crimes.[20]

II. BACKGROUND

This Part will begin by discussing the global opioid epidemic and the subsequent War on Drugs that was first declared by the United States.[21] Subpart A will discuss how the War on Drugs has evolved over the last half-century in the United States, with respect to differing federal, state, and local laws (which focus on decreasing the supply of—not the demand for—illicit drugs), and briefly compare their success stories with the success stories in other countries with legal SIS.[22] Subpart B will begin by explaining what SIS are, and then discuss their goals alongside the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the "1988 Convention").[23]

A. The War on Drugs

From 1999 to 2019, nearly 500,000 people in the United States died from an opioid overdose relating to prescription opioids,

16. Richmond v. J. A. Croson Co., 488 U.S. 469, 529 (1989) (Marshall, J., dissenting).
17. *See infra* Part IV.
18. *See infra* Part II.
19. *See infra* Part III.
20. *See infra* Part IV; *see also infra* text accompanying notes 124–125.
21. *See infra* Part II.
22. *See infra* Part II.A.
23. *See infra* Part II.B.

non-prescription fentanyl, or non-prescription heroin.[24] Over that same time frame, ninety-four percent of people who switched from prescription opioids to heroin did so because prescription opioids "were far more expensive and harder to obtain."[25] It was "not just drug abusers who [we]re dying [from opioid addiction], [but] everyday pain patients" who were also dying from prescribed doses of oxycontin, ever since opioids were first marketed as the solution for "everyday suffering" in the 1990s.[26] Deaths from heroin nearly tripled in 2016, with more U.S. citizens dying from opioids than died in the entire Vietnam War; in 2021, deaths due to opioid drugs reached an all-time high in the United States.[27]

In the early 1970s, former President Richard Nixon declared a "War on Drugs" in the United States.[28] This "War" (still) targets illegal drug traffic in the United States in two major ways.[29] First, the Controlled Substances Act ("CSA") punishes the "private trade of non-prescription, illicit drugs, whilst encouraging the public trade of

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24. *See Opioid Crisis Statistics: Opioids by the Number*, DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/opioids/about-the-epidemic/opioid-crisis-statistics/index.html (last visited July 25, 2022) (finding that number to be around 506,666); *see also Drug Overdose Deaths*, CTRS. DISEASE CONTROL & ADDICTION, www.cdc.gov/drugoverdose/deaths/index.html (Feb. 22, 2022) (finding opioids involved in 70.6% of all drug overdose deaths in the United States in 2019).

25. *See, e.g.*, GLOB. COMM'N DRUG POL'Y, 2017 REPORT: WORLD DRUG PERCEPTION PROBLEM: COUNTERING PREJUDICES ABOUT PEOPLE WHO USE DRUGS 4, 22 (2017) (describing how when pharmaceutical opioids become less available, people switch to heroin because of its greater availability and lower cost); *see also How Many People in the U.S. Use Heroin?*, DRUG POL'Y ALL., drugpolicy.org/drug-facts/how-many-people-use-heroin (last visited July 25, 2022); (emphasis omitted); *Dopesick: First Bottle* (Hulu Oct. 13, 2021) (examining how one company, Purdue Pharma, Inc., triggered the global opioid epidemic in the 1990s through the introduction and fraudulent misrepresentation of both 'pain' as the ailment and prescription opioid medication as the cure).

26. *Dopesick: Black Box Warning* (Hulu Nov. 10, 2021); *see, e.g.*, *Dopesick: First Bottle* (Hulu Oct. 13, 2021) ("This drug has only been on the market for three years and there's already been a spike in overdose and crime rates in . . . all areas where this drug was first launched.").

27. *See* Lubrano, *supra* note 1; Claire Felter, *U.S. Opioid Epidemic*, COUNCIL ON FOREIGN RELS. (Sept. 8, 2021), www.cfr.org/backgrounder/us-opioid-epidemic (explaining how in 2019, opioids killed more than *seven* times the number of United States service members killed in the *combined* post-9/11 wars); *see also* Paul Caine, *US Overdose Deaths Surge to an All-Time High*, WTTW NEWS (Oct. 25, 2021, 8:33 PM), news.wttw.com/2021/10/25/us-overdose-deaths-surge-all-time-high ("More than 96,000 people died of drug overdoses during the first year of the COVID-19 pandemic–that's an increase of almost 30 percent in just one year . . . . It's also the largest single-year increase in drug overdose deaths ever reported in the United States."); HEROIN & PRESCRIPTION OPIATE ADDICTION TASK FORCE, KING CNTY., *supra* note 10, at 4 ("In 2000, there were more than 40,000 traffic-related deaths and fewer than 20,000 from drug overdose; in 2013, there were 43,982 overdose-related deaths and 32,719 traffic fatalities."); *see also Drug Overdose Deaths*, *supra* note 24 ("Opioids [] are currently the main driver of drug overdose deaths . . . . Opioids were involved in 49,860 overdose deaths in 2019 . . . . ").

28. *See War on Drugs*, *supra* note 15.

29. *See id.*

(otherwise illicit but) prescribed drugs."[30] Second, prison sentences are dramatically heightened for those punished under the CSA for a nonviolent, drug-related crime.[31] A single provision of the CSA—the Crack House Statute—enacted a half century ago to combat the War on Drugs, now ironically serves to hinder one of the War's biggest weapons—SIS.[32] That is because the War does not provide any necessary alternatives for those with substance abuse issues—at least not for racial minorities, or socioeconomically disadvantaged users.[33]

For opioid users who are free and alive in the United States today, federal law allows for the possibility of obtaining an opioid prescription, contingent on having the requisite money and resources to obtain one from a "qualified medical practitioner."[34] Not only does the possibility of recovery but "only for a fee" almost entirely shift the focus from a doctor's perspective to the finances of the patient, it also exacerbates the root cause of the epidemic[35]: by allowing "qualified medical practitioner[s]" to prescribe opioids for unsupervised consumption, the

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30. *Id. See* Deborah J. Vagins & Jesselyn McCurdy, CRACKS IN THE SYSTEM: TWENTY YEARS OF UNJUST FEDERAL CRACK COCAINE LAW, AM. CIV. LIBERTIES UNION 1, 6 (Oct. 2006), www.aclu.org/sites/default/files/field_document/cracksinsystem_20061025.pdf. However, where "certain activities" like "operating an opioid treatment program such as a methadone clinic" require "special registration," the "CSA directs the DEA administrator to issue a registration if it would be consistent with the public interest." JOANNA R. LAMPE, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS, R45948, at 13 (2021).

31. *Criminal Justice Facts: The United States Is the World's Leader in Incarceration*, SENTENCING PROJ., www.sentencingproject.org/criminal-justice-facts (last visited July 25, 2022).

32. *See* 21 U.S.C. § 856(a)(2) (1986); *see also* Larissa Morgan, *Regulatory Battle Over Safe Injection Sites*, REGUL. REV., www.theregreview.org/2019/10/08/morgan-regulatory-battle-over-safe-injection-sites (last visited July 25, 2022).

33. *See infra* Part III.B; LAMPE, *supra* note 30, at 2, 5; *see also* Betsy Pearl & Maritza Perez, *Ending the War on Drugs*, CTR. AM. PROGRESS (June 27, 2018, 9:00 AM), www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452786/ending-war-drugs; *War on Drugs*, *supra* note 15; Percy, *supra* note 1 ("Even when the temperatures dropped to the single digits, many of the addicts refused to go to a shelter. For some users, opioid withdrawal was worse than the possibility of freezing to death.").

34. 21 U.S.C. § 823(g)(1) (1970) (defining a "qualified medical practitioner" as someone who is "determined by the Secretary to be qualified (under standards established by the Secretary) . . . . "). *See Safehouse II*, 985 F.3d 225, 241 (3d Cir. 2021), *cert. denied sub nom*. Safehouse v. Dept. of Just., No. 21-276, 2021 WL 4733378 (U.S. Oct. 12, 2021) (mem.); *see also What Happens to Drug Addicts in Jail?*, *supra* note 4.

> [S]ince 2011, opioid prescribing has been cut by more than 60 percent. Unfortunately, however, as medical use declined, the total number of overdose deaths more than *doubled* between 2011 and 2020. Indeed, even before the pandemic, more overdose deaths had occurred since prescribing began to fall than took place while medical opioid use was soaring.

Maia Szalavitz, *We're Overlooking a Major Culprit in the Opioid Crisis*, SCI. AM. (May 28, 2021), www.scientificamerican.com/article/were-overlooking-a-major-culprit-in-the-opioid-crisis.

35. *See What Happens to Drug Addicts in Jail?*, *supra* note 4.

federal government is serving as the number one catalyst for more, uninformed drug use.[36]

The national response to the COVID-19 crisis in 2020, with respect to medically prescribed opioids, was to disrupt the supply chain of them, in the hopes of reducing emergency room visits and costs on downstream health care services.[37] Namely, instead of providing greater access to prescription medication, or to public detoxification services, or to SIS, the federal government decreased access to all three (alternatives to active addiction).[38] This is especially concerning when the United States has already been reducing supplies of prescription opioids, since at least 2011, for the purposes of reducing current demands for prescription opioids.[39] That is, of course, to the exclusion of all harm reduction methods that aim to reduce *future* demands for *all* opioid drugs.[40] Such a faulty focus on yesterday's methods—for example, disrupting the supply chain of prescription opioids, whilst locking up the (current) users and suppliers of heroin—to solve today's crisis, will

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36. *See id.*; *see also* Caine, *supra* note 27 ("[T]he overall number of overdose deaths nationwide has risen sharply because of the widespread availability of pills and other drugs laced with fentanyl, a synthetic opioid that can be up to 100 times more powerful than morphine . . . . Almost every substance right now, we've heard of it having fentanyl in it except for marijuana or LSD. But anything like cocaine, meth and heroin—*heroin is the big one*—we are seeing very little actual heroin and much more fentanyl[] . . . . ") (alterations in original) (emphasis added).

37. *See, e.g.*, Rita Henderson et al., *Opioid Use Disorder Treatment Disruptions During the Early COVID-19 Pandemic and Other Emergent Disasters: A Scoping Review Addressing Dual Public Health Emergencies*, 21 BMC PUB. HEALTH 1, 4 (July 28, 2021), bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-021-11495-0 ("Literature reported reduced access to addiction treatment, recovery supports, and harm reduction services, leading to increased health and safety risks for [drug users]."); *see also* Josh Katz, *How a Police Chief, a Governor & a Sociologist Would Spend $100 Billion to Solve the Opioid Crisis*, N.Y. TIMES (Feb. 14, 2018), www.nytimes.com/interactive/2018/02/14/upshot/opioid-crisis-solutions.html (explaining that the "consensus of experts" in 2018 was to reduce not only the supply of opioids by targeting demand, but also to reduce the demand for opioids, by increasing treatment and the harm-reduction efforts).

38. *See* Justin K. Niles et al., *The Opioid Epidemic Within the COVID-19 Pandemic: Drug Testing in 2020*, 24 POP. HEALTH MGMT. S-43, S-43, S-48 (Feb. 5, 2021), pubmed.ncbi.nlm.nih.gov/33031013; *see also* Missy Owen, *Safe Injection Sites as Harm Reduction*, DAVIS DIRECTION, www.davisdirection.com/post/safe-injection-sites-as-harm-reduction (last visited July 25, 2022).

39. *See* Felter, *supra* note 27; *see also* Szalavitz, *supra* note 34; *see generally* Henderson et al., *supra* note 37, at 4–6 (explaining how the COVID-19 pandemic exacerbated already-existing barriers to treatment and health care for drug users in the United States).

40. *See* Roberts, *supra* note 13 ("In [] Canada, Australia, France, Germany, Spain, and Switzerland, [SIS] have been shown to improve individual health by reducing overdose mortality rates, increasing access to health and social services, and decreasing transmission of viral infections [] like HIV and viral hepatitis.") (internal citation omitted).

leave the United States in an impossibly unfavorable position in the global War on Drugs.[41]

The United States is already twenty years behind Vancouver, Canada, where SIS were similarly operating in particularly vulnerable neighborhoods after local initiatives pushed for their federal legalization.[42] While their success stories are already shocking, it is not difficult to imagine how many people could have used the SIS there prior, let alone outside of the city.[43] North America's first supervised consumption site, Insite, opened in Downtown Vancouver in 2003, in response to a high number of long-term injection drug users.[44] The facility, which has a legal exemption from prosecution under federal drug laws,[45] operates on a harm reduction model, which means that it strives to "decrease the adverse health, social and economic consequences of drug use without requiring abstinence from drug use."[46]

While the widespread assumption associated with drug addicts may be true to a certain extent—people who use drugs, and especially those who abuse opioids, engage in more criminal activities than the average person—not everyone who is convicted of a nonviolent drug offense, under a criminal use or possession statute, should be punished.[47] In fact, the vast majority of those who use prescription opioids illegally (or who use non-prescription heroin) are not committing any crime other than the one in contravention of drug laws.[48] Despite this fact, the United States'

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41. *See* Felter, *supra* note 27; *see also* Szalavitz, *supra* note 34 (juxtaposing the 'iron law of prohibition'—the phrase coined by Richard Cowan in 1986, which refers to "the effects of reducing drug supplies while not acting significantly to manage demand. Almost always, it results in the rise of a more harmful drug . . . "—with the 99th Congress' rationale (or lack thereof) when it wrote § 856(a)(2)).

