


2-25-2019

# Safe Injection Sites and the Federal "Crack House" Statute

Alex Kreit

*Thomas Jefferson School of Law, akreit@tjssl.edu*

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### Recommended Citation

Alex Kreit, *Safe Injection Sites and the Federal "Crack House" Statute*, 60 B.C.L. Rev. 413 (2019), <https://lawdigitalcommons.bc.edu/bclr/vol60/iss2/2>

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# SAFE INJECTION SITES AND THE FEDERAL “CRACK HOUSE” STATUTE

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# SAFE INJECTION SITES AND THE FEDERAL “CRACK HOUSE” STATUTE

ALEX KREIT\*

**Abstract:** Safe injection sites have become the next battlefield in the conflict between state and federal drug laws. A safe injection site is a place where injection drug users can self-administer drugs in a controlled environment under medical supervision. They have been operating in other countries, including Canada, for decades, and a wealth of evidence suggests that they can help to reduce overdose deaths. To date, however, no United States city or state has sanctioned a safe injection site. Until recently, safe injection sites were politically untenable, seen as a form of surrender in the war on drugs. This dynamic, however, has changed over the past few years. Prominent politicians from across the political spectrum have called for an end to the drug war, and the opioid epidemic has grown increasingly dire. Efforts to start safe injection sites are currently underway in at least thirteen United States cities and states. Five cities—Denver, New York, Philadelphia, San Francisco, and Seattle—have gone so far as to announce plans to open an injection site. There is just one small problem: the site proposals appear to violate the federal crack house statute, which makes it a crime to maintain drug-involved premises. The Department of Justice has not yet taken a formal position on safe injection sites, but in a *New York Times* editorial, Deputy Attorney General Rod Rosenstein threatened that “cities and states should expect the Department of Justice to meet the opening of any injection site with swift and aggressive action.” Surprisingly, this looming conflict has gone almost entirely overlooked by legal academics. Meanwhile, the public debate has assumed that safe injection sites are clearly forbidden by federal law. This Article argues that assumption is wrong. Despite the crack house statute, an obscure provision of the federal Controlled Substances Act (CSA) might allow states and localities to establish government-run safe injection sites. Buried in the CSA is a provision that im-

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\* Visiting Professor, Drug Enforcement and Policy Center at The Ohio State University Moritz College of Law. I received valuable input on early drafts of this paper from attendees and participants at the overdose crisis panel at the Association of American Law Schools 2018 conference, the structure and the criminal justice system panel at CrimFest 2018, and the 2018 Southwest Criminal Law Scholars Workshop. Thanks are due in particular to Hadar Aviram, David Ball, Leo Beletsky, Doug Berman, Jack Chin, Beth Colgan, Aliza Cover, Don Dripps, Irene Joe, Carissa Hessick, Ben Levin, Emma MacGuidwin, Jennifer Oliva, Lauren Ouziel, Jocelyn Simonson, Shirin Sinnar, Kristen Underhill, and Ronald Wright. For institutional support, I am grateful to the Moritz College of Law’s Drug Enforcement and Policy Center.

munizes state and local officials who violate federal drug laws in the course of “the enforcement of any law or municipal ordinance relating to controlled substances.” This provision was almost surely intended to protect state and local police officers that possess and distribute drugs in connection with undercover operations. Nevertheless, this Article argues, the text of the immunity provision and the scarce case law interpreting it suggest it could shield government-run safe injection sites from federal interference.

## INTRODUCTION

The first government-sanctioned safe injection site opened in Berne, Switzerland in 1986.<sup>1</sup> In the years since, approximately one hundred safe injection sites have been established in ten countries, including Canada, but not the United States.<sup>2</sup> This may soon change, at least if the choice is left up to local decision makers. As of July 2018, there were at least thirteen U.S. cities and states beginning efforts to open supervised injection sites.<sup>3</sup> In February 2018, the director of San Francisco’s Department of Public Health announced that the city hoped to become the first in the nation to permit safe injection facilities, with plans to have two open around the beginning of July 2018.<sup>4</sup> When July 2018 came, however, the city backed away from its original plan. Instead, it opened a non-operational prototype facility for four days in late August as an exhibition for interested community members.<sup>5</sup>

<sup>1</sup> *Drug Consumption Rooms: An Overview of Provision and Evidence*, EUR. MONITORING CTR. FOR DRUGS & DRUG ADDICTION (July 6, 2018), [http://www.emcdda.europa.eu/attachements.cfm/att\\_239692\\_EN\\_Drug%20consumption%20rooms\\_update%202016.pdf](http://www.emcdda.europa.eu/attachements.cfm/att_239692_EN_Drug%20consumption%20rooms_update%202016.pdf) [<https://perma.cc/XK7Z-KKK6>].

<sup>2</sup> Alex H. Kral & Peter J. Davidson, *Addressing the Nation’s Opioid Epidemic: Lessons from an Unsanctioned Supervised Injection Site in the U.S.*, 53 AM. J. PREVENTATIVE MED. 919, 919 (2017) (reporting that approximately ninety-eight supervised injection sites are currently operating in sixty cities in Australia, Canada, Denmark, France, Germany, Luxembourg, the Netherlands, Norway, Spain, and Switzerland). Although no U.S. city has permitted safe injection sites, at least one unsanctioned facility has been operating in “an undisclosed urban area” in the United States since September 2014. *Id.*

<sup>3</sup> Bobby Allyn, *Cities Planning Supervised Drug Injection Sites Fear Justice Department Reaction*, NPR (July 12, 2018), <https://www.npr.org/sections/health-shots/2018/07/12/628136694/harm-reduction-movement-hits-obstacles> [<https://perma.cc/WM6C-37SX>].

<sup>4</sup> Heather Knight, *SF Safe Injection Sites Expected to Be First in Nation, Open Around July 1*, S.F. CHRON., (Feb. 5, 2018), <https://www.sfchronicle.com/news/article/SF-safe-injection-sites-expected-to-be-first-in-12553616.php> [<https://perma.cc/5TH8-FHJD>].

<sup>5</sup> Laura Waxmann, *Mock Safe Injection Site Opens in SF Amid Threat of Federal Prosecution*, S.F. EXAMINER (Aug. 29, 2018), <http://www.sfexaminer.com/mock-safe-injection-site-opens-sf-amid-threat-federal-prosecution/> [<https://perma.cc/CZ2D-K8MG>]. Safe injection sites are referred to by a number of different names, including supervised injection facilities, safer consumption services, and overdose prevention sites. This Article uses these terms interchangeably. See generally, Colleen L. Barry et al., *Language Matters in Combatting the Opioid Epidemic: Safe*

Safe injection sites are places where individuals can safely use their own drugs under the supervision of trained professionals.<sup>6</sup> They are a harm reduction measure, aimed at allowing people to use drugs safely and reducing public disturbances caused by people using drugs on the streets or in public bathrooms.<sup>7</sup> A wealth of evidence suggests that, if properly implemented, safe injection facilities succeed in achieving these goals. Safe injection sites have been shown to reduce overdose deaths, increase participation in drug treatment programs, and lessen injection drug use in public.<sup>8</sup>

Despite strong empirical support for safe injection facilities, U.S. policymakers have traditionally been resistant to them. Like many other public health-oriented drug strategies—from needle exchange to heroin-assisted treatment<sup>9</sup>—safe injection sites were long considered to be off-limits in the United States simply because they were incompatible with the war on drugs.<sup>10</sup> Through the lens of the drug war, these sort of harm reduction measures were seen as a “form[] of surrender”<sup>11</sup> and rejected out of hand. The dynamic has begun to change over the past decade, however, as a number of prominent politicians from across the political spectrum have called for an end to the war on drugs.<sup>12</sup> At the same time, the opioid epidemic has grown increasingly dire. With more than 52,000 drug overdose deaths in 2015—up over 300% since 2000—our country is arguably “in the worst drug-related crisis in its history.”<sup>13</sup>

This convergence of events has led, somewhat suddenly, to serious efforts in a number of U.S. cities to establish safe injection facilities. Less than one month before San Francisco announced its intention to become the first city with a safe injection site, officials in Philadelphia gave the go-

*Consumption Sites Versus Overdose Prevention Sites*, 108 AM. J. PUB. HEALTH 156 (2018) (discussing the lack of uniformity about the names used to refer to these sites).

<sup>6</sup> Kral & Davidson, *supra* note 2, at 919.

<sup>7</sup> *Id.*

<sup>8</sup> See *infra* notes 32–51 and accompanying text (providing an overview of empirical evaluations of safe injection sites).

<sup>9</sup> For an overview of needle exchange programs (also called syringe exchange programs), see generally Steven R. Salbu, *Needle Exchange, HIV Transmission, and Illegal Drug Use: Informing Law and Public Policy with Science and Rational Discourse*, 33 HARV. J. ON LEGIS. 105 (1996). For an overview of heroin-assisted treatment, see, for example, Dan Werb, *Heroin Prescription, HIV, and Drug Policy: Emerging Regulatory Frameworks*, 91 OR. L. REV. 1213 (2013).

<sup>10</sup> See Alex Kreit, *Drug Truce*, 77 OHIO ST. L.J. 1323, 1336–37 (2016) (discussing the impact of drug war politics on the pursuit of harm reduction measures in the United States).

<sup>11</sup> William J. Bennett, *The Drug War Worked Once; It Can Again*, WALL STREET J. (May 15, 2001), <https://www.wsj.com/articles/SB989884118310019941> [<https://perma.cc/EP6V-34PA>].

<sup>12</sup> Kreit, *supra* note 10, at 1324–26.

<sup>13</sup> Leo Beletsky & Corey S. Davis, *Today’s Fentanyl Crisis: Prohibition’s Iron Law, Revisited*, 46 INT’L J. DRUG. POL’Y 156, 156 (2017).

ahead to open a facility.<sup>14</sup> In late 2017, the Seattle City Council passed a budget that included \$1.3 million for a safe injection site.<sup>15</sup> Other locales that are considering permitting safe injection sites include Boston, Denver, New York City, and the State of Vermont.<sup>16</sup>

With so many interested cities, it seems like only a matter of time before government-sanctioned safe injection sites are open in the United States. There is just one small problem: they appear to violate federal law.

Because safe injection site operators do not handle drugs themselves, it is unlikely the facilities would run afoul of federal laws criminalizing drug possession and distribution.<sup>17</sup> But they would almost certainly violate the so-called federal crack house statute. Passed in the mid-1980s, the crack house statute makes it a crime to make property available to others “for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.”<sup>18</sup> Because safe injection site clients would be at the property for the purpose of using illegal drugs, facility operators—including

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<sup>14</sup> Elana Gordon, *What’s Next for ‘Safe Injection’ Sites in Philadelphia?*, NPR (Jan. 24, 2018), <https://www.npr.org/sections/health-shots/2018/01/24/580255140/whats-next-for-safe-injection-sites-in-philadelphia> [<https://perma.cc/DJ5S-W842>].

<sup>15</sup> *Seattle Budget Includes Money for Safe-Injection Site*, ASSOCIATED PRESS (Nov. 21, 2017), <https://www.usnews.com/news/best-states/washington/articles/2017-11-21/seattle-budget-includes-money-for-safe-injection-site> [<https://perma.cc/5XNQ-7WUW>].

<sup>16</sup> See *infra* notes 52–85 and accompanying text (providing an overview of efforts to establish safe injection facilities).

<sup>17</sup> One does not need to touch an item to possess it. A person can constructively possess contraband if she has the “power and intent” to exercise dominion and control over it. *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015) (“Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.”). Under this formulation, knowing presence near contraband is insufficient to establish constructive possession. See *United States v. Richard*, 696 F.2d 849, 856 (10th Cir. 1992) (“[M]ere proximity to illegal drugs, mere presence on the property where they are located, or mere association with persons who do control them, without more, is insufficient to support a finding of possession.”). As a result, it does not appear that safe injection site operators would be in possession of illegal drugs that were on their premises. Nor would they be likely to be accomplices to drug possession. Assuming *arguendo* that a safe injection facility facilitates the possession of a controlled substance, accomplice liability attaches only to those who act “with the intent of facilitating the offense’s commission.” *Rosemond v. United States*, 572 U.S. 65, 71 (2014). Safe injection operators do not intend to help users possess drugs; their purpose is to provide medical services to injection drug users. See Scott Burris et al., *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 ST. LOUIS U. L.J. 1089, 1133 (2009) (“An SIF is providing a space for use of controlled substances not for its own sake or for profit, but in order to promote drug treatment, prevent disease, and avoid overdose mortality.”).