42. *See* Thomas Kerr et al., *Supervised Injection Facilities in Canada: Past, Present, and Future*, 28 HARM REDUCTION J. 1, 2 (2017) (explaining how one early Vancouver safe injection site operated for 184 days—supervising over 3,000 injections—but soon, "like many of the other unsanctioned SI[S] before it, was eventually closed due to pressure from local police and policy makers").

43. *See, e.g.*, *Supervised Consumption Sites*, VANCOUVER COASTAL HEALTH, www.vch.ca/public-health/harm-reduction/supervised-consumption-sites (last visited July 25, 2022); *see also* Kerr et al., *supra* note 42, at 2 ("In September 2003, Canada's first legally sanctioned . . . [SIS] opened . . . although it is unclear how long this may have taken if the PHS [Portland Hotel Society] had not . . . buil[t] the physical site in secret.").

44. *See Supervised Consumption Sites*, *supra* note 43.

45. *See id.*

46. *See id.*

47. *See* GLOB. COMM'N DRUG POL'Y, *supra* note 25, at 31; *see also* Coyne & Hall, *supra* note 15 ("[M]aking markets illegal fails to reduce, much less eliminate, the market for drugs. Instead, these mandates mainly push the market for drugs into underground black markets.").

48. *See* Coyne & Hall, *supra* note 15, at 7; *see also* Vagins & McCurdy, *supra* note 30, at ii ("The law's goal of targeting high-level drug traffickers has failed. Congress made it explicitly clear that in passing the current mandatory minimum penalties for crack cocaine, it intended to target

drug policy narrative still runs on the theory that arrests and jail time will effectively deter drug addiction.[49] This view—that incarceration enhances public safety—has been widely disproved for many years.[50] The proof is in the pudding: while one-fifth of all incarcerated people in the United States are currently serving time for a drug-related crime, all drug-related crimes and drug-related fatalities have increased in the United States in 2020.[51]

B. What Is a Safe, or Supervised, Injection Site in Practice?

SIS are harm reduction tools that focus on avoiding the life-threatening risks of overdose in particularly vulnerable communities.[52] SIS do this by providing chronic opioid users with sterilized needles, medical monitoring, and advice for safer injection practices.[53] Opioid users must bring their own, pre-obtained drugs to

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'serious' and 'major' drug traffickers. The opposite has proved true: mandatory penalties for crack cocaine offenses apply most often to offenders who are low-level participants in the drug trade. For example, data from the Sentencing Commission shows that 73% of crack defendants have only low-level involvement in drug activity, such as street-level dealers, couriers, or lookouts.").

49. *See* Pearl & Perez, *supra* note 33; *see also Racial Double Standard in Drug Laws Persists Today*, EQUAL JUST. INITIATIVE (Dec. 9, 2019), eji.org/news/racial-double-standard-in-drug-laws-persists-today.

50. *See, e.g.*, *Criminal Justice Facts: The United States Is the World's Leader in Incarceration*, *supra* note 31 (explaining that while "serious, violent crime has been declining for the past 20 years," the number of prison sentences for nonviolent drug offenses has "skyrocketed from 40,900 in 1980 to 430,926 in 2019."); Ingrid A. Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENG. J. MED. 157, 158 (2007); *see also* Christen Linke Young & Abigail Durak, *How Do We Tackle the Opioid Crisis*?, BROOKINGS INST. (Oct. 18, 2019), www.brookings.edu/policy2020/votervital/how-do-we-tackle-the-opioid-crisis; Christie Wisniewski, *Leadership Team Creates Community Opioid Response Plan*, BENNINGTON BANNER (Dec. 20, 2018), www.benningtonbanner.com/uncategorized/leadership-team-creates-community-opioid-response-plan/article_08cd70c9-8377-5182-983e-2462f07ebd82.html (explaining that the people in Bennington, Vermont, recognize that "[i]t's not just about 'keeping the junkies out, [or] keeping the addicts out' [but] it's about recognizing that substance use disorder is something that is among all of us . . . . ").

51. *See* John Gramlich, *What We Know About the Increase in U.S. Murders in 2020*, PEW RSCH. CTR. (Oct. 27, 2021), www.pewresearch.org/fact-tank/2021/10/27/what-we-know-about-the-increase-in-u-s-murders-in-2020; *see also* Brief for Fourteen Cities & Counties et al., *supra* note 6, at 11 ("The promise of [SIS] is not an empty one, nor a hypothetical one. It is based on facts, research, and real-world precedent. There are over a hundred sites operating worldwide . . . and scores of studies show these sites reduce overdose frequency and public drug use without increasing drug trafficking or crime.").

52. *See* Sharon Larson et al., *Supervised Consumption Facilities – Review of the Evidence*, MAIN LINE HEALTH SYS. 6, 15, 25 (Dec. 2017), dbhids.org/wp-content/uploads/2018/01/OTF_LarsonS_PHLReportOnSCF_Dec2017.pdf.

53. *See* Whelan, *supra* note 3; Roberts, *supra* note 13; *see also* Roebuck & Whelan, *supra* note 7.

SIS.[54] SIS personnel then allow the people who show up to the SIS to safely inject their own opioids outside of public parks, tunnels, and bathrooms, which are all places where a fatal overdose is particularly likely.[55]

SIS—like other harm reduction models—are aptly designed to further the War on Drugs' efforts because overdose mortality is immediately reduced in the communities in which they operate, and drug injection rates decline or stay stagnant in the surrounding communities over the long-term.[56] However, SIS are, at least at first glance, inherently violative of the common sense: they not only welcome drug use, but they also operate for the purpose of providing tools for safer injection practices.[57] Opponents thus claim that SIS worsen the epidemic because they make it easier for drug addicts to use opioids, by providing safe spaces and clean needles for people to inject their already-obtained opioids.[58]

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54. *See* Stephanie Bell & Jason Globerman, *Rapid Response Service: What Is the Effectiveness of Supervised Injection Services?*, OHTN 1, 1 (May 2014), www.ohtn.on.ca/Pages/Knowledge-Exchange/Rapid-Responses/Documents/RR83-Supervised-Injection-Effectiveness.pdf; *see also Safehouse II*, 985 F.3d 225, 241 (3d Cir. 2021) ("The user must get his drugs before he arrives and bring them to Safehouse; he may not share or trade them on the premises. The drugs he consumes will be his own[]"), *cert. denied sub nom*. Safehouse v. Dept. of Just., No. 21-276, 2021 WL 4733378 (U.S. Oct. 12, 2021) (mem.).

55. *See* Roberts, *supra* note 13 (explaining that " . . . the current state of affairs [] condemns people experiencing addiction to unnecessarily hazardous conditions, and essentially requires service industry employees to function as supervisors of injection sites in public restrooms and streets."); *see also* Bell & Globerman, *supra* note 54.

56. *See infra* notes 62 & 66 and accompanying text; Marshall et al., *supra* note 2 ("Consistent with earlier evidence showing that SI[S] are not associated with increased drug injecting" the number of heroin injections in the communities declined or stayed stagnant, and overall drug use rates remained unchanged, post SIS-implementation); Dan Gray, *Why Safe Injection Sites Are Considered More Effective Than Needle Exchange Programs*, HEALTHLINE (Jan. 12, 2021), www.healthline.com/health-news/why-safe-injection-sites-are-considered-more-effective-than-needle-exchange-programs#A-safe-space (finding SIS facilities better at reducing fatal overdoses than needle exchange programs); *see also* Jennifer Shulman et al., *Opioid Epidemic: Spotlighting International Efforts to Address the Crisis*, KPMG INT'L 1, 3 (Apr. 2018), assets.kpmg/content/dam/kpmg/ca/pdf/2018/04/the-opioid-epidemic.pdf; Christy Sutherland et al., *Does Evidence Support Supervised Injection Sites?*, 63 CAM FAM. PHYSICIAN 866, 866 (2017) ("E]vidence from cohort and modeling studies suggests that SIS[] are associated with lower overdose mortality (88 fewer overdose deaths per 100 000 person-years []), 67% fewer ambulance calls for treating overdoses, and a decrease in HIV infections.").

57. *See* Jennifer L. Doleac, *New Evidence That Access to Healthcare Reduces Crime*, BROOKINGS INST. (Jan. 3, 2018), www.brookings.edu/blog/up-front/2018/01/03/new-evidence-that-access-to-health-care-reduces-crime ("[R]esidents worry that if such a facility moves into their neighborhood, it will attract drug users and . . . local crime will go up . . . . [S]uch fears are unfounded. The net benefit at the county level implies that there are ways to make everyone better off.").

58. *See, e.g.*, Jeffrey A. Rosen, *Safe Injection Sites Enable Drug Users and Endanger Communities*, U.S. DEP'T JUST. ARCHIVES (Feb. 3, 2020), www.justice.gov/archives/opa/blog/philadelphia-inquirer-op-ed-safe-injection-sites-enable-drug-

However, the idea that SIS are the proximate causes of drug use, or even enable drug use, can only be true because illicit drugs are still widely available and used in and around the communities in which SIS operate.[59] In fact, it is not surprising that some drug use still exists in the communities in which SIS operate, because they only operate in communities with already-high levels of opioid use and abuse.[60] SIS are thus in no way the proximate cause of increased, or continued, opioid use.[61] Instead, the opposite is true: unprecedented connections are being formed between the marginalized peoples who are chronically addicted to opioids, and the social service workers who are capacitated to treat them.[62]

SIS take chronic opioid users out of the graveyards and off of the public streets, and reintegrate them into society.[63] First, SIS staff

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users-and-endanger-communities; *see also QNA*, SAFE SPACE (July 15, 2020), safespace-vancouver.business.site; Brett Wolfson-Stofko et al., *Drug Use in Business Bathrooms: An Exploratory Study of Manager Encounters in New York City*, 39 INT. J. DRUG POL'Y 69, 74 (2017).

59. *See* Marshall et al., *supra* note 2, at 1434; *see also* Doleac, *supra* note 57 ("[I]ncreasing access to treatment makes the *entire community* better off by reducing violence and property crime.").

60. *See Safehouse II*, 468 F. Supp. 3d 687, 695 (E.D. Pa. June 24, 2020) ("The crime that would occur on the premises of Safehouse is the same crime that already occurs daily outside its doors and indeed in the communities across the United States—and one that the federal government rarely prosecutes."), *rev'd and remanded*, 985 F.3d 225 (3d Cir. 2021), *cert. denied sub nom.* Safehouse v. Dept. of Just., No. 21-276, 2021 WL 4733378 (2021) (mem.); *see also* Marshall et al., *supra* note 2, at 1434 ("[A] 35% reduction in mortality was noted within 500 m[eters] of the [SIS analyzed in the study] after its opening. By contrast, overdose deaths in other areas of the city, during the same period, declined by only 9% . . . . This finding is not surprising, since over 70% of frequent SI[S] users reported living within four blocks of the facility.") (alterations in original); Fitzpatrick, *supra* note 9 ("Ideally, the centers would be located where people are experiencing the highest prevalence of overdoses . . . . "). While "[t]he most common concern about overdose prevention sites is the impact on the neighborhood[s] . . . studies show the sites do not increase crime or drug dealing in the area[s] . . . . " *Id.*

61. *See* GLOB. COMM'N DRUG POL'Y, *supra* note 25, at 23 (describing the " . . . social explanations of drug use," such as the " . . . pressure to perform professionally, athletically or academically . . . . "). Drug addiction is not an individual problem of laziness or self-centeredness, but instead a social problem that should be treated, not punished. *Id.*

62. *See Frequently Asked Questions: General*, SAFEHOUSE PHILLY, www.safehousephilly.org/frequently-asked-questions#faqsis-benefitsofops (last visited July 25, 2022); *see also* Shulman et al., *supra* note 56, at 3; Vagins & McCurdy, *supra* note 30, at 3-4; Elana Gordon, *What's the Evidence That Supervised Drug Injection Sites Save Lives?*, NPR (Sept. 7, 2018, 2:40 PM), www.npr.org/sections/health-shots/2018/09/07/645609248/whats-the-evidence-that-supervised-drug-injection-sites-save-lives (explaining that a 2014 review of 75 studies concluded that SIS " . . . promote safer injection conditions, reduce overdoses and increase access to health services. Supervised injection sites were also associated with less outdoor drug use, and they did not appear to have any negative impacts on crime or drug use."). Since Portugal's decriminalization in 2001, "it was reported that the proportion of 15 to 24-year-olds who said they had used drugs in the last month had decreased by almost 50 percent . . . . "). Shulman et al., *supra* note 56, at 5.