<sup>18</sup> 21 U.S.C. § 856(a) (2012).

employees—would almost certainly be susceptible to charges for maintaining drug-involved premises.<sup>19</sup>

The United States Department of Justice (DOJ) has not yet taken a formal position on safe injection facilities, but early signs suggest that the Trump administration is unlikely to defer to states and cities on this issue. The Drug Enforcement Administration (DEA) has stated that it believes safe injection sites would violate the crack house statute.<sup>20</sup> The United States Attorneys for the districts of Colorado, Massachusetts, and Vermont have announced that if safe injection sites were established in their states, they would consider bringing criminal charges against facility employees.<sup>21</sup> In August 2018, Deputy Attorney General Rod Rosenstein penned a *New York Times* editorial in opposition to safe injection sites in which he warned that “cities and counties should expect the Department of Justice to meet the opening of any injection site with swift and aggressive action.”<sup>22</sup> Last but not least, shortly before this article went to press, the United States Attorney for the Eastern District of Pennsylvania filed a lawsuit against Safehouse, a nonprofit that has been working with the city of Philadelphia to open a safe

<sup>19</sup> See *infra* notes 173–277 and accompanying text (analyzing how the crack house statute would apply to safe injection sites).

<sup>20</sup> Tony Pugh, *Supervised Injection Sites Aimed at Cutting Opioid Overdoses Risk the Wrath of the DEA and Prosecutors*, PITT. POST-GAZETTE, (Mar. 20, 2018), <http://www.post-gazette.com/news/nation/2018/03/20/Supervised-injection-sites-aimed-at-cutting-opioid-overdoses-risk-the-wrath-of-the-DEA-and-prosecutors/stories/201803190215> [<https://perma.cc/TP5K-JP7S>]; see also Dominic Holden, *The Trump Administration Says Proposed Heroin Injection Sites Could Face “Legal Action,”* BUZZFEED NEWS (Feb. 14, 2018), [https://www.buzzfeed.com/dominicholden/the-trump-administration-says-proposed-heroin-injection?utm\\_term=.tuAJ4jDxk#.faGGEvldP](https://www.buzzfeed.com/dominicholden/the-trump-administration-says-proposed-heroin-injection?utm_term=.tuAJ4jDxk#.faGGEvldP) [<https://perma.cc/558K-BBJY>] (quoting a Drug Enforcement Agency (DEA) spokeswoman that “[s]upervised injection facilities, or so-called safe injection sites, violate federal law”).

<sup>21</sup> U.S. ATTORNEY’S OFFICE DIST. OF CO., JOINT-STATEMENT OF THE U.S. ATTORNEY’S OFFICE AND THE DENVER FIELD OFFICE OF THE DRUG ENFORCEMENT ADMINISTRATION REGARDING THE CITY AND COUNTY OF DENVER’S PROPOSAL TO CREATE SUPERVISED LOCATIONS TO INJECT HEROIN AND OTHER ILLEGAL DRUGS (Dec. 4, 2018), <https://www.justice.gov/usao-co/pr/joint-statement-us-attorney-s-office-and-denver-field-office-drug-enforcement> [<https://perma.cc/G32H-87DA>]; U.S. ATTORNEY’S OFFICE DIST. OF VT., STATEMENT OF THE U.S. ATTORNEY’S OFFICE CONCERNING PROPOSED INJECTION SITES (Dec. 13, 2017), <https://www.justice.gov/usao-vt/pr/statement-us-attorney-s-office-concerning-proposed-injection-sites> [<https://perma.cc/P97H-FEBK>]; Associated Press, *Prosecutor: Feds Won’t Recognize Injection Sites in Mass.*, BOSTON.COM (July 19, 2018), <https://www.boston.com/news/local-news/2018/07/19/prosecutor-feds-wont-recognize-injection-sites-in-mass> [<https://perma.cc/4N4U-ESS5>] (“The top federal prosecutor in Massachusetts says supervised injection sites for drug users would violate U.S. law and could lead to criminal charges.”).

<sup>22</sup> Rod J. Rosenstein, *Fight Drug Abuse, Don’t Subsidize It*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html> [<https://perma.cc/UE9N-4EYR>].

injection site. Citing the crack house statute, the lawsuit seeks a declaratory judgment to stop Safehouse from going through with its plans.<sup>23</sup>

To date, the debate over supervised injection facilities has largely assumed that their status under federal law is clear and the only question is whether federal prosecutors will “turn a blind eye, as it’s largely done with marijuana, or bring states to court.”<sup>24</sup> This Article raises the possibility that, contrary to conventional wisdom, an obscure provision of the federal Controlled Substances Act (CSA) might already allow states and localities to establish safe injection facilities. Buried in the CSA is a provision that grants immunity from civil or criminal liability to “any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.”<sup>25</sup> This provision was likely intended to immunize state and local police officers that violate federal drug laws in connection with undercover operations. Nevertheless, the plain text of the provision, and the scant case law that exists interpreting it, suggests that it could shield government-run safe injection facilities from federal interference. Indeed, it is even possible that the provision could immunize a privately-run facility, if the operators were deputized as “duly authorized officer[s]”<sup>26</sup> in connection with a state or local safe injection law.

Although there is an extensive literature on safe injection sites in the fields of public health and public policy, legal academics have almost entirely overlooked the subject. Only a handful of articles have examined the legal implications of safe injection facilities.<sup>27</sup> None have considered the immunity provision that is the focus of this Article.

<sup>23</sup> Complaint for Declaratory Judgment, *United States v. Safehouse*, 2:19-cv-00519-GAM (E.D. Pa. 2019), <https://www.courthousenews.com/wp-content/uploads/2019/02/SAFEHOUSE.pdf> [<https://perma.cc/WCM2-3TXZ>]; see also Bobby Allyn, *U.S. Prosecutors Sue to Stop Nation’s First Supervised Injection Site for Opioids*, NPR (Feb. 6, 2019), <https://www.npr.org/sections/health-shots/2019/02/06/691746907/u-s-prosecutors-sue-to-stop-nation-s-first-supervised-injection-site> [<https://perma.cc/ARK4-JTVP>].

<sup>24</sup> The Editorial Board, *Let Cities Open Safe Injection Sites*, N.Y. TIMES (Feb. 24, 2018), <https://www.nytimes.com/2018/02/24/opinion/sunday/drugs-safe-injection-sites.html> [<https://perma.cc/EWQ6-5RAJ>].

<sup>25</sup> 21 U.S.C. § 885(d) (2012).

<sup>26</sup> *Id.*

<sup>27</sup> Burris et al., *supra* note 17, at 1133 (examining safe injection sites and arguing that courts should adopt a narrow interpretation of the crack house statute in order to allow them to be established in the United States); Christine Bulgozdi, *Supervised Injection Facilities: Fighting the Prescription Overdose Epidemic*, 26 ANNALS HEALTH L. ADVANCE DIRECTIVE 118, 128–29 (2017) (proposing that lawmakers consider establishing a combined program of prescription drug monitoring and safe injection sites in order to fight overdoses, but acknowledging that federal law would currently block such a program); Cylas Martell-Crawford, *Safe Injection Facilities: A Path*



Part I of this Article introduces the safe injection sites in more detail. It includes an overview of some of the evidence that supports them and the current efforts to establish them in the United States.<sup>28</sup> Part II addresses the primary roadblock standing in the way of safe injection sites: the federal crack house statute.<sup>29</sup> It also explains why previously proposed strategies for circumventing that law are unlikely to be successful. Part III argues that an often-overlooked provision of the Controlled Substances Act—its immunity provision—should allow cities and states to open government-run safe injection sites without federal interference.<sup>30</sup> Part IV situates the looming conflict between cities and the federal government over safe injection sites within the broader debate about the future of the war on drugs.<sup>31</sup> Part V concludes.

## I. EFFORTS TO ESTABLISH SAFE INJECTION FACILITIES IN THE UNITED STATES

### A. Evidence Supporting Safe Injection Facilities

Although serious discussion of safe injection facilities is new to the United States, they have been operating in other countries for decades. Safe injection facilities are founded on the principle of harm reduction, which “[i]n much of the developed world . . . is recognized as one of the four pillars of drug control, alongside enforcement, treatment, and prevention.”<sup>32</sup> Harm reduction programs are designed “to aid dependent drug users without attempting to curtail their use.”<sup>33</sup> The idea is to reduce the negative consequences associated with drug use, both to the user and to the public, without necessarily reducing drug use itself. Consistent with this strategy, the first sanctioned safe injection site, which opened in Berne, Switzerland in

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*to Legitimacy*, 11 ALB. GOV'T L. REV. 124, 141 (2018) (considering whether states and cities could raise a constitutional challenge to federal laws that block safe injection sites on the theory that the “DOJ’s failure to exempt safe injection facilities [from the CSA] infringes upon drug addict’s equal protection to treatment”).

<sup>28</sup> See *infra* notes 32–86 and accompanying text.

<sup>29</sup> See *infra* notes 87–172 and accompanying text.

<sup>30</sup> See *infra* notes 173–277 and accompanying text.

<sup>31</sup> See *infra* notes 278–297 and accompanying text.

<sup>32</sup> Jonathan P. Caulkins & Peter Reuter, *Dealing More Effectively and Humanely with Illegal Drugs*, 46 CRIME & JUST. 95, 117 (2017). Harm reduction principles are not limited to the drug control setting but are used in connection with other activities that can carry negative health consequences, such as risky sexual activity. Melissa Vallejo, Note, *Safer Bathrooms in Syringe Exchange Programs: Injecting Progress into the Harm Reduction Movement*, 118 COLUM. L. REV. 1185, 1190 n.37 (2018).

<sup>33</sup> Caulkins & Reuter, *supra* note 32, at 117. Although reduced drug use is not a primary goal of harm reduction, harm reduction policies are not necessarily incompatible with the goal of use reduction. Indeed, some evidence suggests that safe injection facilities can help to reduce drug use by serving as an entry point for users to seek addiction treatment.

1986, was intended to “reduc[e] the nuisance associated with public injecting as well as public health problems such as HIV transmission and drug overdose.”<sup>34</sup> Today, supervised injection sites are operating in sixty-six cities in ten different countries (Australia, Canada, Denmark, France, Germany, Luxembourg, the Netherlands, Norway, Spain, and, of course, Switzerland).<sup>35</sup>

Safe injection sites can differ from one another in their operational specifics. They “embrace[] a range of types of service[s], delivered in differing ways, targeting different populations, within different contexts.”<sup>36</sup> Despite these differences, supervised injection facilities share a number of similarities.<sup>37</sup> At the broadest level, all supervised injection facilities are designed to provide a safe space to use a drug with medical personnel on hand.<sup>38</sup> They also share common goals, namely to lower disease and death rates from drug use, decrease drug usage in public, and improve public amenities in high drug use areas.<sup>39</sup> Safe injection sites do not make or distribute illegal drugs, nor do they encourage drug use. Instead, users bring drugs they have purchased elsewhere to use under the watch of medical personnel with hygienic instruments.<sup>40</sup> Safe injection facility staff members, including trained medical personnel, are on site to intervene if there is a possible overdose by administering the overdose reversal drug Naloxone.<sup>41</sup> Supervised injection facilities often offer other services, including educa-

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<sup>34</sup> Garth Davies, *A Critical Evaluation of the Effects of Safe Injection Facilities*, 1 J. GLOBAL DRUG POL’Y & PRAC. 1, 1 (2007).

<sup>35</sup> Kral & Davidson, *supra* note 2, at 919.

<sup>36</sup> Mehmet Zülfi Öner, *An Overview of Drug Consumption Rooms*, 4 HUM. RTS. REV. 87, 92 (2014). Indeed, although often referred to as injection sites, some facilities permit the use of drugs more broadly, and it is increasingly common to see them referred to as “drug consumption rooms.” *Id.*

<sup>37</sup> *Id.* (noting that many injection facilities share “basic common elements”). For an overview and comparison of safe injection sites, see, for example, EBERHARD SCHATZ & MARIE NOUGIER, INTERNATIONAL DRUG POLICY CONSORTIUM, DRUG CONSUMPTION ROOMS EVIDENCE AND PRACTICE 5–6 (2012), [https://www.drugsandalcohol.ie/17898/1/IDPC-Briefing-Paper\\_Drug-consumption-rooms.pdf](https://www.drugsandalcohol.ie/17898/1/IDPC-Briefing-Paper_Drug-consumption-rooms.pdf) [<https://perma.cc/BX6R-YUDA>]; S.F. DEP’T OF PUB. HEALTH, HARM REDUCTION SERVICES IN SAN FRANCISCO ISSUE BRIEF 16–20 (2017) [hereafter SAN FRANCISCO ISSUE BRIEF], <https://www.sfdph.org/dph/files/SIStackforce/IssueBrief-06202017.pdf> [<https://perma.cc/X7CB-6NXE>].

<sup>38</sup> Bulgozdi, *supra* note 27, at 121.

<sup>39</sup> *Drug Consumption Rooms: An Overview of Provision and Evidence*, *supra* note 1 (noting that safe injection facilities are intended to “to reduce morbidity and mortality by providing a safe environment for more hygienic drug use . . . [and] to reduce drug use in public and improve public amenity in areas surrounding urban drug markets”).

<sup>40</sup> Bulgozdi, *supra* note 27, at 121 (noting that drug users are “under medical supervision using clean instruments provided by the facility”).

<sup>41</sup> *Id.*

tion, equipment, and counseling.<sup>42</sup> Many of these add-on services are standard at safe injection facilities that follow the so-called “integrated” model, which is the most common type of safe injection facility.<sup>43</sup> Under the integrated model, the safe injection site is one part of a broader, connected group of other important health and social services located in a larger facility.<sup>44</sup>

Although there remains some debate about the overall strength of the empirical evidence in support of safe injection sites, a number of studies have found that they improve public health and safety outcomes for both users and the community on a range of measures. A 2014 systematic review of the literature that examined seventy-five studies found that the studies all “converged to find that [safe injection sites] 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.”<sup>45</sup> 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, [safe injection sites] do not promote drug use and do not increase crime or drug trafficking or the number of [people who inject drugs].”<sup>46</sup> 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.<sup>47</sup> A study of the safe injection facility in Vancouver, Canada, for example, concluded that overdose deaths in the vicinity of the facility dropped by 35% after it opened while the overdose rate in the city as a whole decreased by 9.3% during that same period.<sup>48</sup>

A 2018 review of the evidence by the RAND Corporation likewise found existing studies to be encouraging but struck a much more cautious

<sup>42</sup> Öner, *supra* note 36, at 93 (noting that safe injection sites often provide “sterile injection supplies and safe disposal, education about safer drug use and communicable disease prevention, support, counseling, [and] referrals to health and social services”).

<sup>43</sup> *Id.* at 94.

<sup>44</sup> SAN FRANCISCO ISSUE BRIEF, *supra* note 37, at 21 tbl.4. The other two models of safe injection sites are the “specialized” model, under which the facility focuses exclusively on safe injection services and does not provide other services in-house, and the “mobile” model, which are “specially outfitted vans that provide space for 1–3 injection booths inside.” *Id.*

<sup>45</sup> Chloé Potier et al., *Supervised Injection Services: What Has Been Demonstrated? A Systematic Literature Review*, 145 DRUG & ALCOHOL DEPENDENCE 48, 48 (2014).

<sup>46</sup> *Id.* at 65.

<sup>47</sup> *Id.* at 62.

<sup>48</sup> Brandon D.L. Marshall et al., *Reduction in Overdose Mortality After the Opening of North America’s First Medically Supervised Safer Injection Facility: A Retrospective Population-Based Study*, 377 LANCET 1429, 1433 (2011).

tone than the 2014 literature review.<sup>49</sup> The RAND report warned against drawing any firm conclusions about safe injection sites because, “[o]verall, the scientific evidence about the effectiveness of [supervised consumption sites] is limited in quality and the number of locations evaluated.”<sup>50</sup> As a result, the report concluded that although there is evidence that supervised drug consumption “reduce[s] the risk of disease transmission and other harms associated with unhygienic drug use practices . . . there is uncertainty about the size of the overall effect.”<sup>51</sup>

### *B. Safe Injection Facilities as a Response to the Opioid Crisis*

While more research may be needed to reach a definitive conclusion about the effectiveness of safe injection sites, the available evidence is strong enough that a number of state and local lawmakers have begun to seriously consider them. Interest in bringing safe injection sites to the United States is not entirely new. Drug policy reform advocates have been lobbying for their adoption for decades, occasionally piquing the curiosity of local officials. In 2007, San Francisco became the first U.S. city to explore the issue when its public health department co-sponsored a symposium on Vancouver’s safe injection site.<sup>52</sup> According to San Francisco’s director of HIV prevention at the time, the conference was meant to help city officials “figure out whether this is a way to reduce the harms and improve the health of our community.”<sup>53</sup> The idea was politically untenable, however. In the context of the war on drugs, a safe injection site was viewed as “a form of giving up,”<sup>54</sup> as an Office of National Drug Control Policy official ar-

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<sup>49</sup> BEAU KILMER ET AL., RAND CORPORATION, RESEARCH REPORT: CONSIDERING HEROIN-ASSISTED TREATMENT AND SUPERVISED CONSUMPTION SITES IN THE UNITED STATES (2018), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2600/RR2693/RAND\\_RR2693.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2600/RR2693/RAND_RR2693.pdf) [<https://perma.cc/79CX-DDUS>].

<sup>50</sup> *Id.* at x.

<sup>51</sup> *Id.* at xi.

<sup>52</sup> Lisa Leff, Associated Press, *San Francisco Considers Safe-Injection Site for Drug Addicts*, USA TODAY (Oct. 18, 2007), [http://usatoday30.usatoday.com/news/health/2007-10-18-sf-injections\\_N.htm](http://usatoday30.usatoday.com/news/health/2007-10-18-sf-injections_N.htm) [<https://perma.cc/2F7K-QXA6>].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* In an interview in 2015, one of the organizers of San Francisco’s 2007 conference said that the effort “just kind of crashed and burned. The country wasn’t ready for this conversation.” Beth Schwartzenfel, *Is America Ready for Safe Injection Rooms?*, VICE (Nov. 6, 2015), [https://www.vice.com/en\\_us/article/4wb5yb/is-america-ready-for-safe-injection-rooms-1106](https://www.vice.com/en_us/article/4wb5yb/is-america-ready-for-safe-injection-rooms-1106) [<https://perma.cc/7RFM-59GK>]. In 2009, supervised injection site advocates held a similar conference in New York City, although this time without any backing from city officials. The New York City conference did not lead to any serious interest in safe injection facilities from local policymakers. *psmith, Feature: Effort to Bring Safe Injection Facility to New York City Getting Underway*, STOPTHEDRUGWAR.ORG (May 29, 2009, 11:00PM), [https://stopthedrugwar.org/chronicle/2009/may/29/feature\\_effort\\_bring\\_safe\\_inject](https://stopthedrugwar.org/chronicle/2009/may/29/feature_effort_bring_safe_inject) [<https://perma.cc/3HB7-DEW7>].

gued at the time, and therefore unacceptable. Even then-Mayor of San Francisco Gavin Newsom, known for being boldly ahead of the political curve on other progressive issues like marriage equality and marijuana legalization, declined to back the effort.<sup>55</sup>

In the decade-or-so since the first effort to establish a supervised injection site in San Francisco fell flat, two developments have resulted in a dramatic shift in the political landscape: a mounting opioid epidemic and the abandonment of the war on drugs. First, problematic opioid use has become an urgent public health crisis.<sup>56</sup> Although the beginning of the opioid epidemic pre-dates this decade,<sup>57</sup> it took on a new dimension in recent years. In 2010, the crisis entered a new “phase . . . [a]fter remaining relatively stable for years, heroin overdose deaths spiked, tripling between 2010 and 2015.”<sup>58</sup> The rise in drug overdose deaths has continued: between 2015 and 2016, drug overdose death rates rose among all age groups, ranging from a 29% increase for 25 to 34 year-olds to a 7% increase for those over 65.<sup>59</sup> In late 2017, the federal government went so far as to officially declare the crisis a public health emergency.<sup>60</sup> Prior to the federal declaration, a number of states had already issued their own public health emergency orders in response to the crisis.<sup>61</sup> Not surprisingly, this state of affairs has given elected officials an incentive to think creatively about how to combat opioid abuse. As San Francisco Mayor London Breed put it in a 2017 report

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<sup>55</sup> See C.W. Nevius, *Support for Supervised Injection Is Growing*, SFGATE.COM (Oct. 15, 2007), <https://www.sfgate.com/bayarea/article/C-W-Nevius-Support-for-supervised-drug-2518428.php> [<https://perma.cc/KK44-6XS6>] (“Asked for comment from Mayor Gavin Newsom, spokesman Nathan Ballard said, “[t]he mayor is not inclined to support this approach, which quite frankly may end up creating more problems than it addresses.”).

<sup>56</sup> See Beletsky, *supra* note 13 (arguing that the epidemic is “the worst drug-related crises in [U.S.] history”).

<sup>57</sup> Nabarun Dasgupta et al., *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182, 182 (2018); See also Ameet Sarpatwari et al., *The Opioid Epidemic: Fixing a Broken Pharmaceutical Market*, 11 HARV. L. & POL’Y REV. 463, 464–77 (2017) (providing a brief history of the emergence of the opioid epidemic, suggesting that the epidemic has “roots . . . that are deeper than popular narrative suggests”).

<sup>58</sup> Dasgupta, *supra* note 57, at 182.

<sup>59</sup> HOLLY HEDEGAARD ET AL., U.S. DEP’T OF HEALTH & HUM. SERV., DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2016 (Dec. 2017), <https://www.cdc.gov/nchs/data/data-briefs/db294.pdf> [<https://perma.cc/D3EJ-5JWS>].

<sup>60</sup> Brianna Ehley, *Trump Administration Extending Opioid Emergency Declaration*, POLITICO (Jan. 19, 2018), <https://www.politico.com/story/2018/01/19/trump-opioids-emergency-declaration-extension-300590> [<https://perma.cc/5WSN-BCFZ>].

<sup>61</sup> James G. Hodge, Jr. et al., *Redefining Public Health Emergencies: The Opioid Epidemic*, 58 JURIMETRICS 1, 3 (2017).

on safe injection services, “this is too big of an issue for us to rule out any possible solutions.”<sup>62</sup>

Second, during roughly this same period, the political consensus in favor of the war on drugs gave way to an emerging consensus that the drug war strategy should be abandoned.<sup>63</sup> Politicians from Chris Christie, the conservative former Republican governor of New Jersey, to Cory Booker, the progressive Democratic Senator from the same state, have branded the drug war a “failure” and called for its end.<sup>64</sup> Both of President Barack Obama’s drug czars, Gil Kerlikowske and Michael Botticelli, expressed similar views, even going so far as to refer to the drug war in the past tense.<sup>65</sup> To be sure, the developing anti-drug war consensus is not yet nearly as cohesive as was support for the drug war in the 1980s, 1990s, or even 2000s, and the Trump administration has taken steps to revive the war on drugs.<sup>66</sup> But political backing for a public health-oriented approach to drug policy has nevertheless changed the tenor of the discussion. In the context of the opioid epidemic, for example, the Obama administration released a 2011 report that “broke with decades of tradition to shift the agency’s rhetorical focus toward a more evidence-based, proactive approach to what had previously been termed the ‘War on Drugs,’ and announced the agency’s goal of decreasing unintentional opioid deaths in the United States by 15% within five years.”<sup>67</sup> At first glance, announcing a goal to reduce overdose deaths may not seem especially noteworthy. But the move was a genuine break from the strategy of the drug war, which has had a single-minded focus on “the consumption of the prohibited substance rather than any secondary consequences,”<sup>68</sup> such as overdose deaths.

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<sup>62</sup> S.F. DEP’T OF PUB. HEALTH, S.F. SAFE INJECTION SERVS. TASK FORCE, FINAL REPORT 5 (2017), <https://www.sfdph.org/dph/files/SISTaskforce/SIS-Task-Force-Final-Report-2017.pdf> [<https://perma.cc/E56V-JFR3>].

<sup>63</sup> See Kreit, *supra* note 10, at 1324–26 (discussing this trend).

<sup>64</sup> *Id.* at 1325–26 (noting that Gavin Newsom and Rand Paul have made similar remarks).

<sup>65</sup> *Id.* at 1324 (discussing Kerlikowski’s and Botticelli’s criticisms of the drug war, including Kerlikowski’s statement in 2011 that the administration had “ended the drug war now almost two years ago”).