63. *See* Marshall et al., *supra* note 2, at 1434, 1436.

(medical professionals) or volunteers act as supervisors for the people who want to safely inject their already-obtained opioids off of the public streets, bathrooms, and parks.[64] Next, SIS volunteers act as social service workers—providing some of the most vulnerable peoples in society with the requisite advice for short-term survival, and for long-term rehabilitation.[65] SIS do not increase drug use levels at all: SIS merely convert the inevitable, unsafe realities into their safe, relatively invisible, parallels.[66]

SIS can be an efficient bridge to the much-needed treatment that millions of Americans do not currently have, because they attract the most marginalized peoples to them.[67] SIS were not found to increase levels of drug injecting, drug trafficking, or crime in any of the locations

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64. *See Supervised Consumption Services*, *supra* note 5; *see also Frequently Asked Questions: General*, *supra* note 62.

65. *See* Alex Kreit, *Safe Injection Sites and the Federal "Crack House" Statute*, 60 B.C. L. REV. 414, 416 (2019) (SIS "reduc[e] public disturbances caused by people using drugs on the streets or in public bathrooms" by "lessen[ing] injection drug use in public," "reduc[ing] overdose deaths, [and] increas[ing] participation in drug treatment programs . . . . "); *see also* Leonieke C. van Boekel et al., *Stigma Among Health Professionals Towards Patients with Substance Use Disorders and Its Consequences for Healthcare Delivery: Systematic Review*, 131 DRUG & ALCOHOL DEPEND. 23, 24, 31-33 (2013) (explaining that SIS both reduce the public nuisance associated with opioid injections and link the most vulnerable populations of society to the requisite medical treatment, advice, and social services, otherwise unavailable or apparent to them).

66. *See* Leo Beletsky et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 AM. J. PUB. HEALTH 231, 236 (2008) ("In addition to reducing the health risks of drug use and serving as a bridge to other services, SI[S]'s are intended to reduce the externalities of public drug use in the communities they serve."); Vagins & McCurdy, *supra* note 30, at 5 (explaining that "much of the violence [associated with the introduction of crack in the mid to late 1980s] was associated with the territorial disputes between low-level street corner drug dealers."); *see also* Kim Dovey et al., *Safety Becomes Danger: Dilemmas of Drug-Use in Public Space*, 7 HEALTH & PLACE 319, 319 (2001) (explaining the dilemma that people face when they inject opioids in public, with respect to needing privacy and exposure in the event of an overdose); *id.* at 328 ("Each end of the exposure/seclusion trajectory has its dilemma: more exposed means safer in the event of an overdose yet more danger from police; more secluded means safer from police yet more danger from an overdose."); Bluthenal et al., *supra* note 15, at 33 (explaining how a drug user "will go to considerable effort to avoid punishable arrest while carrying drug paraphernalia, including hiding syringes in semi-public places, . . . flushing syringes down [public] toilets, and injecting with previously used syringes.").

67. *See, e.g.*, Kreit, *supra* note 65, at 422 ("A 2014 systematic review of the literature that examined seventy-five studies found that the studies all converged to find that [SIS] were efficacious in attracting the most marginalized [people who inject drugs], promoting safer injecting conditions, enhancing access to primary health care, and reducing the overdose frequency. The same literature review revealed that safe injection sites generate public benefits such as a decrease in the number of [people] injecting [drugs] in public and a reduction of dropped syringes in public places. Contrary to what was feared, [SIS] do not promote drug use and do not increase crime or drug trafficking or the number of [people who inject drugs]. Perhaps most notably—particularly in light of the current overdose crisis in the United States—the 2014 literature review observed that all of the studies that had evaluated overdose-induced mortality suggested that safe injection sites were effective at reducing overdose deaths.") (internal citations omitted).

in which they have been studied.[68] Rather, SIS decrease levels of public drug injections and dropped syringes in the communities in which they have been studied.[69] Further, SIS promote smarter and safer injection conditions among users, enhance their knowledge of and access to primary health care, and reduce their risks of overdose.[70] The only reason not to implement them, then, is to maintain the status quo—that is, the unprecedented number of drug overdoses and drug-related crime and trafficking, in addition to the already-high rates of public injections and dropped syringes encircling America's worst-off cities and towns.[71]

1. Regulations Abroad Versus in the United States

Peer-reviewed studies of SIS in other countries confirm the theories underlying harm-reduction methods everywhere: the fatalities and co-morbidities associated with opioid addiction are reduced in the communities in which they operate, as well as in the surrounding communities, where, generally, the largest financial burdens of chronic opioid addiction are borne.[72] SIS thus benefit their surrounding

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68. *See id.*; *Frequently Asked Questions: General*, *supra* note 62 ("Considerable research on neighborhoods around safe consumption sites has shown no increase in crime. In fact, a decrease in drug-related crime has been reported.") (internal citation omitted); *see also* Benjamin Rolland et al., *Supervised Injection Services: What Has Been Demonstrated? A Systematic Literature Review*, 145 DRUG & ALCOHOL DEPENDENCE 48, 64 (2014) ("[I]t was feared that SIS[] might foster the initiation of new users into intravenous drug use, but *no study* found *any* increase in the total number of local [drug users].") (emphasis added).

69. *See* Rolland et al., *supra* note 68, at 54 tbl.1 ("SIS use is associated with positive changes in injecting practices: decreased the reuse of syringes [], decreased injections in public places [], taking the time needed [], use of clean water [], cooking/filtering drugs [], tie off prior to injection [], and safe disposal of syringes [].") (alterations in original).

70. *See id.* at 56 tbl.1; *see also* Beletsky et al., *supra* note 66, at 232 ("41% of SI[S] clients reported adopting *at least* 1 safer injection technique since using the facility.") (emphasis added); *Overdose Prevention Centers*, DRUG POL'Y ALL., drugpolicy.org/issues/supervised-consumption-services (last visited July 25, 2022) ("Over 100 evidence-based, peer-reviewed studies have consistently proven that supervised consumption services[] increas[e] entry into substance use disorder treatment[,] reduc[e] the amount and frequency that clients use drugs[,] [and] reduc[e] public disorder and public injecting while increasing public safety.").

71. *See, e.g.*, Harry Levine et al., *Syringe Disposal Among People Who Inject Drugs Before and After the Implementation of a Syringe Services Program*, 202 DRUG ALOCHOL DEPEND. 1, 5 (2019) (finding a "49% decrease in syringes found in public areas after the implementation of an S[IS].").

72. *See* Evan Wood et al., *Methodology for Evaluating Insite: Canada's First Medically Supervised Safer Injection Facility for Injection Drug Users*, 1 HARM REDUCTION J. 1, 4 (2004) ("[T]he experiences within Insite as well as the community impact have been consistent with the experience of over two dozen European settings where SI[S] exist, and more recently, in Sydney, Australia."); Sutherland et al., *supra* note 56 (stating that SIS reduce monthly ambulance calls by an average of 67%; annual fatalities by an average of 88%; and "show healthcare savings for each $1 spent"); *see also* NAT'L ACADS. SCI., ENG'G, & MED., *Pain Management and the Opioid Epidemic: Balancing Societal and Individual Benefits and Risks of Prescription Opioid Use*, NAT'L

communities not only by reducing drug-related crimes but by also preventing unnecessary burdens on downstream health services, like emergency rooms and paramedic services, which are generally located in the more affluent communities where opioid addiction is a non-issue.[73] SIS thus provide a "middle ground" for everyone—one that is "safer than using on the streets but doesn't overtax healthcare systems."[74]

Other countries are focusing on limiting the future demand for opioid drugs and are thus increasing the current supply of opioid treatments—which, according to one survey, sixty-seven percent of the American public also demands from Congress.[75] The United States, however, is still, as it was half a century ago, focusing on decreasing the supply of opioid drugs by punishing and jailing the drug users after the

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ACADEMIES PRESS 1, 6 (2017) ("It is important to recognize that people who inject drugs are vulnerable to harms related to drug use that can be reduced by safe access to injection materials."); *QNA*, *supra* note 58 ("Over 100 evidence-based, peer-reviewed studies have consistently proven the positive impacts of supervised consumption services . . . . "); Bell & Globerman, *supra* note 54, at 1 ("The use of supervised injection services can lead to reductions in injecting behaviour and an increase in the number of clients accessing addiction treatment services. . . . Supervised injection services can be cost saving when the analysis takes into account their capacity to reduce transmission of blood-borne diseases, namely HIV and HCV . . . . Overdose morbidity and mortality are reduced when clients inject at supervised injection sites. Clients who inject at supervised injection sites receive education on safer injecting practices that helps reduce injection related morbidity . . . . Supervised injection sites do not lead to any significant disruptions in public order or safety in the neighbourhoods where they are located.").

73. *See* Shulman et al., *supra* note 56, at 4–5; *see also* Larson et al., *supra* note 52, at 26 (explaining how SIS " . . . can leverage their environment for constructive discussions about how to mitigate negative consequences of their drug use and facilitate conversations related to entering substance use treatment programs."); U.S. DEP'T OF HEALTH & HUM. SERVS., *Early Intervention, Treatment and Management of Substance Use Disorders, in* FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH 1, 11 (2016) (explaining that harm reduction methods like SIS "do not increase rates of community drug use" and are highly effective in reducing HIV transmissions).

74. Gray, *supra* note 56.

75. *See, e.g.*, Felter, *supra* note 27 ("After facing an intense epidemic in the 1990s that led Lisbon to be known as the 'heroin capital of Europe,' the country adopted a harm reduction drug policy that decriminalized the possession of narcotics for personal use and focused on treatment instead of incarceration. By 2018, Portugal had the lowest rate of drug-related deaths in Europe, with the number of heroin users dropping from about one hundred thousand people in 2001 to one-quarter that."); *see also America's New Drug Policy Landscape: Two-Thirds Favor Treatment, Not Jail, for Use of Heroin, Cocaine*, *supra* note 15 (explaining that Americans were against sentencing nonviolent drug users to jail even prior to 2014, and in 2014, the majority of Americans—whose views were codified in a national survey—advocated instead for treatment); Larson et al., *supra* note 52, at 26 ("Integrated models are the most common model in Europe and serve as a one-stop-shop for S[IS] clients where they have access to a variety of services, such as counseling and medical [treatment] for general health care needs[].") (emphasis removed) (alterations in original).

fact, instead of rehabilitating them.[76] A primary tool in the arsenal is the Crack House Statute, among other statutes.[77]

Despite a wealth of research since at least 1986 indicating that SIS combat opioid addiction in Canada, Australia, and more than eight other countries and forty other cities around the world, the United States Congress has banned SIS, and the Third Circuit has upheld that ban.[78] Thus, while "the opioid crisis may call for innovative solutions, local innovations may not break federal law," which apparently is the only rationale for punishing people who want to take advantage of a nonprofit, public health intervention.[79]

Proscribing SIS and punishing their users is not a strategy that any other developed nation is currently using to fight the modern War on Drugs.[80] The Crack House Statute, however, still makes it a crime to "knowingly and intentionally make[] [their] place[s] available for use or rent[]" their places to others who have the purpose of engaging in

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76. *See Racial Double Standard in Drug Laws Persists Today*, *supra* note 49 ("Meanwhile, people with convictions for nonviolent drug offenses and their families continue to suffer the consequences of an unfair system. At the federal level, people with drug offenses have been barred from receiving public assistance and housing benefits, federal student aid, and even veteran benefits. As the Network reports, drug convictions often prevent people from getting steady jobs, voting in elections, and living in desirable housing.").

77. *See, e.g.*, Bruce K. Alexander, *Addiction, Environmental Crisis, and Global Capitalism*: *A Historical View of Addiction*, BRUCEKALEXANDER.COM, https://www.brucekalexander.com/articles-speeches/ecological-issues/addiction,-environmental-crisis,-and-global-capitalism (last visited July 25, 2022) ("Punish drug users, to the extent of declaring a 'war' on drug[s]. This was the dominant approach in the late 19th century and the first two-thirds of the twentieth century. It is based on the assumption that drug addiction is a willful act of evil. It disregards both the historical view of addiction as a desperate attempt at adaptation and the Official View of addiction as a disease.").

78. *See* Beletsky et al., *supra* note 66, at 231–32; *see also America's New Drug Policy Landscape: Two-Thirds Favor Treatment, Not Jail, for Use of Heroin, Cocaine*, *supra* note 15. *Compare* Shulman et al., *supra* note 56, at 5 (explaining that when the Portuguese government increased prosecution and administered severe punishments for nonviolent opioid use, "it became clear that the approach only exacerbated the crisis; by the end of the 1990s, one percent of the entire population (100,000 people) was addicted to heroin"), *with* Vagins & McCurdy, *supra* note 30, at 2 (explaining that two years after Ronald Reagan signed the Crack House Statute into law, as part of the War on Drugs effort, "drug-related crimes were still on the rise").