<sup>66</sup> See James Cooper, *The United States, Mexico, and the War on Drugs in the Trump Administration*, 25 WILLAMETTE J. INT’L L. & DISP. RESOL. 234, 281–91 (2018) (discussing the Trump administration’s interest in renewing the drug war).

<sup>67</sup> Corey Davis et al., *Action, Not Rhetoric, Needed to Reverse the Opioid Overdose Epidemic*, 45 J. L. MED. & ETHICS 20, 20 (2017).

<sup>68</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 9 (1992).

At the federal level, the emerging drug truce has been mostly rhetorical and has not resulted in much in the way of significant concrete change.<sup>69</sup> The story is a bit different at the local level. On issues from marijuana legalization to the repeal of mandatory minimum drug sentencing laws, states and cities across the country have begun to translate rhetoric into real reform.<sup>70</sup> In response to the opioid crisis, states and cities have enacted a number of harm reduction-oriented policies. As of mid-2017, forty states and the District of Columbia had passed a “Good Samaritan” law.<sup>71</sup> While the specifics of these laws vary from state to state, they generally give immunity from prosecution to people who call 911 to report a drug overdose for specified offenses like drug possession.<sup>72</sup> Similarly, states have enacted a range of laws to increase access to the anti-overdose drug Naloxone.<sup>73</sup>

Some state and local lawmakers have also begun to give serious thought to more far-reaching reforms like safe injection sites that were, until just a few years ago, considered to be political nonstarters. Lawmakers in a number of states including Colorado, Massachusetts, and Vermont have discussed safe injection sites.<sup>74</sup> They have also attracted support from influen-

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<sup>69</sup> Kreit, *supra* note 10, at 1345–49 (discussing efforts to reform federal drug laws during the Obama administration and their lack of success). Federal criminal justice reform efforts finally bore fruit at the very end of 2018, with the passage of the First Step Act. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018). Although not as far reaching as some of the failed legislative proposals put forward during the Obama administration, the First Step Act includes meaningful reforms to federal drug sentencing laws. See Erin McCarthy Holliday, *President Trump Signs Criminal Justice Reform First Step Act into Law*, JURIST.ORG (Dec. 21, 2018), <https://www.jurist.org/news/2018/12/president-trump-signs-criminal-justice-reform-first-step-act-into-law/> [<https://perma.cc/LS6U-THCR>] (discussing the First Step Act).

<sup>70</sup> Kreit, *supra* note 10, at 1345–46.

<sup>71</sup> *Drug Overdose Immunity and Good Samaritan Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (June 5, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx> [<https://perma.cc/583D-AES6>].

<sup>72</sup> See Kelsey Bissonnette, Note, *Anti-Death Legislation: Fighting Overdose Mortality from a Public Health Perspective*, 23 TEMP. POL. & CIV. RTS. L. REV. 451, 464–68 (2014) (providing an overview of Good Samaritan laws in place as of 2014).

<sup>73</sup> Jing Xu et al., *State Naloxone Access Laws are Associated with an Increase in the Number of Naloxone Prescriptions Dispensed in Retail Pharmacies*, 189 DRUG & ALCOHOL DEPENDENCE 37, 37 (2018). State efforts to expand naloxone access have received some support from federal agencies. See Christopher T. Creech, Note, *Increasing Access to Naloxone: Administrative Solutions to the Opioid Overdose Crisis*, 68 ADMIN. L. REV. 517, 524–25 (2016) (outlining the limited federal assistance). Of course, not all state and local responses to the opioid epidemic have followed a harm reduction strategy. In a number of states, some prosecutors have adopted a “get tough” approach by increasingly pursuing drug-induced homicide charges in cases of overdoses. See Valena E. Beety, *The Overdose/Homicide Epidemic*, 34 GA. ST. U. L. REV. 983, 990–91 (2018) (providing an overview of drug-induced homicide statutes and prosecutions).

<sup>74</sup> Mattie Quinn, *Drug Addicts Could Soon Get Their First Safe Haven in America*, GOVERNING (Jan. 8, 2018), <http://www.governing.com/topics/health-human-services/gov-supervised-injection-2018.html> [<https://perma.cc/WVM8-FPLS>].

tial organizations like the American Medical Association.<sup>75</sup> In a handful of cities—Denver, New York, Philadelphia, San Francisco and Seattle—officials have gone so far as to formally outline plans to open safe injection facilities. In January 2017, Seattle Mayor Ed Murray and King County Executive Dow Constantine jointly announced that the city and county would partner to open two safe injection sites.<sup>76</sup> Just one year later, the Philadelphia Health Commissioner declared the city’s intent to encourage a private organization to open “the nation’s first supervised injection site.”<sup>77</sup> One month after that, in February 2018, San Francisco officials said that their city would become “the first in the country” to house a safe injection site and that two were scheduled to open by July 1, 2018.<sup>78</sup> In May 2018, New York City Mayor Bill de Blasio sent a letter to the state “asserting its intention to open four injection centers”—which would be called Overdose Prevention Centers—and seeking permission from the State Department of Health.<sup>79</sup> Most recently, in November 2018, the Denver City Council approved a supervised injection site to operate on a trial basis for two years, subject to approval from the state legislature.<sup>80</sup> Although each of these proposals was sincere and well thought out, none of them have come to fruition as of publication of this Article.<sup>81</sup>

<sup>75</sup> Press Release, Am. Med. Ass’n, AMA Wants New Approaches to Combat Synthetic and Injectable Drugs, (June 12, 2017), <https://www.ama-assn.org/ama-wants-new-approaches-combat-synthetic-and-injectable-drugs> [<https://perma.cc/SUC6-QZSV>] (“In an effort to consider promising strategies that could reduce the health and societal problems associated with injection drug use, the AMA today voted to support the development of pilot facilities where people who use intravenous drugs can inject self-provided drugs under medical supervision.”).

<sup>76</sup> David Gutman, *Seattle, King County Move to Open Nation’s First Safe Injection Sites for Drug Users*, SEATTLE TIMES (Jan. 28, 2017), <https://www.seattletimes.com/seattle-news/crime/seattle-king-county-move-to-create-2-injection-sites-for-drug-users/> [<https://perma.cc/DNA4-CTPV>] (noting that the legislators aimed to “create two safe-consumption rooms for drug users, the first of their kind in the county, as part of an effort to halt the surge of prescription opioid overdose deaths in the region”).

<sup>77</sup> Gordon, *supra* note 14.

<sup>78</sup> Knight, *supra* note 4.

<sup>79</sup> William Neuman, *De Blasio Moves to Bring Safe Injection Sites to New York City*, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/nyregion/nyc-safe-injection-sites-heroin.html> [<https://perma.cc/WRH6-P5MJ>].

<sup>80</sup> Blair Miller, *Denver City Council Approves Supervised Injection Site Pilot, Which Still Needs Legislative Approval*, THE DENVER CHANNEL (Nov. 26, 2018), <https://www.thedenverchannel.com/news/politics/denver-city-council-approves-supervised-injection-site-pilot-which-still-needs-legislative-approval> [<https://perma.cc/X2KY-QRBN>].

<sup>81</sup> Although there are no sanctioned safe injection sites operating openly in the United States, there is at least one unsanctioned safe injection site operating in secret somewhere in the country. Davidson & Kral, *supra* note 2. In addition, in an effort to combat overdoses, some syringe exchange programs have begun to make their on-site bathrooms safer for drug use by equipping them with hazardous materials disposal boxes. Vallejo, *supra* note 32, at 1202. Although these so-called “safer bathrooms” are a much more modest reform than safe injection sites, they may also



The reason for the disconnect between words and actions is simple. Federal law appears to make it a crime to operate a safe injection facility. As a result, and as discussed in more detail below, if a city were to open a facility, its managers and employees would be at risk of being sent to federal prison.<sup>82</sup> This fact has not stopped elected officials from continuing to make bold pronouncements about their plans for safe injection sites. In late August 2018, for example, after California lawmakers passed a bill to authorize San Francisco to open up a safe injection site, Mayor London Breed told reporters, “I am committed to opening one of these sites here in San Francisco, no matter what it takes, because the status quo is not acceptable.”<sup>83</sup> In October 2018, former Pennsylvania Governor Ed Rendell announced he had incorporated a nonprofit to open a safe injection site in Philadelphia. In response to a question about the possibility of federal prosecution, Rendell said, “I’m the incorporator of the safe injection site nonprofit and they can come and arrest me first.”<sup>84</sup> But despite statements like these, it is hard to imagine a safe injection site opening while the risk of federal prosecution looms. After all, the first mover could easily find its city employees charged with serious federal crimes. As Professor Scott Burris observed, while a number of cities have said they want to be the first to open a safe injection site, “my guess is that you have a lot of cities who are actually racing to be second.”<sup>85</sup>

Is there a way around this impasse? The next Part examines the federal law that stands as the chief obstacle to safe injection sites and explains why it has proven to be such a difficult hurdle for cities and states to overcome.<sup>86</sup>

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be at risk of prosecution under the crack house statute. *See id.* at 1205–07 (discussing application of the crack house statute to syringe exchange programs with “safer bathrooms”). The case for applying the crack house statute to a safer bathroom is weaker than for a safe injection site, however. *See id.* at 1215–17 (arguing against the crack house statute’s application to “safer bathrooms”).

<sup>82</sup> *See infra* note 168 and accompanying text.

<sup>83</sup> Keri Blakinger, *Safe Injection Sites Get Green Light from California Lawmakers*, THE FIX (Aug. 27, 2018), <https://www.thefix.com/safe-injection-sites-get-green-light-california-lawmakers> [<https://perma.cc/795H-6W4W>]. Governor Jerry Brown vetoed the bill, citing Deputy Attorney General Rod Rosenstein’s threat to prosecute safe injection site operators. German Lopez, *The Trump Administration’s Threat Against Safe Injection Sites Is Working*, VOX (Oct. 2, 2018), <https://www.vox.com/policy-and-politics/2018/10/2/17927864/safe-injection-site-trump-jerry-brown-california> [<https://perma.cc/69EK-QHHT>].

<sup>84</sup> German Lopez, *Former PA Governor Calls-out Trump Administration on Safe Injection Sites: “Come and Arrest Me,”* VOX (Oct. 12, 2018), <https://www.vox.com/policy-and-politics/2018/10/12/17967920/philadelphia-safe-injection-sites-ed-rendell-rod-rosenstein> [<https://perma.cc/2A6J-DKNP>].

<sup>85</sup> Allyn, *supra* note 3.

<sup>86</sup> *See infra* notes 87–172.

## II. THE “CRACK HOUSE” STATUTE

The biggest legal hurdle to states and cities that want to establish safe injection sites is the federal crack house statute. It contains two subsections that make it unlawful to:

- (a)(1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;
- (a)(2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.<sup>87</sup>

Although formally titled “maintaining drug-involved premises,” the statute is often referred to as the crack house statute because it was passed in response to concerns about “so-called ‘crack-houses,’ where ‘crack’, cocaine and other drugs are manufactured or used.”<sup>88</sup>

The crack house statute was enacted as part of the Anti-Drug Abuse Act of 1986,<sup>89</sup> near the height of the drug war and during the moral panic surrounding crack cocaine.<sup>90</sup> Though clearly inspired by concerns about property owners who allow their houses to be used as crack houses, the statute sweeps much more broadly, as early decisions applying it make clear. For example, in the 1991 Ninth Circuit case *United States v. Tamez*, the defendant was prosecuted under the crack house statute for drug distribution that occurred at his used car dealership.<sup>91</sup> He argued that the statute should not apply to his case because it “was intended only to apply to ‘crack

<sup>87</sup> 21 U.S.C. § 856 (2012).

<sup>88</sup> 132 CONG. REC. 26,474 (1986) (excerpt of Senate Amendment No. 3034 to H.R. 5484).

<sup>89</sup> See *United States v. Sturmoski*, 971 F.2d 452, 462 (10th Cir. 1992) (discussing the legislative history of the crack house statute).

<sup>90</sup> See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 25 (2010) (discussing the moral panic surrounding crack cocaine in the context of the Anti-Drug Abuse Act of 1986). The Anti-Drug Abuse Act of 1986 was the same bill that instituted a 100-to-1 sentencing disparity in the treatment of crack and powder cocaine, meaning it took 100 times the amount of powder cocaine as crack cocaine to trigger the same mandatory minimum sentence. *Id.* The 100-to-1 disparity was widely criticized and is one of the very few federal drug war measures to have been amended or repealed. In 2010, the disparity was reduced to 18-to-1. See Sarah Hyser, Comment, *Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of the Fair Sentencing Act of 2010*, 117 PENN. ST. L. REV. 503, 504 (2012) (discussing reduction of the crack/powder cocaine disparity under the Fair Sentencing Act).

<sup>91</sup> *United States v. Tamez*, 941 F.2d 770 (9th Cir. 1991).

houses' or manufacturing operations."<sup>92</sup> The Ninth Circuit quickly rejected Tamez's theory, citing the plain language of the statute. "Although . . . the Congressional Record synopsis refer[s] to manufacturing and crack houses," the court explained, "the words of the statute clearly imply more expansive coverage."<sup>93</sup>

The statute's reach was further expanded in the early 2000s, this time based on fears about teenage ecstasy use at raves.<sup>94</sup> In 2003, Congress passed an amendment to the crack house statute, initially named the RAVE Act,<sup>95</sup> "to cover more relationships between persons and property" than the original statute.<sup>96</sup> When it was passed in 1986, the crack house statute was limited to permanent locations. The 2003 RAVE Act amendment extended the crack house statute to apply to permanent or temporary places, allowing it to reach indoor or outdoor venues and one-off events.<sup>97</sup> It also added declaratory and injunctive relief as remedies for violations of the law.<sup>98</sup> The statute has remained unchanged since the 2003 amendment.

Federal prosecutors rarely bring charges under the crack house statute. In 2017, maintaining a drug-involved premise was the primary offense of conviction for only twenty-four defendants who received federal sentenc-

<sup>92</sup> *Id.* at 773.

<sup>93</sup> *Id.*

<sup>94</sup> Christina L. Sein, Note, *The Agony and the Ecstasy: Preserving First Amendment Freedoms in the Government's War on Raves*, 12 S. CAL. INTERDISC. L.J. 139, 139 (2002) (describing raves as "all-night dance part[ies] where electronically synthesized music is played"). For more on concerns about ecstasy use at raves in the early 2000s, see, for example, Michael H. Dore, Note, *Targeting Ecstasy Use at Raves*, 88 VA. L. REV. 1583, 1584 (2002) (noting that in 2000, the *New York Times* "described ravers as 'probably the most significant and innovative American youth dance culture today'"). Today, raves seem to have mostly faded as a cultural phenomenon. See Jacob A. Epstein, Note, *Molly and the Crack House Statute: Vulnerabilities of a Recuperating Music Industry*, 23 U. MIAMI BUS. L. REV. 95, 102 (2014) ("Although raves were distinctive in the late 1990s and the early 2000s, largely because of the electronic music and 'underground' nature of such events, today such music has migrated from the fringes of society to the mainstream music culture.").

<sup>95</sup> The amendment was originally introduced as the RAVE (Reducing Americans' Vulnerability to Ecstasy) Act, but it died in Congress in 2002 in the face of opposition to the bill, including concerns about "the findings section of the bill, which accused property owners and rave promoters of being intentional profiteers of illicit drug use." Epstein, *supra* note 94, at 104. A "slightly modified version" of the law was reintroduced by then-Senator Joe Biden under a different name in 2003, the Illicit Drug Anti-Proliferation Act, and passed in conjunction with the Amber Alert Bill. *Id.* at 104–105.

<sup>96</sup> Michael V. Sachdev, *The Party's Over: Why the Illicit Drug Anti-Proliferation Act Abridges Economic Liberties*, 37 COLUM. J. L. & SOC. PROBS. 585, 603 (2004).

<sup>97</sup> Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 608, 117 Stat. 650, 691 (2003); see also Epstein, *supra* note 94, at 103–104 (discussing the changes made by the amendment).

<sup>98</sup> PROTECT Act § 608.

es.<sup>99</sup> By comparison, a total of 19,750 federal drug offenders were sentenced in 2017.<sup>100</sup> In cases when the crack house statute is employed, it appears that federal prosecutors have used it mostly to target property owners with close ties to the drug activities occurring on their property.<sup>101</sup> The statute has the potential to apply to individuals with no direct connection to drugs, however.

A 2013 Eighth Circuit case, *United States v. Tebeau*, demonstrates the potential reach of the crack house statute.<sup>102</sup> James Tebeau owned 300 acres of land in rural Missouri that he sometimes used to hold weekend music festivals, with the number of attendees ranging between 3,600 and 8,000.<sup>103</sup> At some point, law enforcement officials became concerned that drug sales were taking place at Tebeau’s music festivals. They proceeded to conduct a year-and-a-half long investigation, sending undercover officers to ten festivals between April 2009 and August 2010 and making “more than 150 controlled purchases of illegal drugs including marijuana, psychedelic mushrooms, ecstasy [sic], cocaine, LSD, MDMA, opium, and moonshine liquor.”<sup>104</sup> The undercover officers also witnessed extensive drug use at the festivals.<sup>105</sup>

The Government charged Tebeau with maintaining a drug-involved premises, under subsection (a)(2) of the statute. Recall that under that provision, it is a crime to “manage or control any place whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled sub-

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<sup>99</sup> U.S. SENTENCING COMM’N, 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, S-41 tbl.17 (2017). Courts applied the sentencing guideline for crack house statute convictions—U.S.S.G. § 2D1.8—in an additional seventy-one cases. *Id.*

<sup>100</sup> *Id.* at S-104 tbl.33.

<sup>101</sup> See Sachdev, *supra* note 96, at 596 (discussing crack house statute prosecutions). The crack house statute’s most common use might actually be as a plea negotiation tool, rather than as a charge pursued by a prosecutor at trial. This is because the crack house statute is not subject to the mandatory minimum penalties triggered by most other federal drug offenses. Ronald Weich, *Plea Agreements, Mandatory Minimum Penalties and the Guidelines*, 1 FED. SENT’G REP. 266, 267 (1988); see also Gerald W. Heaney, *Response to William W. Wilkins, Jr., Chairman of the Sentencing Commission*, 4 FED. SENT’G REP. 236, 237–38 (1992) (comparing a possible sentence to an offender convicted of violating the crack house statute to that of an offender who engages in similar conduct but is convicted of possession with intent to distribute).

<sup>102</sup> *United States v. Tebeau*, 713 F.3d 955 (8th Cir. 2013).

<sup>103</sup> *Id.* at 957–58.

<sup>104</sup> *Id.* at 958. Although the court listed ecstasy and MDMA as two separate drugs, they are the same drug; ecstasy is one of the informal terms for MDMA (3,4-methylenedioxymethamphetamine). *United States v. David*, 681 F.3d 45, 47 (2d Cir. 2012).

<sup>105</sup> *David*, 681 F.3d at 47.

stance.”<sup>106</sup> After Tebeau’s motion to dismiss the indictment was denied, he pled guilty but reserved his right to appeal the denial of his motion.<sup>107</sup>

On appeal, Tebeau acknowledged that he was aware of drug sales at the festivals and that he oversaw a medical site on the grounds, known as “Safestock,” where festival-goers were treated if they overdosed.<sup>108</sup> He argued, however, that proof that he knew others were using his property for the purpose of selling and using drugs was not enough to violate the statute. Instead, Tebeau claimed that the crack house statute “should be read to require the government to show that *he* had the specific intent to store, distribute, manufacture, or use drugs” on his property.<sup>109</sup> Consistent with the other appellate courts that have considered this issue,<sup>110</sup> the Eighth Circuit rejected Tebeau’s reading of the statute and held “that § 856(a)(2) only requires that a defendant has the purpose of maintaining property where drug use takes place, and not that the defendant intends the drug use to occur.”<sup>111</sup> As a result, a “defendant may be liable if he manages or controls a building that others use for an illicit purpose, and he either knows of the illegal activity or remains deliberately ignorant of it.”<sup>112</sup>

Based on decisions like *Tebeau*, a theoretical case against safe injection sites under the crack house statute would seem to be fairly straightforward. Safe injection facilities are a place for people to use illegal drugs in a supervised environment. To be sure, safe injection facilities 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<sup>113</sup> by providing counseling to people with a substance use disorder, preventing overdoses, and stopping the use of dirty needles.<sup>114</sup> However, as noted in *Tebeau*, section “856(a)(2) only requires that a defendant has the purpose of maintaining property where drug use takes place, and not that

<sup>106</sup> 21 U.S.C. § 856 (2012).

<sup>107</sup> *Tebeau*, 713 F.3d at 957.

<sup>108</sup> *Id.* at 958.

<sup>109</sup> *Id.* at 958–59.

<sup>110</sup> *Id.* at 959–60 (reviewing cases).

<sup>111</sup> *Id.* at 960.

<sup>112</sup> *Id.* at 961 (quoting 8th Cir. Model Crim. Jury Instr. § 6.21.856B (2011), <https://www.rid.uscourts.gov/sites/rid/files/documents/juryinstructions/otherPJI/8th%20Circuit%20Model%20Criminal%20Jury%20Instructions.pdf> [<https://perma.cc/E6QL-J3FM>]).

<sup>113</sup> Burris et al., *supra* note 17, at 1133.

<sup>114</sup> PHS Cmty. Servs. Soc’y v. Att’y General of Canada, [2008] B.C.S.C. 661, ¶ 136 (Can.) (“While users do not use Insite [a safe injection facility in Canada] to directly treat their addiction, they receive services and assistance at Insite which reduce the risk of overdose that is a feature of their illness, they avoid the risk of being infected or of infecting others by injection, and they gain access to counseling and consultation that may lead to abstinence and rehabilitation. All of this is health care.”).

the defendant intends the drug use to occur.”<sup>115</sup> As a result, knowledge that clients are coming to the facility to use illegal drugs would likely constitute a violation.<sup>116</sup>

To date, advocates for safe injection sites appear to have focused their energies on three different strategies for overcoming the crack house statute. First, if courts were to embrace a narrower construction of the crack house statute, it might not apply to safe injection sites.<sup>117</sup> Second, some have suggested localities consider advancing a federalism-based defense of safe injection facilities.<sup>118</sup> Finally, if federal prosecutors could be persuaded to adopt a non-enforcement policy with respect to safe injection sites—similar to the current approach to state marijuana legalization laws—then localities could move forward in opening them, even if they are technically illegal under federal law.<sup>119</sup> Under a different administration, this last strategy might well be a viable option. At present, however, none of these three approaches seem likely to succeed in shielding safe injection facilities from federal interference. Each one is considered in turn.

#### A. A Narrow Reading of the Crack House Statute

A caveat to the above analysis of safe injection facilities and the crack house statute is that the Supreme Court has not yet considered the interpretive argument made by the defendant in *Tebeau*. If the Supreme Court were to find that section (a)(2) of the crack house statute requires the defendant to maintain property with “the express purpose . . . that drug related activity take place,”<sup>120</sup> safe injection site operators might well be excluded from its reach. Four scholars made this argument in a 2009 article that provides the most thorough scholarly analysis of the legal status of safe injection sites under federal law to date.<sup>121</sup> They contended that the crack house statute should be read to require a drug-related purpose on the *defendant’s* part. If the statute were so construed, arguably it would not apply to safe injection site operators. This is because, “[j]ust as a hospital is operated to treat patients, not to facilitate the use of controlled substances, and a methadone

<sup>115</sup> *Tebeau*, 713 F.3d at 960.

<sup>116</sup> *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990) (“Based on our reading of the statute, § 856(a)(2) is designed to apply to the person who may not have actually opened or maintained the place for the purpose of drug activity, but who has knowingly allowed others to engage in those activities by making the place ‘available for use . . . for the purpose of unlawfully’ engaging in such activity.”).

<sup>117</sup> See *infra* notes 120–125 and accompanying text.

<sup>118</sup> See *infra* notes 126–140 and accompanying text.

<sup>119</sup> See *infra* notes 141–170 and accompanying text.

<sup>120</sup> *Chen*, 913 F.2d at 190.

<sup>121</sup> *Burris et al.*, *supra* note 17, at 1133.

clinic is operated to treat drug dependency, not to facilitate the use of controlled substances, [a safe injection facility] is operated to reduce the individual and social costs of drug injection, not to facilitate the use of controlled substances.”<sup>122</sup> While there is a solid case that allowing the use of illegal substances is not the ultimate purpose<sup>123</sup> of a safe injection site, there is little reason to think that the Supreme Court will find that an illicit purpose on the part of the defendant is required to violate section (a)(2) of the crack house statute.