79. *Safehouse II*, 985 F.3d 225, 229 (3d Cir. 2021), *cert. denied sub nom.* Safehouse v. Dept. of Just., No. 21-276, 2021 WL 4733378 (U.S. Oct. 12, 2021) (mem.); *see* Feldman, *supra* note 1; *see also* Marshall et al., *supra* note 2, at 1434 (explaining that SIS reduce mortality rates in the communities in the SIS immediate vicinity by 35%; by 9% in other areas of the city; and in areas further than 500 meters from the SIS, by statistically insignificant amounts).

80. *See* Sanjana Mitra et al., *Acceptability and Design Preferences of Supervised Injection Services Among People Who Inject Drugs in a Mid-Sized Canadian City*, 46 HARM REDUCTION J. 1, 2 (2017); *see also* Deborah Ahrens, *Safe Consumption Sites and the Perverse Dynamics of Federalism in the Aftermath of the War on Drugs*, 124 DICK. L. REV. 559, 568 (2020); NAT'L ACADS. SCI., ENG'G, & MED., *supra* note 72, at 30–31.

unlawful drug activity.[81] But to "knowingly and intentionally" make a place available for use or rent a place "for the purpose of" unlawful drug activity under the statute, that person must make the place available with the proscribed purpose of conducting or facilitating unlawful drug activity.[82] SIS are places which operate for the purpose of reducing the risks associated with existing opioid use—which is quite different than operating for the purpose of facilitating opioid trade or future use.[83]

2. Demand and Supply: The 1988 Convention and the United States' Drug Policy Narrative

The Crack House Statute squarely governs the personal "use" of illicit opioid drugs, and so it does in fact cover SIS under a plain reading.[84] The 1988 Convention also governs the personal use of illicit opioids, and is thus a useful way to show the critical failures of a personal-use statute like the Crack House Statute.[85] The 1988 Convention categorized priorities according to the signatory nation's drug traffic scheme, in terms of the amounts produced and consumed therein as compared to all other signatory nations.[86] Since developing countries like Afghanistan made disproportionately more illicit drug sales than illicit drug purchases, they were coined the "produc[ing]

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81. *See* 21 U.S.C. § 856(a)(2) (1986); *see also* Beletsky et al., *supra* note 66, at 234; *Safehouse II*, 991 F.3d 503, 507 (3d Cir. 2021).

> [T]here is no support for the view that Congress meant to criminalize projects such as that proposed by Safehouse. Although the language, taken to its broadest extent, can certainly be interpreted to apply to Safehouse's proposed safe injection site, to attribute such meaning to the legislators who adopted the language is illusory. Safe injection sites were not considered by Congress and could not have been, because their use as a possible harm reduction strategy among opioid users had not yet entered public discourse.

Id. at 510.

82. United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 587 (E.D. Pa. 2019).

83. *See* Beletsky et al., *supra* note 66, at 234.

84. Petition for a Writ of Certiorari, *supra* note 7, at 15, 17. *Cf.* United States v. Russell, 595 F.3d 633, 642–43 (6th Cir. 2010) (noting uniformity of circuit law to exclude personal use of drugs from § 856(a)(2) and holding that " . . . the defendant's *drug-related* purpose for maintaining premises be 'significant or important[] . . . . '") (emphasis added); United States v. Church, 970 F.2d 401, 406 (7th Cir. 1992) (interpreting § 856(a)(2) to exclude "casual drug users").

85. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 3, Dec. 20, 1988–Feb. 28, 1989, 1582 U.N.T.S. 95, 171 (initially explaining that "each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally . . . the possession or purchase of any narcotic drug or psychotropic substance . . . . "); 21 U.S.C. § 856(a)(2) (1986).

86. *See* Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 85, at 165; *see also* Amira Armenta & Martin Jelsma, *Primer: The UN Drug Control Conventions: A Primer*, TRANSNAT'L INST. (Oct. 8, 2015), www.tni.org/en/publication/the-un-drug-control-conventions#5.

countries."[87] It was then the duty of these "produc[ing] countries" to suppress manufacturing and distribution of illicit drugs.[88] In turn, it was the duty of the developed, or "consuming countries," like the United States, to suppress the demand for illicit drugs—not the supply.[89]

The United States was not forced into the "producing country" role because Afghanistan or Mexico "produced" more heroin than cartels based in major U.S. cities did.[90] Instead, the United States is a "consuming country" because it "consumed" more heroin than Afghanistan in 1988.[91] This is not surprising, given that there are currently 296 million more people living in the United States than there are living in Afghanistan, as a whole.[92] But in fact, almost none of the supply (of heroin) in the United States is smuggled.[93]

Instead, the majority of United States' supply of heroin is produced and distributed domestically.[94] Thus, "consuming countries" like the United States are now forced to grapple with the implications associated with less international drug traffic *coming in* (because of the heightened regulations placed on "producing countries"),[95] and more interstate drug traffic (because of the increased importance of domestic heroin).[96] In

87. *See* Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 85, at 165 at 187-88; Armenta & Jelsma, *supra* note 86.

88. *See* Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 85, at 165; Armenta & Jelsma, *supra* note 86.

89. *See* Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 85, at 165; Armenta & Jelsma, *supra* note 86.

90. *See* Felter, *supra* note 27 ("Although most of the world's heroin comes from Afghanistan, only a small portion of the U.S. supply is produced there.").

91. *See generally id.* ("Heroin for decades was the most commonly used illegal opioid, as the supply of the drug in the United States soared and its average retail-level price dropped by the mid-2010s to roughly one-third of what it was in the early 1980s.").

92. *Afghanistan Is About 15 Times Smaller Than the United States*, MY LIFE ELSEWHERE, www.mylifeelsewhere.com/country-size-comparison/philadelphi/united-states (last visited July 25, 2022).

93. *See* Felter, *supra* note 27.

94. *See id.*

95. *See id.* ("Amid sustained U.S. diplomatic pressure, Beijing made several moves to crack down on fentanyl production . . . . Recent U.S. administrations have also increased the number of border patrol agents to approximately twenty thousand. Heroin seizures and trafficking arrests more than doubled [] between 2007 and 2017 . . . . "); *see also* Press Release, Gen. Assembly, Effects of Globalization, Market Liberalization, Poverty on World Drug Problem Among Issues Raised at Assembly Special Session, U.N. Press Release GAOR/9416 (June 9, 1998) [hereinafter 1998 Press Release] (explaining the then-international "[e]fforts in the anti-drug struggle [which] c[ould] [not] produce the expected results, [so] as long as [the] consuming States d[id] not make parallel efforts.").

96. *See* 1998 Press Release, *supra* note 95 ("The tireless efforts made by drug producing countries cannot yield the expected results so long as the consuming countries do not pledge to implement an efficient policy to cut demand."); Felter, *supra* note 27 ("Federal agencies, state governments, insurance providers and physicians all influence the supply of opioid medications."); *see also 2020 National Drug Threat Assessment*, U.S. DEP'T JUST. DRUG ENF'T ADMIN. 1, 8 (Mar.

2019, for example, the United States Drug Enforcement Administration ("DEA") seized the highest quantities of heroin from New York—not Afghanistan, nor any other country for that matter.[97] This is exactly where the Crack House Statute fails[98]: in targeting the demand for opioid drugs by suppressing the supply of opioid prescription drugs, the demand for opioids is simply re-allocated elsewhere—to the black markets and the public sidewalks.[99]

Thus, the primary divide among "consuming countries" now is whether to reduce the supply of prescription and non-prescription opioids by chasing down the users on the streets (temporarily stopping a never-ending cycle from repeating its course) or, simply, to increase the supply of harm-reduction strategies, like SIS (making the users feel like they have a way out of the cycle, thereby bankrupting it from the inside out).[100] In other words, does targeting the demand for opioids, by going after the manufacturers, distributors or consumers really prevent opioid addiction, or, in the alternative, is it merely redistributing addiction and

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2021), www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf.

97. *See 2020 National Drug Threat Assessment*, *supra* note 96.

98. *See* Michael E. Rayfield, *Pure Consumption Cases Under the Federal 'Crackhouse' Statute*, 75 U. CHI. L. REV. 1805, 1806-07 (2008) ("The legislative intent of the statute—to target drug activity to which the defendant's property meaningfully contributes in some way—suggests that "using" was intended to capture a narrower range of conduct than manufacturing and distributing. Thus, a stricter and more specific standard is necessary to draw a line between pure consumption covered by the statute and pure consumption left to other drug possession statutes with lower penalties."); *see also* Blumenson & Nilsen, *supra* note 15, at 37–39 ("This massive outpouring of money and effort has produced record numbers of drug seizures, asset forfeitures, and prosecutions. By more meaningful measures, however, the Drug War has been an extraordinary failure. Drugs are more available-at higher purity and lower prices-than they were at the start of the decade. Drug dependence in the inner city" and among teenagers has increased substantially. And the drug problem continues to produce massive amounts of crime, $20 billion in annual medical costs, one-third of all new HIV infections, prisons filled with drug-related offenders, and the attendant decimation of inner-city communities. By all accounts, we have thus far been unable to spend and jail our way out of this problem.").

99. *See* Armenta & Jelsma, *supra* note 86; *see also* Katz, *supra* note 37 ("[Former] President Trump . . . views the crisis primarily as a law enforcement problem that can be solved with harsher legal penalties for drug dealers and a border wall with Mexico. But none of the 30 panelists we asked would commit a single dollar to the effort."). On the other hand, the category termed 'harm reduction' had "wide support among our panel while requiring a smaller amount of funding [than other solutions]." *Id.*

100. *See* Katz, *supra* note 37 (explaining that the "consensus of experts" in 2018 was to do both); *see also infra* Part IV.C.2; Pearl & Perez, *supra* note 33 (describing harm reduction as " . . . a more effective and cost-efficient alternative to the "revolving door" of recidivism."). Unless the federal drug policy narrative addresses the underlying issue of addiction, recidivism is the "likely" result. *Id.*

demand for drugs to the furthest margins of society?[101] Contemporary evidence suggests the latter.[102]

III. LEGAL ISSUE: THE CRACK HOUSE STATUTE AS APPLIED TO SIS IS UNCONSTITUTIONAL, INEQUITABLE AND COUNTER-INTUITIVE

The Crack House Statute serves to threaten the United States' ability to provide one of the only proven remedies to the War on Drugs.[103] Opioid addicts in the United States have only two choices under federal law, as it currently stands.[104] For those without the money and resources to visit a doctor and pharmacist every month, the choice is one of avoiding a potential felony charge (and not injecting opioids) or avoiding the inevitable, acute withdrawal symptoms (and injecting opioids).[105] Opioid addicts with enough money and resources, on the other hand, can utilize federal laws (to consume a steady supply of legally prescribed opioids) or circumvent federal laws (to consume black market opioids), or die (from acute withdrawal symptoms).[106] There is simply no in-between for those who do not have the knowledge or support—let alone the resources—to obtain the information for rehabilitative treatment options not costing $100,000 per month.[107]

Subpart A first explains why the Crack House Statute is constitutionally overbroad, in that it infringes on state sovereignty.[108] Subpart A next explains why the Crack House Statute as applied to SIS

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101. *See* Katz, *supra* note 37; *Supervised Injection Sites Are Coming to the United States: Here's What You Should Know*, NURSING USC, nursing.usc.edu/blog/supervised-injection-sites (last visited July 25, 2022) ("People use opioids wherever they can . . . . [t]he street, abandoned buildings . . . they will find a place to use.") (internal citation omitted).

102. *See supra* notes 59–62 and accompanying text; Jennifer Lyden & Ingrid A. Binswanger, *The United States Opioid Epidemic*, 43 SEMINARS PERINATOLOGY 123, 124 (2019) ("Initially driven by increased consumption and availability of pharmaceutical opioids, an increasing number of opioid overdoses are now related to heroin and illicitly manufactured fentanyl and fentanyl analogs.").

103. *See, e.g.*, Young & Durak, *supra* note 50 ("Making naxolene available to individuals about to be released from incarceration can be a particularly impactful harm reduction strategy."); *see also Racial Double Standard in Drug Laws Persists Today*, *supra* note 49.

104. *See* 21 U.S.C. § 856(a)(2) (1986); 21 U.S.C. § 823(g)(1) (1970).

105. *See* Coyne & Hall, *supra* note 15.

106. *See id.*

107. *See* Suzette Gomez, *How Much Does Luxury Rehab Cost?*, ADDICTION CTR. (Nov. 4, 2021), www.addictioncenter.com/treatment/luxury-treatment/how-much-does-luxury-rehab-cost.