This is not an issue that has divided lower courts. Every circuit to address the question has held “[t]he phrase ‘for the purpose,’ as used in this provision, references the purpose and design *not* of the person with the premises, but rather of those who are permitted to engage in drug-related activities there.”<sup>124</sup> These courts have relied on both the plain language of the section 856(a)(2) as well as the conclusion that interpreting that provision to require purpose on the part of the defendant would render section 856(a)(1) “superfluous” because the two provisions would then criminalize essentially the same conduct.<sup>125</sup> As a result, although safe injection facilities might be on solid legal ground *if* the federal crack house statute were construed more narrowly, they appear to fall squarely within its reach under the prevailing interpretation.

### B. The Federalism Defense

In search of a different way around federal law, some safe injection facility advocates have floated the possibility of a federalism-based challenge to the crack house statute. Specifically, some commentators have suggested that a 2006 Supreme Court decision regarding the CSA and Oregon’s assist-

<sup>122</sup> *Id.* at 1131.

<sup>123</sup> *Id.* at 1133 (“Allowing drug use is not the purpose, but the means to achieve other purposes—just as the ‘purpose’ of using morphine in a hospital is not the use of morphine but the relief of pain.”).

<sup>124</sup> *United States v. Wilson*, 503 F.3d 195, 197–98 (2d Cir. 2007); *see also Tebeau*, 713 F.3d at 960 (collecting cases). Interestingly, circuits are split on the meaning of the crack house statute’s other provision, § 856(a)(1). All agree that in this portion of the statute, in contrast to (a)(2), “the phrase *for the purpose of* applies to the person who opens or maintains the place for the illegal activity.” *Chen*, 913 F.2d at 190. The circuits disagree on whether the defendant’s primary purpose in maintaining the property must be as a place for drug activity or if it need only be a significant purpose, a more than incidental purpose, or something else. *See* Matthew P. Fitzsimmons, *Primary, Significant, or Merely More Than Incidental: What Level of Intent Does the Federal Drug-Involved Premises Statute Really Require?*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 177, 179–80 (2009) (discussing this circuit split).

<sup>125</sup> *Wilson*, 503 F.3d at 198; *cf. Chen*, 913 F.2d at 190 (interpreting section (a)(1) as requiring a purpose on the part of the defendant because “any other interpretation would render § 856(a)(2) essentially superfluous”).

ed-suicide law, *Gonzales v. Oregon*,<sup>126</sup> might shield safe injection facilities from federal prosecution.<sup>127</sup> The theory seems to have attracted the attention of at least one local official: Dan Satterberg, the Prosecuting Attorney for King County, Washington (where Seattle is located), told a reporter in February 2018 that if the Justice Department threatened to block safe injection sites in Seattle, “we think it will be an opportunity to convince the court that local public health powers are superior to criminal statutes that ban private drug dens run for profit.”<sup>128</sup> Although Oregon’s physician-assisted suicide law and safe injection facilities both implicate federalism concerns, the Supreme Court’s decision in *Gonzales* does not stand for the principle that local public health powers trump federal law.

In *Gonzales*, the Supreme Court struck down a rule issued by the Attorney General that had prohibited doctors from prescribing drugs for use in physician-assisted suicide.<sup>129</sup> The Attorney General’s rule rested on the DEA’s authority to license physicians to dispense controlled substances with medical uses. It provided that “using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the CSA.”<sup>130</sup> The rule was in effect a threat to revoke the license to prescribe controlled substances (referred to in the CSA as a registration) of any doctor who prescribed them to assist suicide.<sup>131</sup> The Court held that the CSA did not grant the Attorney General the power to regulate medical practice in this way, in an opinion that relied heavily on the premise that “regulation of health and safety is ‘primarily, and historically, a matter of local concern.’”<sup>132</sup>

If read out of context, parts of the decision in *Gonzales* might seem to suggest that the CSA gives states broad deference on matters of public health in all settings. The Court, for example, criticized the Attorney General’s interpretive rule as being based on the false “assumption that the CSA impliedly authorizes an Executive officer to bar a use [of a controlled sub-

<sup>126</sup> 546 U.S. 243 (2006).

<sup>127</sup> See Burris et al., *supra* note 17, at 1134–39 (arguing that *Gonzales v. Oregon* might provide a degree of legal protection to safe injection facilities).

<sup>128</sup> Holden, *supra* note 20. Satterberg went so far as to say that “a face-off with Jeff Sessions” on the issue “could be a lot of fun”—a comment that likely has more to do with the electoral benefits to a Seattle politician of battling the Trump administration in court than Satterberg’s view of the merits of his position. *Id.*

<sup>129</sup> 546 U.S. 243 (2006). The case arose in the context of the Oregon Death With Dignity Act (ODWDA), ORE. REV. STAT. § 127.800 *et seq.* (2003).

<sup>130</sup> *Gonzales*, 546 U.S. at 249.

<sup>131</sup> See KENNETH BAUMGARTNER, CONTROLLED SUBSTANCES HANDBOOK, at Part 1301 (2015) (providing an overview of the CSA’s registration provisions).

<sup>132</sup> *Gonzales*, 546 U.S. at 271 (quoting *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)).



stance] simply because it may be inconsistent with one reasonable understanding of medical practice.”<sup>133</sup> Elsewhere in the opinion, the Court described Oregon’s assisted suicide law—which had prompted the Attorney General’s order—as “an example of the state regulation of medical practice that the CSA presupposes”<sup>134</sup> and discussed elements of Oregon’s law that some have argued compare favorably with safe injection facilities.<sup>135</sup>

*Gonzales*’s deference to state and local lawmakers regarding medical practice would do little on its own to protect safe injection sites, however. The Attorney General’s physician-assisted suicide rule claimed the authority to dictate how the substances that are legal to distribute as medicines—meaning substances in Schedules II through V of the CSA—can be used.<sup>136</sup> As a result, the validity of the rule turned on whether the Attorney General had the statutory authority to determine what constitutes legitimate use of an approved medicine within the context of the CSA.<sup>137</sup> Schedule I substances like heroin<sup>138</sup> are not considered medicines at all, and they therefore cannot be prescribed or used in medical practice. By placing a substance in Schedule I, the DEA has made an “express determination that [the substance] ha[s] no accepted medical use,” which would “foreclose[] any argument about statutory coverage of drugs available by a doctor’s prescription.”<sup>139</sup> Moreover, application of the crack house statute to safe injection sites would not rest on the validity of an interpretive rule, as was the case in *Gonzales*. The crack house statute, which already accounts for places that are maintained for the lawful use of medicines in Schedules II and below,<sup>140</sup>

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<sup>133</sup> *Id.* at 272–73; *see id.* at 270 (stating that the CSA “manifests no intent to regulate the practice of medicine generally”).

<sup>134</sup> *Id.* at 271.

<sup>135</sup> *See* Burris et al., *supra* note 17, at 1124, 1135 (arguing that “the Crack House Statute can only be applied to a [safe injection facility] through the sort of regulatory over-reaching by the federal government that the Supreme Court rejected in the Oregon Death with Dignity case” and the “*Gonzales* Court was emphatic about the limited scope of the CSA in relation to medical practice”).

<sup>136</sup> *Gonzales*, 546 U.S. at 273–74 (discussing the CSA’s scheduling process and noting that the Attorney General’s interpretive rule rested on a reading of the CSA’s prescription requirement).

<sup>137</sup> *Id.* at 248–49 (“The question before us is whether the Controlled Substances Act allows the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure.”).

<sup>138</sup> 21 C.F.R. § 1308.11(c)(11) (2018).

<sup>139</sup> *Gonzales*, 546 U.S. at 269 (distinguishing *Gonzales* from the Supreme Court’s decision in *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483 (2001), holding that the CSA did not recognize a medical necessity defense to the use or distribution of marijuana).

<sup>140</sup> The statute begins with the proviso that it does not criminalize activity that is “authorized by this subchapter.” 21 U.S.C. § 856. This “is why the broad language of § 856 does not sweep in hospitals and doctors’ offices and the landlords that rent to them.” Burris et al., *supra* note 17, at 1124.

does not call for a determination about the medical value of safe injection facilities. For these reasons, the statutory limits on the Attorney General’s power over the practice of medicine that was at issue in *Gonzales v. Oregon* would have no bearing on the application of the crack house statute to a place where Schedule I substances like heroin are being used.

### C. Non-Enforcement Policies

Of course, as the recent experience with state marijuana legalization highlights, federal law only stands as a barrier to state and local drug policy reform if it is enforced. After spending more than a decade actively fighting the implementation of state medical marijuana laws, the Department of Justice (DOJ) adopted an advisory marijuana non-enforcement policy following the passage of the first legalization laws in Colorado and Washington state. Under the policy, issued in late 2013 but rescinded by Attorney General Jeff Sessions in early 2018,<sup>141</sup> federal prosecutors were advised not to use their limited resources to prosecute people who are operating in compliance with state marijuana laws.<sup>142</sup> The DOJ’s non-enforcement policy effectively allowed states to implement wide-ranging marijuana legalization laws without federal interference.<sup>143</sup> As a result, even though it remains a crime to manufacture, distribute, and even simply possess marijuana under federal law, nine states have legalized the possession, manufacture, and retail sale of marijuana<sup>144</sup> and thousands of marijuana businesses are openly operating

<sup>141</sup> Memorandum from Jefferson B. Sessions, III, Att’y Gen., to all United States Attorneys, (Jan. 4, 2018) [hereinafter Sessions Memo], <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/6FRY-GQL9>].

<sup>142</sup> Memorandum from James M. Cole, Deputy Att’y Gen., to all United States Attorneys (Aug. 29, 2013) [hereinafter Cole Memo], <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/GZ4H-6AQA>].

<sup>143</sup> Although the non-enforcement policy has allowed states to implement legalization laws without active opposition, the federal ban on marijuana continues to present challenges for state marijuana businesses on issues ranging from banking to trademarks. See generally Julie Anderson Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015) (discussing how federal law has resulted in a lack of access to banking services for marijuana businesses); Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217 (2016) (discussing intellectual property and marijuana law).

<sup>144</sup> In 2012, Colorado and Washington were the first states to pass legalization laws, with Oregon and Alaska following suit in 2014. See Colo. Const. art. XVIII, § 16; ALASKA STAT. § 17.38.060 (2015) (codifying Ballot Measure No. 2); Control and Regulation of Marijuana Act, OR. REV. STAT. §§ 475B.010–395 (2015); Initiative Measure No. 502, WASH. REV. CODE § 69 (2018). California, Maine, Massachusetts, and Nevada all passed ballot measures legalizing marijuana in November 2016. See Christopher Ingraham, *Marijuana Wins Big on Election Night*, WASH. POST (Nov. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/08/medical-marijuana-sails-to-victory-in-florida/> [<https://perma.cc/Y252-8QYN>] (reporting on the election results). In 2018, Michi-

without any significant fear of federal prosecution.<sup>145</sup> Some safe injection site advocates have expressed hope that the DOJ might take a similar approach to safe injection sites.<sup>146</sup>

If federal officials could be persuaded to adopt a non-enforcement policy for safe injection facilities, states and cities could move forward with them, regardless of their legal status under federal law. At first blush, there would seem to be a good case for the federal government to give the same degree of deference to states for safe injection facilities as they have for marijuana legalization. Safe injection facilities are much less likely to impact neighboring states or implicate federal enforcement concerns than state marijuana legalization laws.<sup>147</sup> Safe injection facilities do not manufacture or distribute controlled substances, nor do they expressly encourage people to possess controlled substances. Even if safe injection sites impliedly “encourage and normalize heroin use,”<sup>148</sup> as some of their critics contend, any conceivable impact of permitting a handful of cities to establish safe injection facilities on the market for controlled substances would be negligible in comparison to marijuana legalization.

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gan voters passed a marijuana legalization ballot measure. See Kathleen Gray, *Legal Marijuana in Michigan: What You Need to Know*, DET. FREE PRESS (Nov. 7, 2018), <https://www.freep.com/story/news/marijuana/2018/11/07/michigan-marijuana-results-election-legalization/1835297002/> [<https://perma.cc/A577-ZSGP>] (reporting that Michigan’s marijuana legalization ballot measure passed by a 56–44 margin). In addition to these states, Vermont and Washington, D.C. have legalized the possession and personal cultivation, although not the commercial distribution, of marijuana. See D.C. CODE § 48-904.01 (2015); Jeff Smith, *Vermont Now Allows Adult-Use Marijuana, but MJ Sales Not Permitted*, MARIJUANA BUS. DAILY (July 2, 2018), <https://mjbizdaily.com/vermont-now-allows-adult-use-marijuana-but-mj-sales-not-permitted/> [<https://perma.cc/XF7L-HM7B>] (describing Vermont’s law).

<sup>145</sup> As of September 2016, in Colorado alone there were six-hundred licensed marijuana vendors generating nearly \$1 billion in annual sales. ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 4 (2017).

<sup>146</sup> For example, after Philadelphia announced its intent to help facilitate the establishment of a safe injection facility in the city, city official Brian Abernathy told reporters, “[w]e’re confident and hopeful that the federal government has more important things to do than to not save people’s lives.” Jeremy Roebuck & Chris Palmer, *Will Trump Administration, Law Enforcement Challenge Safe Injection Site Plans?*, INQUIRER (Jan. 23, 2018), <http://www.philly.com/philly/news/pennsylvania/philadelphia/philly-safe-injection-opioids-law-enforcement-trump-sessions-police-20180123.html> [<https://perma.cc/S5DY-NKYJ>]; see also The Editorial Board, *supra* note 24 (arguing that the DOJ should “turn a blind eye” to states and cities who wish to establish safe injection sites “as it’s largely done with marijuana” legalization laws).

<sup>147</sup> In the context of marijuana enforcement, the DOJ’s non-enforcement policy identified eight “enforcement priorities that are particularly important to the federal government.” Cole Memo, *supra* note 142. Although federal enforcement priorities may differ for a substance like heroin, it is nevertheless notable that none of the priorities outlined in the Cole Memo—such as preventing against the enrichment of criminal enterprises, the diversion of drugs to other states, or the use of firearms in connection with drug trafficking—would be implicated by safe injection facilities. See *id.*

<sup>148</sup> *Statement of U.S. Attorney’s Office Concerning Proposed Injection Sites*, *supra* note 21.

Despite a seemingly strong public policy case in favor a non-enforcement policy for safe injection sites,<sup>149</sup> it would be a surprise to see the DOJ take this approach. First, putting political considerations to the side for the moment, the marijuana non-enforcement policy was mostly a product of resource constraints that left the federal government effectively unable to block state marijuana reforms. Before adopting the non-enforcement policy, the DOJ spent more than a decade trying to shut down state medical marijuana laws with little success.<sup>150</sup> The federal government won a number of legal victories in the process—including two United States Supreme Court cases<sup>151</sup>—but by 2009, it was clear that federal enforcement was not going to stop a significant number of medical marijuana businesses from operating in states that permitted them. As Professor Robert Mikos explained at the time, because “[o]nly 1 percent of the roughly 800,000 marijuana cases generated every year are handled by federal authorities . . . [m]ost medical marijuana users and suppliers can feel confident they will never be caught by the federal government.”<sup>152</sup> Short of *dramatically* increasing federal marijuana enforcement in legalization states, the federal government was powerless to end state marijuana legalization.<sup>153</sup> Rather than continuing to indiscriminately prosecute a handful of state-legal marijuana businesses with little to show for it, the DOJ issued its non-enforcement policy.

The dynamic would be much different for safe injection sites.<sup>154</sup> The cities that have discussed establishing safe injection facilities appear to con-

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<sup>149</sup> This Article makes no claim about the advisability of prosecutorial non-enforcement policies in general, only that the arguments in favor of a non-enforcement policy for safe injection sites are strong in comparison to the arguments for such a non-enforcement policy for activity that complies with state marijuana legalization laws. For a critique of the use of non-enforcement policies in general, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 757–59 (2014) (discussing the DOJ’s non-enforcement policy for individuals in compliance with state marijuana laws).

<sup>150</sup> See Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 U. DENV. L. REV. 1027, 1033–41 (2012) (discussing federal efforts to block state medical marijuana laws between 1996 and 2012).

<sup>151</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005); *Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483.

<sup>152</sup> Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1424 (2009).

<sup>153</sup> The DOJ acknowledged this dynamic in its non-enforcement memo by referring to the need for it to “us[e] its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way.” Cole Memo, *supra* note 142.

<sup>154</sup> Indeed, when explaining in an interview why his office would not take the same approach to safe injections sites as it has to marijuana businesses, the United States Attorney for the District of Massachusetts Andrew Lelling pointed to resources: “What I have tried to say is what I can, which is I have limited resources and they’re not focused on marijuana. Right now they’re focused on opioids.” Deborah Becker & Chris Citorik, *Supervised Injection Sites Are a Terrible Idea, U.S. Attorney Lelling Says*, RADIO BOS. (July 20, 2018), <http://www.wbur.org/radioboston/2018/07/20/elling-supervised-injection-marijuana-enforcement> [https://perma.cc/7RMB-J7D5].

template a handful of sites at most.<sup>155</sup> Shutting them down would be a relatively easy and inexpensive proposition in comparison to contending with the hundreds of marijuana businesses that were operating openly in California by the late-2000s.<sup>156</sup> Indeed, federal prosecutors would not even have to bring criminal prosecutions against safe injection sites to stop them if they thought doing so would be a questionable use of prosecutorial discretion (or, at least, a bad move politically). Under the crack house statute, prosecutors could simply sue safe injection facilities to enjoin their operation.<sup>157</sup> Because resource constraints would not present an obstacle to blocking safe injection sites, the DOJ might not follow the same deferential approach that it has taken with respect to state marijuana legalization laws in recent years, even under a progressive administration.

Second, and more important for the near future, the Trump administration's retrograde approach to drug policy suggests it would be exceedingly unlikely to defer to states and cities when it comes to safe injection sites. During a time when politicians from across the political spectrum have denounced the drug war,<sup>158</sup> the Trump administration has largely moved to double down on it.<sup>159</sup> Jeff Sessions, who served as Attorney General from the start of Trump's term until late 2018, has a long history as a staunch supporter of the drug war. As a Senator, "Sessions spent years as one of the most vocal obstacles to criminal justice reform in Congress," according to his former Senate colleague Sheldon Whitehouse.<sup>160</sup> During his time as Attorney General, Sessions rescinded an Obama-era policy that limited the use

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<sup>155</sup> For example, New York's proposal contemplates four safe injection sites. Neuman, *supra* note 79.

<sup>156</sup> Roger Parloff, *How Marijuana Became Legal*, FORTUNE MAG. (Sept. 18, 2009), [http://archive.fortune.com/2009/09/11/magazines/fortune/medical\\_marijuana\\_legalizing.fortune/index.htm](http://archive.fortune.com/2009/09/11/magazines/fortune/medical_marijuana_legalizing.fortune/index.htm) [<https://perma.cc/K3YK-TAB2>] (reporting that there were an estimated 700 medical marijuana dispensaries openly operating in California).

<sup>157</sup> 21 U.S.C. § 856(e) (2012) ("Any person who violates subsection (a) of this section shall be subject to declaratory and injunctive remedies as set forth in section 843(f) of this title."). Notably, federal officials used the strategy of seeking injunctions against early medical marijuana dispensaries in California with some success. *See United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086 (N.D. Cal. 1998) (granting a preliminary injunction against a medical marijuana establishment), *rev'd sub nom. United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999) (per curiam), *rev'd*, 532 U.S. 483 (2001).

<sup>158</sup> *See* Kreit, *supra* note 10, at 1324–26 (discussing this trend).

<sup>159</sup> *See* Matt Ford, *Jeff Sessions Reinvigorates the Drug War*, THE ATLANTIC (May 12, 2017), <https://www.theatlantic.com/politics/archive/2017/05/sessions-sentencing-memo/526029/> [<https://perma.cc/X2CQ-V353>] (discussing Sessions's decision to rescind an Obama-era policy that limited the use of mandatory minimum sentences in certain lower-level drug cases).

<sup>160</sup> Sheldon Whitehouse, *Foreword: Beyond the War on Drugs*, 11 HARV. L. & POL'Y REV. 359, 373 (2017).

of mandatory minimum penalties in lower-level drug cases.<sup>161</sup> He did the same with the DOJ’s marijuana non-enforcement policy.<sup>162</sup> With respect to the opioid crisis specifically, Sessions said that he thinks the only solution is to increase the number of prosecutions.<sup>163</sup> Although, the DOJ has not announced a formal policy regarding safe injection sites, Deputy Attorney General Rod Rosenstein wrote an editorial denouncing them, and threatened “swift and aggressive action”<sup>164</sup> against any city or state that opens a safe injection site. Even if Rosenstein’s editorial does not definitively rule out the possibility of the DOJ allowing individual United States Attorneys to decide what approach to take, as it has done with marijuana legalization after rescinding the non-enforcement policy, there is little reason to think Trump-appointed United States Attorneys would be likely to take a hands-off approach. Indeed, the four United States Attorneys who have made public statements about safe injection facilities have threatened to bring prosecutions against anyone who tries to open one,<sup>165</sup> and, shortly before this article went to press, the United States Attorney for the Eastern District of Pennsylvania filed a lawsuit to block a safe injection site from opening in Philadelphia.<sup>166</sup> The Drug Enforcement Administration (DEA), for its part, has also announced opposition to safe injection facilities, with a DEA spokesperson saying that facility operators would likely be prosecuted.<sup>167</sup>

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In sum, safe injection facilities seem to be on very shaky ground under federal law. Because safe injection site operators would know that clients are coming to their building in order to use illegal drugs, they would almost certainly be guilty of maintaining a drug-involved premises under the federal crack house statute. Indeed, even lower level employees could be at risk

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<sup>161</sup> Alan Vinegrad, *DOJ Charging and Sentencing Policies: From Civiletti to Sessions*, 30 FED. SENT’G REP. 3, 4 (2017) (discussing this development).

<sup>162</sup> Sessions Memo, *supra* note 141.

<sup>163</sup> Whitehouse, *supra* note 160 (“[D]uring Senate debate of the Comprehensive Addiction and Recovery Act, Sessions summed up his approach to the opioid crisis by saying, ‘we’re going to have to enhance prosecutions. There just is no other solution.’”) (citation omitted).

<sup>164</sup> Rosenstein, *supra* note 22.

<sup>165</sup> See *supra* note 21 and accompanying text.

<sup>166</sup> See *supra* note 23 and accompanying text.

<sup>167</sup> Paige Winfield Cunningham, *The Health 202: Supervised Injection Facilities Are Illegal in the United States. These Cities Want to Open Them Anyway*, WASH. POST (Apr. 30, 2018), [https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/04/30/the-health-202-supervised-injection-facilities-are-illegal-in-the-united-states-these-cities-want-to-open-them-anyway/5ae5dbc630fb043711926901/?noredirect=on&utm\\_term=.6b54fd0ab3bc](https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/04/30/the-health-202-supervised-injection-facilities-are-illegal-in-the-united-states-these-cities-want-to-open-them-anyway/5ae5dbc630fb043711926901/?noredirect=on&utm_term=.6b54fd0ab3bc) [https://perma.cc/M6C4-T946].

of federal prosecution.<sup>168</sup> Absent a change in federal law, then, the viability of safe injection sites would seem to depend on one of a few long-shot possibilities. Courts could reject the prevailing interpretation of the crack house statute, under which a facility operator does not need to act with the purpose of permitting drug use. States and cities could pursue novel constitutional claims in defense of safe injection sites<sup>169</sup> or invite the Supreme Court to reconsider the extent to which the commerce power permits the federal government to regulate intrastate drug activity.<sup>170</sup> Federal prosecutors could allow safe injection sites to move forward as a matter of prosecutorial discretion. All of these are unlikely outcomes, however.

In the next section, I argue that there may yet be hope for safe injection sites in the form of a “relatively obscure provision”<sup>171</sup> of the CSA that grants immunity to state and local officials who violate the CSA while enforcing state and local drug laws. This provision, which has been entirely absent from the discussion of safe injection sites and has received little attention from legal academia in general,<sup>172</sup> may very well immunize safe injection sites and the individuals who run them from federal prosecution.

### III. THE CONTROLLED SUBSTANCES ACT’S IMMUNITY PROVISION AND SAFE INJECTION SITES

#### A. Overview

Buried within the Controlled Substances Act is a provision that confers immunity on federal, state, and local officials who commit federal crimes while enforcing drug laws. The statute provides, in relevant part, that “no

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<sup>168</sup> See 21 U.S.C. § 856(a)(2) (liability extends to those who “manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, *employee*, occupant, or mortgagee”) (emphasis added); U.S. ATTORNEY’S OFFICE DIST. OF VT., *supra* note 21 (announcing that “exposure to criminal charges would arise for . . . workers”).