108. *See infra* Part III.A.1; U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also State & Local Government*, WHITE HOUSE PRES. BARACK OBAMA, obamawhitehouse.archives.gov/1600/state-and-local-government (last visited July 25, 2022) ("Under the Tenth Amendment to the U.S. Constitution, all powers not granted to the federal government are reserved for the states and the people.").

is statutorily overbroad, in that it conflicts with the 99th Congress' expressed intent in enacting the Crack House Statute.[109] Subpart B discusses the racial and socioeconomic implications of the Crack House Statute as applied to SIS in a post-*United States v. Safehouse*[110] landscape and the resulting prosecutorial discretion in the United States.[111] Subpart B then explains how the Third Circuit's interpretation of the Crack House Statute, when analyzed alongside its counterpart, § 823(g)(1), entitled "Practitioners dispensing narcotic drugs for narcotic treatment; annual registration; separate registration; qualifications; waiver," is undeniably underinclusive of socioeconomically disadvantaged opioid users.[112]

A. The Crack House Statute Is Unconstitutional as Applied to SIS

The name "Crack House Statute" speaks for itself—it is intended to stop people from owning, renting, or attending a private residence for the purpose of making, storing, selling or using crack.[113] Despite this fact, the Crack House Statute now serves to prohibit people from owning, renting, or attending a non-profit public-health facility, which operates for the purpose of facilitating the safe injection of already-obtained opioid drugs, and reducing the externalities associated with public drug consumption.[114]

1. The Crack House Statute as Applied to SIS: Tenth Amendment State Sovereignty Concerns

If the Crack House Statute were to proscribe SIS across the United States, it would be doing so in light of actual or potential state or local regulations to the contrary, which would be exactly the types of public-health and safety-related activities reserved to the states for regulation.[115] States and municipalities have the "duty to protect and

109. *See infra* Part III.A.2; *see also infra* text accompanying notes 124–125.

110. 991 F.3d 503 (3d Cir. 2021).

111. *See infra* Part III.A.2.

112. *See infra* Part III.B.

113. *See* LAMPE, *supra* note 30, at 29; *see also* Rayfield, *supra* note 98, at 1808–09.

114. *See* Gordon, *supra* note 62; *see also* Beletsky et al., *supra* note 66, at 234.

115. *See generally* Biden v. Missouri, 142 S. Ct. 647, 658 (Thomas, J., dissenting) ("Vaccine mandates also fall squarely within a State's police power, and, until now, only rarely have been a tool of the Federal Government.") (citations omitted); Beletsky et al., *supra* note 66, at 233; *id.* at 234 ("States have clear legal authority to authorize SI[S], just as they can legalize the cultivation, distribution, and possession of marijuana for medical purposes."); *see also Safehouse I*, 408 F. Supp. 3d 583, 593 (E.D. Pa. 2019); *State & Local Government*, *supra* note 108 ("Municipal governments–those defined as cities, towns, boroughs [], villages, and townships . . . generally take

preserve the welfare of their citizens."[116] The legal authority to fulfill this duty, commonly known as the state's "police power," has been recognized as a basic attribute of the state since the founding of the United States.[117] "Disagreements about the effectiveness of SI[S] do not diminish legislatures' discretion to pass health laws based on their independent assessment of the facts."[118]

Using the Crack House Statute to prosecute future local and state SIS infringes on exactly the type of local, non-economic activity—"squarely" within the category of "health, safety and morals"—that the Bill of Rights' framers intended to reserve to the states.[119] There is simply no constitutional fairness in federally proscribing state- and locally-approved, public-health and safety interventions, on account of a provision of federal law which "does not reveal any rational basis for believing that [such interventions] would pose any special threat to the [federal government's interest in curbing illegal drug activities]."[120]

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responsibility for parks and recreation services, police and fire departments, housing services, emergency medical services, municipal courts, transportation services [], and public works [].").

116. Beletsky et al., *supra* note 66, at 233.

117. *See id.*

118. *See id.*

119. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."); Ben Longnecker, *Federal Ignorance and the Battle for Supervised Injection Sites*, 74 U. MIAMI L. REV. 1145, 1165 (2020) ("[W]hile federal authorities have expressed their opinion that supervised injection sites are unlawful as a matter of federal law, this apparent federal hostility is not enough to prevent states from establishing supervised injection sites in accordance with their lawful police powers."); *see also State & Local Government*, *supra* note 108 (explaining how the constitutional concerns associated with infringing on states' rights to protect the health and safety of its citizenry are worsened when it is federally criminal to do what is locally permissible). "[M]ost Americans have more daily contact with their state and local governments than with the federal government. Police departments, libraries, and schools—not to mention driver's licenses and parking tickets—usually fall under the oversight of state and local governments." *Id.*

120. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 433 (1985); *see Political Parties on Drug Use*, *supra* note 15 (explaining that between 2009 and 2013, forty states made changes to ease their drug laws); *see also* Beletsky et al., *supra* note 66, at 275–76 ("States have clear legal authority to authorize SI[S] . . . . State authorization could make [] SI[S] legal under state law and prevent state law enforcement officials from taking action against [them]. It is equally clear, however, that state authorization *cannot nullify federal drug laws*, and so does not protect [] SI[S] against being shut down by federal law enforcement agencies through raids, arrests, or other legal proceedings.").

2. The Crack House Statute Is Overbroad as Applied to SIS Activity, and Does Not Reflect the 99th Congress' Intent Behind Enacting the Crack House Statute

The undisputed legislative intent behind the Crack House Statute was to proscribe illegal drug activity.[121] Despite this fact, SIS, which are maintained for the opposite "purpose of" illegal drug activity, are now proscribed under the Crack House Statute.[122] Although using "controlled substances" rather than "crack" or "cocaine" avoids challenges that a contrary, more narrow reading might espouse, the Crack House Statute's challenges, now, are for its expansive breadth: in interpreting it so broadly as to proscribe harm-reduction activities which were non-existent at the time of its enactment, the Crack House Statute now serves to halt the very best remedy to the opioid epidemic: nonprofit, SIS, community plans.[123]

The legislative intent, circuit court opinions and all logic surrounding the Crack House Statute suggest that "using" was intended to capture a narrower range of conduct than "manufacturing" or "distributing."[124] So if the 99th Congress intended to criminalize the maintenance of "any one place" where illicit drugs are manufactured, distributed, stored, or used, for profit, then why should circuit court judges in the 117th congressional session be able to interpret this language to mean the maintenance of "any one place" for another person(s) to safely use pre-obtained drugs in their place, for health and safety reasons (and not for drug use or trade reasons)?[125]

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121. *See* Rayfield, *supra* note 98, at 1808-09; *see also infra* text accompanying notes 124–125.

122. *See, e.g.*, *Supervised Injection Sites Are Coming to the United States: Here's What You Should Know*, *supra* note 101 ("Advocates recommend supervised injection sites because they provide a space where those using IV drugs can inject under the supervision of a clinician who is ready to intervene in the event of an overdose[,]" to *replace*, *not reinforce* the "[i]ntravenous drug use in public spaces like restrooms, parks and pedestrian tunnels[,] [which] isn't conducive to safe injection or safe communities.").

123. *See* Ahrens, *supra* note 80, at 564 (explaining how in reality, the War on Drugs' targeted "crack-cocaine," but in an effort to avoid discriminatory backlash, Congress utilized blanket, statutory language in 21 U.S.C. § 856(a)(2) like "controlled substances").

124. Rayfield, *supra* note 98, at 1808 ("The main purpose of enacting the [C]rack [H]ouse [S]tatute was to outlaw operation of houses or buildings, so-called 'crack-houses,' where 'crack,' cocaine and other drugs are manufactured or used. In that sense, § 856 goes beyond the proscriptions found in other statutes relating to possession and manufacture and distribution of controlled substances. Unlike these other statutes, § 856 is aimed at a distinct offense: the use of property for narcotics-related purposes. In enacting the statute, Congress contemplated situations in which the property contributes to the use, manufacture, or distribution of the drugs.").

125. *See* Kreit, *supra* note 65, at 432 ("[SIS] serve a much different purpose than crack houses or jam band music festivals. They are not meant to promote recreational drug use but to serve a medical purpose. By providing counseling to people with a substance use disorder, preventing overdoses, and stopping the use of dirty needles."); *see also* Feldman, *supra* note 1 ("[T]he law does

A stricter and more specific standard is thus necessary to draw a line between pure consumption covered by the Statute, and pure consumption left to other drug possession statutes with lower penalties: stricter in the sense that the standard actually requires courts to find that the defendant's "place" contributed meaningfully to his drug consumption, and more specific in the sense that it directs courts to particular kinds of evidence establishing a link between the place and the consumption.[126] In other words, if you are "storing," "distributing," or "manufacturing" opioid drugs in "any one place" in contravention of the statute, then your property ("any one place") *does* meaningfully contribute to future, illicit drug activity, and thus *should be* held to a higher criminal penalty than if you are merely "using" opioid drugs in "any one place" in contravention of § 856(a)(2). In the latter situation, the defendant's property does not meaningfully contribute to drug activity, let alone "substantially" contribute to drug activity.[127]

The United States District Court for the Eastern District of Pennsylvania was the first to analyze SIS under the Crack House Statute, in the 2019 case of *United States v. Safehouse* ("*Safehouse I*")[128]—but not under a facial attack.[129] Rather, the United States sought to enjoin operation of Pennsylvania's proposed SIS, contending that its operation was unlawful under the Crack House Statute.[130] The district court emphasized that "under § 856(a)(2), an actor must make the place in question available for the *specific purpose* of drug activity."[131]

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not apply to [SIS] because the central purpose of [them] [i]s not, in fact, facilitating drug use but preventing overdoses for those who would be using drugs anyway."); *see generally* Rayfield, *supra* note 98, at 1807 (arguing for "a new test involving three factors for determining whether a defendant has opened or maintained a place for the purpose of pure consumption of drugs.").

126. *See supra* note 124 and accompanying text.

127. *See* Rayfield, *supra* note 98, at 1818-19.

128. 408 F. Supp. 3d 583 (E.D. Pa. 2019).

129. *Id.* at 583. In *Safehouse I*, the United States sought to enjoin operation of a proposed SIS, "Safehouse," for violating the federal Crack House Statute despite statewide support and extremely high levels of opioid fatalities in the community where Safehouse was proposed. *Id*. Safehouse counterclaimed, seeking a declaratory judgment that its proposed operation *would not violate* the Crack House Statute. *Id.* When the United States moved for judgment on the pleadings, the court did not settle the merits of the counterclaim, which lead to the *Safehouse II* line of cases. *Id*.; *Safehouse II*, 2020 WL 906997 (E.D. Pa.), *stay granted*, 468 F. Supp. 3d 687 (E.D. Pa. June 24, 2020), *rev'd and remanded*, 985 F.3d 225 (3d Cir. Jan. 12, 2021), *cert. denied sub nom.* Safehouse v. Dept. of Just., No. 21-276, 2021 WL 4733378 (U.S. Oct. 12, 2021) (mem.). So, *Safehouse II* dealt with whether the SIS plan proposed by Pennsylvania legislatures *would not* violate the Crack House Statute. *Id.*

130. *See Safehouse I*, 408 F. Supp. 3d at 585.

131. *See id.*

In the court's own words:

> "For the purpose of" in (a)(1) clearly and undisputedly refers to the purpose of the actor accused of violating the provision. Although the implication in (a)(2) that third parties will use the place in question may make the purpose clause there less clear to some readers than in (a)(1), courts should presume—absent context indicating otherwise—that the clause carries the same meaning. That is, courts should presume that (a)(2) requires that the *actor* act "for the purpose of" drug activity.[132]

Although the majority of the three-judge panel of the court acknowledged that "[s]ubjecting Safehouse to criminal liability" would be "prosecuting an entity engaged in the struggle against the very evil that [the Crack House Statute] was intended to combat,"[133] it ultimately enjoined Safehouse from operating because of the ambiguous nature of the Crack House Statute and the need for legislative clarification on its scope of coverage.[134]

On appeal, the Third Circuit was also tasked with settling the merits of Safehouse's counterclaim—that is, that the SIS would not violate the Crack House Statute.[135] The court found that the nonprofit, public-health interventions would violate the Crack House Statute, despite the fact that "nearly everyone [] agree[d] that Congress did not envision the situation posed by [the SIS] . . . when it enacted [the Crack House Statute]."[136] The Third Circuit's rationale was that "[The Crack House Statute] requires only that the third party have the purpose of drug activity" on the defendant's property, with the defendant's "knowledge."[137]

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132. *Id.*

133. *See id.* at 583; *see also* Roebuck & Whelan, *supra* note 53; Beletsky et al., *supra* note 66, at 280–81 ("It was never intended to interfere with a legally authorized public health intervention. It should not be interpreted to infringe upon states' traditional authority in public health, absent a 'clear statement' of Congress's intention to do so.").

134. *Safehouse I*, 408 F. Supp. 3d at 583.

135. *Safehouse II*, 985 F.3d 225, 233–36 (3d Cir. 2021), *cert. denied sub nom.* Safehouse v. Dept. of Just., No. 21-276, 2021 WL 4733378 (U.S. Oct. 12, 2021) (mem.).

136. *Safehouse II*, 991 F.3d 503, 510 (3d Cir. 2021).

> [T]here is no support for the view that Congress meant to criminalize projects such as that proposed by Safehouse. Although the language, taken to its broadest extent, can certainly be interpreted to apply to Safehouse's proposed safe injection site, to attribute such meaning to the legislators who adopted the language is illusory. Safe injection sites were not considered by Congress and could not have been, because their use as a possible harm reduction strategy among opioid users had not yet entered public discourse.

Id. at 510.

137. *See Safehouse II*, 985 F.3d at 233–35, *cert. denied sub nom.* Safehouse v. Dept. of Just., No. 21-276, 2021 WL 4733378 (U.S. Oct. 12, 2021) (mem.).

If SIS are operated for the purpose of drug activity as contemplated by the Statute, then an inconceivable number of methadone clinics, needle exchange sites, and even private homes are also at risk under this broad reading.[138] More importantly, because a "substantial number of [the Crack House Statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," the Crack House Statute is a prime candidate for a facial attack, especially when its continued application is evidenced by discriminatory motives.[139]

B. Prosecutorial Discretion in a Post-Safehouse Landscape

This Subpart will explain how only a racially targeted motivation justifies the United States' position vis-à-vis fighting the War on Drugs with the same weapons (such as jailtime) that have malfunctioned in battle since 1971.[140] Richard Nixon's domestic policy advisor, John Ehrlichman, revealed in a 1994 interview that the War on Drugs began as a racially motivated crusade to criminalize Blacks and the anti-war left.[141] In 1971, just one year after then-President Nixon declared said War, § 823(g)(1) of the CSA was enacted into federal law.[142]

Section 823(g)(1) allows a "qualified medical professional" in the United States, meeting certain criteria (to be determined by the Attorney General), to prescribe opioid pills for unsupervised use.[143] In other words, § 823(g)(1) makes concessions for drug abuse when the

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138. *See Safehouse I*, 408 F. Supp. 3d at 592 ("[O]nly the third party must act 'for the purpose of unlawfully . . . using drugs.'"). Only a defendant who does not know that trespassers are doing drugs on his property, does not invite them there, and further, does not want them there or "has the goal of trying to stop…[third parties] from doing drugs [in his home]" will escape liability under the Crack House Statute. *Id.* at 609. *See also* Petition for a Writ of Certiorari, *supra* note 7, at 23–24 ("Ignoring that legislatures and not courts should define criminal activity, the majority incorrectly defaulted to the broadest possible reading of the statute.") (internal citations omitted).

139. United States v. Stevens, 559 U.S. 460, 473 (2010) (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

140. *See infra* Part III.B.

141. *See, e.g.*, Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER'S MAG. (Apr. 2016), harpers.org/archive/2016/04/legalize-it-all ("We knew we couldn't make it illegal to be either against the war or blacks, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."); *see also* Blumenson & Nilsen, *supra* note 15, at 39 n.17; *War on Drugs*, *supra* note 15; Coyne & Hall, *supra* note 15.

142. *See* Morgan, *supra* note 32; *see also Crack House Statute Law and Legal Definition*, USLEGAL, definitions.uslegal.com/c/crack-house-statute (last visited July 25, 2022).

143. 21 U.S.C. § 823(g)(1) (1970).

government says it is okay.[144] Thus, only people with the wherewithal to visit a "qualified medical practitioner" and pay for an opioid medical prescription, can legally consume opioids under § 823(g)(1)—which is, of course, its own separate challenge for socioeconomically disadvantaged Americans.[145]

But limiting the scope of this provision is not the most effective solution when so much harm has been done with respect to making opioids accessible to everyone.[146] The United States has already, unsuccessfully, spent "hundreds of millions of dollars on cutting the medical supply [of opioids], while more than eighty percent of people with opioid use disorder still don't have access to effective treatment . . . ."[147] Since only treatment can provide relief to the millions of Americans chronically addicted to opioids, and "the Laws of the United States . . . shall be the supreme Law of the Land[]," limiting the scope of the Crack House Statute to account for modern evidence on SIS and state and local demands for legal SIS, is the only viable solution.[148]

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144. *See id.*; *see generally Opioid Overdose Crisis*, *supra* note 3 ("About 80 percent of people who use heroin first misused prescription opioids.").

145. *See* Sean F. Altekruse et al., *Socioeconomic Risk Factors for Fatal Opioid Overdoses in the United States: Findings from the Mortality Disparities in American Communities Study (MDAC)*, PLOS ONE 1, 6–7, 9 (Jan. 17, 2020), www.ncbi.nlm.nih.gov/pmc/articles/PMC6968850/pdf/pone.0227966.pdf ("Compared to people who lived in households at 500% above the poverty line or more, those living in less affluent households had statistically significantly higher opioid mortality HRs [hazard ratios], with the highest HR among people in households below the poverty line.").

146. *See, e.g.*, *Dopesick: Black Box Warning* (Hulu Nov. 10, 2021) (describing the pervasiveness of opioid addiction in the United States as a direct consequence of aggressive and fraudulent marketing tactics by one pharmaceutical sales' company in particular, Purdue Pharma, Inc.).

147. Szalavitz, *supra* note 34. In fact, the vast majority of overdose deaths are now caused by street fentanyl and its chemical cousins, not prescriptions. *Id.*; *see* HEROIN & PRESCRIPTION OPIATE ADDICTION TASK FORCE, KING CNTY., *supra* note 10, at 26 (SIS "offer a supervised place for hygienic consumption of drugs in a non-judgmental environment free from stigma, while providing low-barrier access to on-site health services and screenings, referrals, and linkages to behavioral health and other supportive services (for example, housing)."); Katz, *supra* note 37 ("Almost 90 percent of inmates with substance-use disorders receive no medical treatment for [their substance abuse disorders], which experts say leaves them prone to relapse and overdose when they are freed" and are only free to inject, for the most part, in the public sidewalks and restrooms.).

148. *See* U.S. CONST art. VI, cl. 2; *see also Dopesick: Black Box Warning* (Hulu Nov. 10, 2021) (showing how Purdue Pharma, Inc., together with some of the most senior members of the Food and Drug Administration ("FDA"), defrauded the media and medical professionals globally, vis-à-vis the results of OxyContin clinical trials and the ultimate safety of prescription opioids for "everyday pain"). "[T]he guy that [ultimately] approved [OxyContin] went from working at the FDA to working for Purdue Pharma for $379,000 a year." *Id.*; *see also Opioids*, *supra* note 2 and accompanying text ("Regular use—even as prescribed by doctor—can lead to dependence and, when misused, opioid pain relievers can lead to addiction, overdose incidents, and deaths."); *see supra* note 25 and accompanying text.

It is well known that "crack" is a cheaper version of cocaine, and that historically, it has disproportionately affected the black and poor communities in the United States.[149] Similarly, heroin is a "cheaper" version of prescription opioids, and it has also disproportionately affected low-income and communities of color in the United States.[150] Precisely because of this, and because of the clear benefits that SIS bring to surrounding communities, above and beyond the direct benefits that they bring to the heroin users in the community, state and federal enforcement officers often turn a blind eye to SIS.[151] The recent legalization of SIS in Rhode Island and New York, as well as marijuana in several states and the District of Columbia, has also led to a more tolerant political view on SIS and recreational drug use in general.[152]

Even if the federal government turns a blind eye to Rhode Island and New York, relying on prosecutorial discretion (as is the case with marijuana) in no way clarifies the rule of law, let alone guarantees any lasting change.[153] Further, while it remains unclear whether the Crack House Statute covers state-approved, nonprofit public-health

149. *See Racial Double Standard in Drug Laws Persists Today*, *supra* note 49.

150. *See, e.g.*, *Racial Trends in Prescription Opioid Use Reflect Racial Disparities, Undertreatment*, NYU (Dec. 7, 2021), www.nyu.edu/about/news-publications/news/2021/december/racial-trends-in-prescription-opioid-use-reflect-disparities.html ("People of color were less likely to be prescribed opioids in the late 1990s, when they first became widely available as a pain treatment, according to a new study by researchers at the NYU School of Global Public Health."); *see also* Altekruse et al., *supra* note 145, at 6–7; NAT'L ACADS. SCI., ENG'G, & MED., *supra* note 72, at 6.

151. *See, e.g.*, Beletsky et al., *supra* note 66, at 231–37.

152. *See* Andrew J. LeVay, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 705 (2000); *see also* Sutton, *supra* note 9; Mulvaney, *supra* note 9; *Drug Overdose Immunity & Good Samaritan Laws*, NAT'L CONF. STATE LEGISLATURES (June 5, 2017), www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx.

153. *See, e.g.*, *AMA Wants New Approaches to Combat Synthetic and Injectable Drugs*, AM. MED. ASS'N (Jun. 12, 2017), www.ama-assn.org/press-center/press-releases/ama-wants-new-approaches-combat-synthetic-and-injectable-drugs ("Although Congress passed AMA-supported legislation in 2012 that placed [twenty-six] synthetic drugs in Schedule 1 under the Controlled Substances Act (CSA), drug traffickers have devised ways to circumvent federal drug laws by slightly altering the chemical structure of their products and designing new synthetic drugs . . . . "); *see also* Jennifer McLogan, *Nation's Eyes on New York as Unprecedented Opioid Trial Begins on Long Island*, CBS N.Y. (June 28, 2021, 6:08 PM), newyork.cbslocal.com/2021/06/28/opioid-trial-pharmaceutical-companies-nassau-county-suffolk-county; LeVay, *supra* note 152, at 705 ("[U]nder federal law, states can only dispense [marijuana] by creating formal research programs and getting [FDA] approval . . . . Ultimately, these laws proved too difficult to implement as the paperwork required by federal regulation was more than the physicians and administrators involved could manage.") (alterations in original). *But see* Jan Conway, *Cannabis Cultivation Licenses in the United States in 2019, by State*, STATISTA (Dec. 14, 2021), www.statista.com/statistics/1108194/cannabis-cultivation-licenses-by-state-us ("California had the most cultivation licenses of any state in the United States in 2021, by far. That year, there were 7,548 such licenses in the state compared with 1,319 in Oregon.").

interventions, dramatically-increased federal sentencing practices of the War on Drugs era continue to loom in the background—threatening nonviolent drug users who dare to seek recovery in a Safe Injection Site in the United States today.[154] The need for clarity, or at the very least, judicial deference to properly enacted state legislative decisions, could not be more apparent in 2022.[155] This is especially true when it is the state and local municipalities that have the best abilities to respond to local concerns—not the federal government.[156]

IV. PROPOSED SOLUTION: AMEND THE CRACK HOUSE STATUTE

Part IV will discuss the wide-ranging socioeconomic and health benefits associated with narrowly tailoring the Crack House Statute to cover the types of illegal drug activities originally intended for proscription by the 99th Congress.[157] That is, criminalizing the maintenance of a place for the purpose of unlawfully using, storing or transacting in illegal drugs for profit therein.[158] That is not, however, the same as criminalizing the maintenance of a nonprofit public health facility for the purpose of reducing the negative externalities associated with public drug injections—which is exactly what the Third Circuit has interpreted as the extent of the statute's breadth.[159]

Thus, Subpart A will explain how the widely accepted, intended scope of the Crack House Statute has only two critical elements for liability, and end by juxtaposing what its (unintended) scope has covered in practice, in the United States, for the past thirty-plus years.[160] Subpart

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154. *See, e.g.*, Bluthenal et al., *supra* note 15, at 25–27, 32. That is, if you really think that you will be prosecuted under the Crack House Statute when even the Justice Department signaled to the Associated Press in February 2022 that it was "evaluating" SIS and talking to regulators about "appropriate guardrails." Associated Press, *Justice Dept. Signals It May Allow Safe Injection Sites*, USNEWS (Feb. 8, 2022, 12:37 AM), www.usnews.com/news/health-news/articles/2022-02-07/justice-dept-signals-it-may-allow-safe-injection-sites. The position is a drastic change from its stance in the Trump administration, when federal prosecutors sought to enjoin operation of Safehouse for violating the Crack House Statute. *See id.*; *Safehouse I*, 408 F. Supp. 3d 583 (E.D. Pa. 2019).

155. *See* Associated Press, *supra* note 154; *see also* text accompanying note 129.

156. *See supra* Part III.A.1; *see also* U.S. CONST. amend. X; Longnecker, *supra* note 119, at 1164-65.

157. *See infra* Part IV.A, IV.B.

158. *See supra* Part III.A.2; *see also H.R.5484—99th Congress (1985–1986)*, CONGRESS.GOV, www.congress.gov/bill/99th-congress/house-bill/5484/titles (last visited July 25, 2022); *Safehouse I*, 408 F. Supp. 3d at 595; Beletsky et al., *supra* note 66, at 280–81 ("It was never intended to interfere with a legally authorized public health intervention. It should not be interpreted to infringe upon states' traditional authority in public health, absent a 'clear statement' of Congress's intention to do so."); *see also* Rayfield, *supra* note 98, at 1820; *Opioid Overdose Crisis*, *supra* note 3.

159. *See H.R.5484—99th Congress (1985–1986)*, *supra* note 158.

160. *See infra* Part IV.A.

B will explain who and what an amended Crack House Statute would benefit in practice, in the United States.[161] Subpart C will illuminate why it is so vital in 2022 to narrowly tailor the Crack House Statute to cover only its intended breadth, for the purposes of allowing SIS to legally operate under federal law.[162]

A. Amend the Language of the Crack House Statute to Reflect Its Originally Intended Scope

This Subpart will propose an amendment to the Crack House Statute that more narrowly tailors the Crack House Statute's intended scope—the profitable maintenance of a place for the purpose of unlawfully using, storing or transacting with drugs therein—to the language of the law.[163] Subsection 1 will explain how there are only two critical elements for liability under the proposal.[164] The following amendment reflects this proposal:

> (a) UNLAWFUL ACTS: Except as authorized by this subchapter, it shall be unlawful to—(2) manage or control any place . . . and knowingly and intentionally [] profit from [and] make available for use . . . the place, for the primary purpose of unlawfully manufacturing, storing or distributing [] a controlled substance [for profit].[165]

Subsection 2 will clarify how this amendment is consistent with the 99th Congress' intent in enacting the Crack House Statute, and then will address the constitutional concerns associated with the statute as applied to SIS.[166]

1. Two Critical Elements for Liability

Only two critical elements are required for liability under the proposed Crack House Statute.[167] To "manage or control any place . . . for the primary purpose of unlawfully manufacturing, storing or distributing [] a controlled substance . . . . "[168] is the first element; and to " . . . knowingly and intentionally rent, lease, profit from, or make

161. *See infra* Part IV.B.
162. *See infra* Part IV.C.
163. *See infra* Part IV.A.
164. *See infra* Part IV.A.1.
165. 21 U.S.C. § 856(a)(2) (1986) (alterations in original).
166. *See infra* Part IV.A.2; *see also supra* notes 123-24 and accompanying text.
167. *See infra* Part IV.A.1.
168. 21 U.S.C. § 856(a)(2) (1986) (alterations in original).

available for use, with compensation . . . " is the second element.[169] Thus, the illicit purpose of the premises being used and the financial gains realized from said use are conditions precedent to liability under the amended Crack House Statute—which is consistent with the original legislative intent in enacting the Statute, which was narrowly tailored to proscribe crack house activity.[170]

Eliminating "or without" before "compensation" reduces any ambiguity as to the lawfulness of SIS—they are nonprofit organizations by their very nature.[171] By narrowly tailoring the Statute's breadth to cover only for-profit facilities that transact in illegal drugs, the amended Statute serves precisely to criminalize only those "places" that the 99th Congress intended to eliminate—for example, ones operating for illicit and profitable purposes.[172] This leaves nonprofit SIS, which operate for benevolent reasons, free to save addicts' lives under federal law.[173]

Second, eliminating "or using" after "distributing" reduces the overbreadth problem: it eliminates any redundancy associated with "storing" and "using" illicit drugs "in any one place." Precisely because a predicate to entry of an SIS is having pre-obtained opioid drugs, the "using" of the opioid drugs would already be happening without the SIS (but with no medical supervision, and with unsterilized needle-sharing).[174] By eliminating the "using" of controlled substances "in any one place" from the scope of liability, only the "manufacturing" (that is, making), the "storing" (that is, preparing for sale), and the "distributing" (that is, selling) of controlled substances would be criminalized under federal law—which is consistent with public policy and the drug laws of all nations finding success in the War on Drugs, as well as the original legislative intent of § 856(a)(2)'s framers themselves.[175]

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169. *Id.*

170. *See id.*; *see infra* Part IV.A.

171. *See Supervised Consumption Sites*, *supra* note 43.

172. *See supra* Part III.A.2; *see also supra* text accompanying notes 124–125.

173. *See supra* note 125 and accompanying text.

174. *See* Allison Colman, *Substance Use in Parks and Recreation: We Can't Do Nothing*, NAT'L RECREATION & PARK ASS'N (Dec. 5, 2019), www.nrpa.org/blog/substance-use-in-parks-and-recreation-we-cant-do-nothing; *see also* Kerr et al., *supra* note 42, at 17 ("As in other SI[S] [] internationally, [] [people] can inject pre-obtained drugs under nurse supervision at Vancouver's sanctioned SI[S] [], as well as access sterile injection equipment, receive emergency overdose response and referrals to a range of internal and external programs.") (alterations in original).

175. *See infra* Part IV.

2. Both Elements Cover the Intent of the Crack House Statute's Framers

The undisputed legislative intent behind the Crack House Statute was to criminalize the profitable operation of houses or buildings—those that resembled traditional "crack houses"—where illegal drugs like crack and cocaine were made, distributed, or used.[176] This legislative focus on profit makes sense, because if it were otherwise, the "trafficking business" that Congress sought to destroy would not be businesses—or an enemy worth fighting in the War on Drugs—at all.[177] Striking at the drug trafficker's economic roots or business operations, for instance, would be traditionally the most effective way of disincentivizing harmful societal activities from a Congressional standpoint.[178] Thus, eliminating "or without" before "compensation" only bolsters this goal by clarifying that in order to have the "purpose of" the harmful societal activity in question—manufacturing, distributing, storing or using illicit drugs, for profit—one must be compensated.[179]

Similarly, eliminating "or using" from the list of prohibited activities in the Crack House Statute clarifies that only "new," illicit drug activities for "compensation" will be covered under the amended Crack House Statute.[180] Existing drug activities with no more transactional feature, like the personal consumption of already-obtained street opioids, will no longer be the focus of a slice of the American criminal justice system—and soon the whole pie.[181] Removing the "us[e]" element from the focus of criminality actually serves to bolster the Statute's original goals of decreasing drug use and abuse[182]: by eliminating the illegality and stigma associated with "using" drugs,

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176. *See supra* Part III.A.2.

177. *See* Rayfield, *supra* note 98, at 1815 ("[I]n order for the 'purpose' element of the Actor Statute to be satisfied, 'at least in the residential context, [ ] the manufacture (or distribution or use) of drugs must be at least one of the primary or principal uses to which the house is put.' The court concluded that because Loroan was not sleeping at the house, and because most of the equipment, drugs, and money associated with the drug enterprise were found in the room under his control, it appeared that one of his primary purposes in maintaining his place in the home was as a base of operations to run a drug manufacturing and distributing business.") (internal citation omitted).

178. *See* VICTORIA L. KILLION, FUNDING CONDITIONS: CONSTITUTIONAL LIMITS ON CONGRESS'S SPENDING POWER, R46827, at 2, 18-21 (2021).

179. *See generally* Rayfield, *supra* note 98, at 1816 (explaining how "pure consumption" laws, like the "using" provision of § 856(a)(2), raise unique issues and thus require separate standards than "manufacturing" or "distributing" provisions of a federal drug law like § 856(a)(2)).

180. *See id.*

181. *See id.*

182. *See supra* text accompanying notes 7–8.

overall drug consumption in the communities in which the SIS operate decline.[183]

Targeting the supply of opioids in the United States—such as the manufacturers and distributers of opioid drugs—is especially important because the United States and many other Western nations have assumed the "consuming country role" since the 1988 Convention and as such, have continued to target the demand for illicit drugs by jailing the drug users and dealers.[184] Further, "unlawfully" "storing," "manufacturing" or "distributing" crack-cocaine is exactly the type of activity that the 99th Congress intended to suppress when it enacted the Crack House Statute.[185] The 99th Congress certainly did not intend to suppress SIS-type activities that are intended to provide lifesaving medical treatment and wraparound rehabilitation services, however.[186]

B. Amend the Language of the Crack House Statute to Allow SIS to Legally Operate Under Federal Law in the United States

Subpart B will explain who benefits from amending the Crack House Statute as proposed and break down what benefits each group should respectively expect to receive from this amendment, which will serve to federally legalize SIS.[187] Subsection 1 will begin by discussing the number of drug addicts in the United States who will benefit from this proposal, and then discuss the wide-ranging benefits they should expect from this proposal.[188] Subsection 2 will explain how everyone else in the United States will benefit from this amendment generally, but

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183. *See, e.g.*, Rolland et al., *supra* note 68, at 64 ("SIS[] contribute[] to a significant reduction of drug injection in public spaces."); *see also Overdose Prevention Centers*, *supra* note 70 ("Studies from other countries have shown that supervised injection facilities reduce the number of overdose deaths, reduce transmission rates of infectious disease, *and increase the number of individuals initiating treatment for substance use disorders without increasing drug trafficking or crime* in the areas where the facilities are located.") (citing *AMA Wants New Approaches to Combat Synthetic and Injectable Drugs*, *supra* note 153) (emphasis added); Gordon, *supra* note 62 ("[]It's about making a space where drug users are allowed to feel like people[] . . . . ").

184. *See* Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 85, at 166, 170-71 ("Desiring to eliminate the root causes of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs . . . [e]ach Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally . . . the possession or purchase of any narcotic drug or psychotropic substance . . . . ") (alterations in original); *see also* Armenta & Jelsma, *supra* note 99 (explaining how the United States erred in focusing its War on Drugs' efforts on the mass incarceration of young black men, via imposing mandatory minimum sentences, which similarly reflected the values behind the "consuming country" role it assumed in the 1988 Convention).

185. *See* Longnecker, *supra* note 119, at 1168.

186. *See* Petition for a Writ of Certiorari, *supra* note 7, at 15–17.

187. *See infra* Part IV.B.

188. *See infra* Part IV.B.1.

how specifically, those in the surrounding communities of would-be SIS will benefit the most from this amendment.[189]

1. Benefits for Drug Addicts in the United States

SIS clearly benefit chronic opioid users, but the users and abusers of opioid drugs are closer to our own backyard than one might gather from the local news.[190] Every day, more than 130 people in the United States die after overdosing on opioids.[191] In 2019 and 2020, the following data was recorded in the United States among people aged twelve and older[192]:

In 2019, 35,803,000 interviewees reported using "any illicit drugs" in the past month;[193] 378,000 interviewees reported using "crack" in the past month;[194] 431,000 interviewees reported using "heroin" in the past month;[195] and 3,101,000 interviewees reported using "opioids" in the past month.[196] In contrast, in 2020, 37,309,000 interviewees reported using any illicit drugs in the past month;[197] 335,000 interviewees reported using crack in the past month;[198] 513,000 interviewees reported using heroin in the past month;[199] and 2,885,000 interviewees reported using opioids in the past month.[200] In 2019, 10,065 thousand reported interviewees—or 10,065,000 people—used opioids in the past year, and in 2020, that number was 9,490,000.[201]

While millions of Americans can thus expect to benefit directly from an amendment to the Crack House Statute, the benefits do not take the form one might expect from a supervised injection site facility: they do not make it easier for drug users to consume drugs.[202] In fact,

189. *See infra* Part IV.B.2.

190. *See* Larson, *supra* note 52, at 8 ("A recent survey by the Pew Research Center in August 2017 found that nearly half of Americans (46% of U.S. adults) report having a family member or close friend with a current or past drug addiction, regardless of age, education, gender or political affiliation.").

191. *See* Colman, *supra* note 174.

192. Substance Abuse & Mental Health Servs., *2020 National Survey of Drug Use and Health (NSDUH) Releases: Detailed Tables*, U.S. DEP'T HEALTH & HUM SERVS. tbl. 1.1A (Oct. 25, 2021), www.samhsa.gov/data/release/2020-national-survey-drug-use-and-health-nsduh-releases.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *See, e.g.*, Bell & Globerman, *supra* note 54, at 2 ("[SIS] enable the consumption of pre-obtained drugs in an anxiety and stress-free atmosphere, under hygienic and low risk

would-be SIS consumers must prove that they have already purchased the opioid drugs for consumption before they can enter the SIS.[203] Instead, the direct benefits of amending the Crack House Statute for drug addicts in the United States are those relating to their personal well-beings—less morbidity, mortality, HIV, Hepatitis C, and less overdoses overall, as well as the opportunity for recovery, in an otherwise impoverished circumstance or remote city.[204]

2. Benefits for Non-Drug Addicts in the United States

SIS implementation benefits more than the individual drug addict, and in fact, serves to benefit the surrounding communities the most.[205] In one recent study conducted across New York City businesses, fifty-eight percent of managers reported experiencing or hearing of drug-use encounters in their own business' bathrooms.[206] SIS would eliminate this problem altogether, like Vancouver's famous Insite facility, where almost all public drug injections vanished post-SIS implementation.[207]

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conditions . . . . [SIS also] reduce overdose morbidity and mortality, reduce transmission of bloodborne infections, and improve access to other health and social services."). In fact, "those who used [the SIS,] Insite[,] were more likely to initiate *detoxing from drugs* and access to treatment like methadone, compared to those who weren't using the facility." Gordon, *supra* note 62 (emphasis added). *Cf.* Rosen, *supra* note 58 (describing the life-saving public health intervention as a process of "enabling those suffering from addiction to go to the brink of death").

203. *See* Larson et al., *supra* note 52, at 14–15 ("[T]he Vancouver Police Department found drug trafficking [] had not significantly increased or decreased in the surrounding area a year after the opening of the Insite facility. Another study . . . found no significant increase in the number of drug dealers in the area surrounding the Insite facility.") (emphasis removed) (internal citations omitted).

204. *See, e.g.*, *id.* at 13 (explaining that SIS "models aiming to estimate the cost-benefits of S[IS] have consistently found them to be cost-effective, to a large extent, due to the proven effects of S[IS] in deceasing the rates of HIV and HCV[]."). *But see* Mitra et al., *supra* note 80, at 2 ("Injection drug use is associated with a wide range of health and *social harms* . . . . Aside from the individual-level harms experienced among people who use injection drugs (PWID), at the *community level*, injection drug use in public spaces contributes to the improper disposal of injection-related litter and is perceived as a public nuisance. Likewise, costs due to injection drug-use related infections take a financial toll on the health care system.") (emphasis added).

205. *See, e.g.*, *Overdose Prevention Centers*, DRUG POL'Y ALL., drugpolicy.org/issues/supervised-consumption-services (last visited July 25, 2022); *AMA Wants New Approaches to Combat Synthetic and Injectable Drugs*, *supra* note 153 (explaining how SIS have been proven to increase the amount of drug abusers in substance abuse treatment, decrease disease transmission rates, overdose rates, and do not increase drug use or crime, in the areas in which they operate).

206. Wolfson-Stofko et al., *supra* note 58, at 69.

207. Larson et al., *supra* note 52, at 14 ("In a study investigating the before and after effects of injection-related public order problems during the initial period after opening Insite . . . it was found that the 12-week period after the facility's opening was independently associated with reductions in the number of drug users injecting in public (from a daily mean of ~4.3 to ~2.4 drug users in public), publicly discarded syringes (from a daily average of 11.5 to 5.4), and injection related

Further, among Insite users whose "injecting behavi[or] had changed as a result of accessing Insite"—which one study found that seventy-five percent of Insite participants had reported doing—seventy-one percent interviewed reported fewer public injection practices, and fifty-six percent reported less unsafe needle disposal practices overall.[208] Evidence from Insite has demonstrated that it prevents "more than [eighty] HIV infections annually, which results in an estimated annual savings of about $13.7 million in HIV-related medical care."[209]

C. Wide-Ranging Benefits of Amending the Crack House Statute as Proposed

Subpart C will first discuss the benefits of amending the Crack House Statute from a constitutional standpoint, so that SIS, under conflicting state and local laws, can legally operate under federal law.[210] That is, under § 856(a)(2)—originally enacted to combat the War on Drugs—which now ironically serves to hinder the United States' very ability to win that same War, almost a half century later.[211] Subsection 1 will discuss the constitutional concerns associated with the Crack House Statute (as is) as applied to SIS.[212] Subsection 2 will explain how amending the Crack House Statute will target the source of the War on Drugs' efforts—drug addiction—and in doing so, it is setting out to accomplish more than the Crack House Statute ever sought out to accomplish, from the outset.[213] Subsection 2 will explain how SIS mirror the goals of other successful harm-reduction models like syringe exchange programs—all of which have been proven, in global, peer-reviewed studies, to be better alternatives to locking up drug users and their dealers.[214]

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litter . . . . Externally collected data and statistics from the city of Vancouver corroborated the numbers.").

208. Bell & Globerman, *supra* note 54, at 2, 5.

209. *See* Larson et al., *supra* note 52, at 13.

210. *See infra* Part IV.C.

211. 21 U.S.C. § 856(a)(2) (1986). *See* Kreit, *supra* note 65, at 417-18; *see also* Morgan, *supra* note 32.

212. *See infra* Part IV.C.1.

213. *See infra* Part IV.C.2; *see also* HEROIN & PRESCRIPTION OPIATE ADDICTION TASK FORCE, KINGS CNTY., *supra* note 10, at 26–27; *see also* OFF. OF SEC'Y, DEP'T HEALTH & HUMAN SERVS., DETERMINATION THAT A PUBLIC HEALTH EMERGENCY EXISTS (2017), www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/October_26_2017_Public_Health_Declaration_for_Opioids_Crisis.pdf (showing that in 2017, Former President Donald Trump's Administration declared a public health emergency).

214. *See infra* Part IV.C.3; *see also supra* notes 56, 60, 62, 72 and accompanying text.

1. Eliminates Constitutional Concerns

If the Crack House Statute is construed broadly, parents who let their children consume illicit drugs in their homes could be charged as felons.[215] If construed narrowly, only people who intentionally "keep" their homes for the "purpose of" using, storing, manufacturing or distributing illicit drugs therein are liable.[216] Further, while "storing" controlled substances is a necessary predicate to "using" them in any one place—proscribing typical crack-house activity—"using" a controlled substance does not require "storing" it in any one place—demonstrated through supervised injection site facilities across the globe—and thus criminalizing "us[e]" is redundant under the Crack House Statute.[217]

2. Narrowly Tailors Opioid Addiction Prevention Like Other Harm-Reduction Models

Syringe exchange programs, also known as "needle exchange programs," provide sterile needles and syringes to intravenous drug users in exchange for used equipment " . . . to reduce sharing of contaminated equipment . . . . "[218] Thus, needle exchange programs reduce the transmission of blood-borne disease. They also reduce rates of injection and other drug use among both " . . . drug users and the general population, which is reflected through a decrease in substance abuse treatment admissions over time . . . . "[219]

Like syringe exchange programs, SIS turn the communities in which they operate from public injection-hubs, with high rates of crime and overdose mortality and morbidity, into highly rehabilitated communities with more drug addicts in recovery than in active addiction.[220] What is more, access to SIS is free, for the drug users

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215. *See* Petition for a Writ of Certiorari, *supra* note 7, at 19a.

216. *See id.* at 33a; *see also* Rayfield, *supra* note 98 at 1809.

217. *See Frequently Asked Questions: General*, *supra* note 62 (explaining how SIS do not allow heroin to be "stored" on site but instead require users to bring pre-obtained heroin to the site for injection). "Under no circumstances w[ould] S[IS] make available any narcotic or opioid, other than those that are FDA-approved for treating opioid addiction." *Id.*

218. Rebecca Ferrini, *American College of Preventive Medicine Public Policy on Needle-Exchange Programs to Reduce Drug-Associated Morbidity and Mortality*, 18 AM. J. PREV. MED. 173, 173 (2000). Currently, there are 112 needle-exchange programs operating in twenty-nine states and the District of Columbia, involving at least seventy-one U.S. cities. *Id.* Since 1989, more than 5.4 million syringes have been exchanged. *Id.*

219. Ingram, *supra* note 2 ("[T]here is a statistically significant reduction in injection drug use among drug users, injection drug use in the general population and overall drug use in the general population for each additional year that a syringe and needle exchange programs operates . . . . ").

220. *See, e.g.*, U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 73, at 11 ("[P]roviding sterile needles and syringes to people who inject drugs has become an important strategy for reducing disease transmission . . . . Additional services from these programs often include . . . health

themselves, the communities in which they operate, and society as a whole. SIS pay for themselves (and payment is made by private entities and/or individuals): SIS lead to lower rates of disease transmission, public drug use, crime, and overdose fatalities in the communities in which they operate and in the immediately surrounding cities.[221]

Other harm-reduction models, like increasing access to naloxone—an opioid antagonist that reverses opioid overdoses—have received Federal Drug Administration ("FDA") approval in recent years.[222] Public health efforts to make naloxone available to at-risk individuals and their families, or through community-based opioid overdose prevention programs, have surged in the United States.[223] At least eight states—California, Kentucky, New Hampshire, New Mexico, New York, Rhode Island, Vermont, and Washington—now have laws that specifically allow pharmacists to dispense naloxone to individuals without a prescription.[224] Further, to encourage people to seek out medical attention for an overdose either before or after one has been administered naloxone, forty state legislatures and the District of Columbia have enacted drug immunity laws.[225]

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care services. Needle/syringe exchange programs also [] encourage individuals to engage in substance use disorder treatment.") (internal citations omitted).

221. *See, e.g.*, Beletsky et al., *supra* note 66, at 236 ("SI[S] can save public funds by preventing death, disease, and crime . . . . "); *see also Frequently Asked Questions: General*, *supra* note 62 ("By reducing ambulance rides, emergency room trips, and hospital visits [alone], overdose prevention services [we]re expected to save Philadelphia $2 million a year in health care costs."); Brief for Fourteen Cities & Counties et al., *supra* note 6, at 11 ("Cost-benefit studies of the feasibility of opening sites in Baltimore, Philadelphia and San Francisco . . . found that the costs of operation would be more than offset by the savings realized by preventing HIV, hepatitis, and other infections, increasing enrollment in medication-assisted treatment, and reducing hospitalizations and deaths from opioid overdoses."); Owen, *supra* note 38 ("[T]hese individuals are going to use illicit drugs anyway. So, why not give them a safe place to use them and reduce chances of infection or disease, reduce the risks of overdose, and reduce the overdose mortality rate?"); Gordon, *supra* note 62 ("Insite averted about 50 deaths in the first three to four years of operation; . . . people were less likely to engage in behaviors that would lead to HIV infections; and . . . those who used Insite were more likely to initiate detoxing from drugs and access treatment like methadone, compared to those who weren't using the facility.").

222. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 73, at 11–12; *Drug Overdose Immunity & Good Samaritan Laws*, *supra* note 152; *see also* DEP'T OF HEALTH & HUM. SERVS., SAMHA OPIOID OVERDOSE PREVENTION TOOLKIT 1, 2 (2018), store.samhsa.gov/sites/default/files/d7/priv/sma18-4742.pdf; *State Naloxone Access Laws*, EDUC. DEV. CTR., INC., preventionsolutions.edc.org/services/resources/state-naloxone-access-laws (last visited July 25, 2022).

223. *See State Naloxone Access Laws*, *supra* note 222; *see generally* Larson et al., *supra* note 52, at 13 (explaining that SIS " . . . attract people at high risk of overdose, including those who inject in public and others at risk of blood-borne infection transmission[]").

224. *See State Naloxone Access Laws*, *supra* note 222.

225. *See Drug Overdose Immunity & Good Samaritan Laws*, *supra* note 152; *see also Strategies and Partnerships: Promising Strategies*, CTRS. DISEASE CONTROL & PREVENTION INJURY CTR. (Apr. 20, 2021), www.cdc.gov/drugoverdose/strategies/index.html ("[E]ffective

V. CONCLUSION

As the COVID-19 pandemic has only worsened the opioid epidemic in the United States—every state and the District of Columbia have reported spikes in drug overdose deaths due to injected drugs during the pandemic—the need for quick and effective answers from the Supreme Court could not be more apparent in 2022.[226] This is especially so when SIS are, arguably, the only viable weapons left to fight the War on Drugs.[227] SIS save lives, reduce downstream healthcare service costs, and serve to eliminate the barriers to treatment and the stigmas associated with opioid addiction.[228] The United States cannot beat the War without a change, nor can it beat the facts—that SIS work—and so must "join" in on what every other winning nation is doing and legalize them.[229]

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approaches include community distribution programs, co-prescription of naloxone, and equipping first responders."). Good Samaritan provisions of a municipality's drug laws serve to encourage bystanders to administer naloxone, and to summon emergency responders, without fear of being arrested for engaging in illicit drug activities. *See id.*

226. *See* Daniel Blaney-Koen, *Issue Brief: Nation's Drug-Related Overdose and Death Epidemic Continues to Worsen*, AM. MED. ASS'N (Feb. 15, 2022), www.ama-assn.org/system/files/issue-brief-increases-in-opioid-related-overdose.pdf; *see also* Henderson et al., *supra* note 37, at 2, 7.

227. *See Frequently Asked Questions: General*, *supra* note 62; *see also* Marshall et al., *supra* note 2, at 1430, 1436.

228. *See, e.g.*, Gordon, *supra* note 62 ("You know, you give someone a safer, cleaner, warmer, drier place to inject and they end up going into addiction treatment.").

229. *See, e.g.*, Sutherland et al., *supra* note 56, at 866; *If You Can't Beat Them, Join Them*, COLLINS, www.collinsdictionary.com/us/dictionary/english/if-you-cant-beat-them-join-them (last visited July 25, 2022).

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