<sup>169</sup> In addition to a federalism-based constitutional claim, one commentator recently proposed defending safe injection sites on equal protection grounds, on the theory that federal opposition to the facilities might be “a violation of the equal protection rights of those drug addicts attempting to get treatment.” Martell-Crawford, *supra* note 27, at 141. Courts have consistently and swiftly rejected equal protection-based challenges to other controlled substances classifications, including in the medical marijuana context, however, and there is little reason to think there would be a different result with respect to safe injection sites. See, e.g., *United States v. Green*, 222 F. Supp. 3d 267, 279–80 (W.D.N.Y. 2016) (rejecting an equal protection challenge to the classification of marijuana); *United States v. Pickard*, 100 F. Supp. 3d 981, 1009 (E.D. Cal. 2015) (same).

<sup>170</sup> See *Raich*, 545 U.S. at 1 (holding that the Commerce Clause grants the federal government the power to criminalize the noncommercial, intrastate possession of marijuana for medical purposes).

<sup>171</sup> Mikos, *supra* note 152, at 1457.

<sup>172</sup> *Id.* (observing that the immunity provision has mostly “escaped the attention of the legal academy”).

civil or criminal liability shall be imposed by virtue of this subchapter upon . . . any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.”<sup>173</sup> There does not appear to be any legislative history explaining the origins of this provision<sup>174</sup>, but it is reasonable to assume it was meant to protect police officers that commit drug crimes in the course of undercover operations.<sup>175</sup>

Although the CSA is nearly fifty years old, there is very little case law interpreting its immunity provision.<sup>176</sup> This is perhaps to be expected, since prosecutions of undercover police officers are exceedingly rare,<sup>177</sup> regardless of the existence of a statutory grant of immunity. After all, “outside of extraordinary situations (such as that of the rogue official),”<sup>178</sup> prosecutors do not typically bring criminal charges against police officers for overstepping their authority. Even without the CSA’s immunity provision, prosecutorial

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<sup>173</sup> 21 U.S.C. § 885(d) (2012). The Controlled Substances Act consists of two subchapters. The immunity provision and the criminal provisions that apply to domestic activity, including the crack house statute, are housed in the first subchapter. The second subchapter addresses the import and export of controlled substances. The immunity provision expressly limits this grant of immunity based on two federal statutes: 18 U.S.C. § 2234 (2012) and 18 U.S.C. § 2235 (2012). These two statutes, respectively, make it a crime for an officer to willfully exceed her authority in executing a search warrant and to maliciously procure a search warrant.

<sup>174</sup> The House Report summarizing the CSA stated only that the immunity provision “exempts federal officers from liability when lawfully engaged in enforcing Title II and further exempts state and local officers when lawfully engaged in enforcing any law relating to controlled substances.” H.R. REP. NO. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4625.

<sup>175</sup> Mikos, *supra* note 152, at 1458 (arguing that “the purpose of section 885(d) immunity is readily apparent” in that “[w]ithout it undercover agents and informants could not feel secure handling narcotics in the course of a drug sting; in theory, by handling the drugs, they could face the same charges as the drug pushers they investigate”). The statute also extends immunity to officials in other settings—for example, laboratory personnel who “obtain and transfer controlled substances for use as standards in chemical analysis.” Exemption of Law Enforcement Officials, 21 C.F.R. § 1301.24 (2018) (“Laboratory personnel, when acting in the scope of their official duties, are deemed to be officials exempted by this section and within the activity described in section 515(d) of the Act (21 U.S.C. § 885(d)).”).

<sup>176</sup> A Westlaw search conducted in September 2018 revealed just twenty-six published decisions that have cited 21 U.S.C. § 885(d).

<sup>177</sup> Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 170 (2009) (observing that the public authority defense has not been “rigorously tested” because police “are seldom, if ever, prosecuted” in cases where the defense might be raised); Mikos, *supra* note 152, at 1459 (discussing the CSA’s immunity provision and noting that “Congress could have relied on the good sense of U.S. Attorneys not to prosecute such violations, but one can hardly fault Congress for wanting to codify immunity and remove any doubts”).

<sup>178</sup> Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy*, 52 AM. J. COMP. L. 569, 576 (2004).



discretion would almost certainly protect police officers from being prosecuted for crimes they commit in the course of uncover drug operations.

Until the early 2000s, the few cases to address the CSA's immunity provision almost exclusively involved rogue officials who attempted to rely on it as a defense.<sup>179</sup> In one such case that stands out for its colorful set of facts, *United States v. Fuller*, the mayor of the small town Vance, South Carolina, was prosecuted after being videotaped selling crack cocaine outside of a convenience store on four separate occasions.<sup>180</sup> At his trial, Mayor Fuller admitted to selling crack cocaine at the convenience store, but he testified that he had done it as part of "a police-style undercover investigation into employee misconduct at Angler's Mini-Mart."<sup>181</sup> Fuller claimed that he had not enlisted the police department in his supposed sting operation because he was unhappy with the performance of the chief of police.<sup>182</sup> On appeal, the Fourth Circuit found the CSA's immunity provision inapplicable on the grounds that South Carolina law did not give mayors the power to engage in law enforcement activity. Because "Fuller was not authorized under South Carolina law to engage in illegal drug transactions as part of his investigation," the court reasoned, "the immunity conferred by 21 U.S.C. § 885(d) does not apply."<sup>183</sup>

Cases like *Fuller* make clear that the CSA's immunity provision does not extend to officials who act outside the bounds of state and local law. But they do not shed much light on how the immunity provision might apply to a state- or city-run safe injection site. Is the grant of immunity limited to officials who are engaged in the enforcement of drug prohibition laws

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<sup>179</sup> See *United States v. Reeves*, 730 F.2d 1189, 1195 (8th Cir. 1984) (upholding the marijuana distribution convictions of a sheriff and deputy sheriff on the grounds that the evidence was sufficient to disprove their claim that their acts were "related to their law enforcement duties" and consequently "sanctioned by 21 U.S.C. § 885(d)"); *Matje v. Leis*, 571 F. Supp. 918, 929 n.3 (S.D. Ohio 1983) (rejecting the defendant's effort to rely on the CSA's immunity provision because it "pertains to lawful enforcement of narcotics laws" and the "evidence raises questions as to the lawfulness of his activities").

<sup>180</sup> *United States v. Fuller*, 162 F.3d 256, 257–58 (4th Cir. 1998) (noting that the case began when the FBI received a complaint "from the owner of Angler's Mini-Mart in Vance, South Carolina, that Vance's mayor, Frank Fuller, was attempting to sell drugs in and around the store and was attempting to enlist the store's employees to sell drugs on his behalf").

<sup>181</sup> *Id.* at 258.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 262; see also *United States v. Cortes-Caban*, 691 F.3d 1, 21 (1st Cir. 2012) ("Police officers who plant drugs on persons in order to create a false basis for arrest are not 'lawfully engaged' in law enforcement activities, and thus under the plain language of the [immunity] statute they may be prosecuted for distribution."); *United States v. Wright*, 634 F.3d 770, 777 (5th Cir. 2011) (approving the trial court's instruction based on the CSA's immunity provision and upholding the defendant's conviction where his "statutory or formal duties as a deputy sheriff and parish jailer did not include engaging in covert undercover narcotics investigations").

through undercover work? Or, can it apply state and local drug laws that are in tension with the CSA?

*B. The Case for Applying the Immunity Statute to Safe Injection Sites*

On the surface, the idea of applying an immunity statute meant to facilitate undercover police stings to a safe injection site might seem far-fetched. But a closer look reveals that government-run safe injection sites would have both a strong and surprisingly straightforward argument for receiving protection under the CSA’s immunity provision. The discussion that follows considers how the CSA’s immunity provision would apply to a government-run safe injection site established by a state or locality pursuant to a state law or municipal ordinance. The facility would be operated entirely by government employees whose duties and authority would be spelled out in the applicable state law or municipal ordinance.

By its terms, the CSA’s immunity provision shields from prosecution “any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.”<sup>184</sup> A government-run safe injection site would appear to satisfy each of these requirements. The issue that has caused trouble for defendants in cases like *Fuller*—namely, that they were not “duly authorized” to engage in undercover policing—would not present a problem for a safe injection site run by government officials. So long as the applicable state or local law made clear that the managers and employees of the safe injection site were authorized to run the facility, they would surely qualify as “duly authorized officer[s]”<sup>185</sup> for purposes of the immunity provision.<sup>186</sup> Likewise, a state law or city ordinance establishing a government-run safe injection site would constitute a law “relating to controlled substances.”<sup>187</sup> This is because the core function of a supervised injection facility is to provide a space for people to use controlled substances. To be sure, supervised injection facility personnel do not distribute or handle controlled substances. The facilities are not intended to encourage the use of controlled substances but rather to provide overdose prevention

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<sup>184</sup> 21 U.S.C. § 885(d).

<sup>185</sup> *Id.*

<sup>186</sup> In contrast, the defendant in *Fuller* was not entitled to rely on the immunity provision because, as the Mayor, he was not “authorized under South Carolina law to conduct undercover drug operations.” 162 F.3d at 261. Likewise, in *Wright*, the Fifth Circuit held that a jailer could not rely on the immunity provision because his duties “did not include engaging in covert undercover narcotics investigations.” 634 F.3d at 777.

<sup>187</sup> 21 U.S.C. § 885(d).

and other services to drug users. But this would not leave them outside of the scope of the immunity provision. Because a safe injection site is a place for people to use controlled substances, a law or municipal ordinance governing the operation of such a site would be a law “relating to controlled substances.”<sup>188</sup> Finally, the government employees working at a safe injection site would be implementing the city or state’s safe injection law and thus would be “lawfully engaged in the enforcement”<sup>189</sup> of that law. As a result, based on the plain language of the CSA’s immunity provision, a government run safe injection site would have a very strong case for immunity from “civil or criminal liability”<sup>190</sup> for any potentially applicable federal drug crime, including the crime of maintaining a drug-involved premises under the crack house statute.<sup>191</sup>

The case for applying the CSA’s immunity statute to government run safe injection sites is also supported by a handful of court decisions that have applied it in the context of state medical marijuana laws. These cases, which like the immunity provision itself have received very little attention from scholars and practitioners, have mostly involved motions for the return of marijuana that had been seized by the police. In each of these return of property cases, the police seized marijuana in a state with a medical marijuana law from a person who turned out to be a patient entitled to possess the marijuana. When the patient sought the return of their property, the police refused on the grounds that federal law makes it a crime to distribute marijuana. To resolve the dispute, courts in these cases have looked to the CSA’s immunity provision. To date, four published appellate decisions have involved this general fact pattern.<sup>192</sup> In all but one of these cases, the court held that the CSA grants immunity to a police officer who is ordered to return marijuana to a patient in compliance with state law. (The fourth case is discussed in the next section, along with a Ninth Circuit case that consid-

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> The immunity provision only applies to the first subchapter of the CSA. *Id.* The second subchapter of the CSA addresses the import and export of controlled substances, and it includes some criminal offenses. Because safe injection sites would not be engaged in the import or export of controlled substances, however, they would not run afoul of the CSA’s import and export offenses.

<sup>192</sup> See generally *State v. Okun*, 296 P.3d 998 (Ariz. Ct. App. 2013); *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656 (Ct. App. 2007); *People v. Crouse*, 388 P.3d 39 (Colo. 2017); *State v. Kama*, 39 P.3d 866 (Or. App. 2002). The appellate division of a California trial court has also addressed this issue in a published case, holding that the CSA’s immunity provision applies to “the return of marijuana ‘lawfully possessed’ under California law.” *San Francisco Cty. v. Smith*, 28 Cal. App. 5th Supp. 1, 6 (Super. Ct. App. Div. 2018).

ered application of the immunity provision to a private individual who had been “deputized” to grow marijuana for the City of Oakland.)

In the 2013 Arizona Court of Appeals case *Arizona v. Okun*, for example, Valerie Okun was arrested at a Border Patrol checkpoint after an agent found marijuana in her car.<sup>193</sup> Okun, a Californian, had a medical marijuana recommendation pursuant to California law. Although Okun was arrested at a border checkpoint, her case was apparently referred to local prosecutors, who filed drug charges against her in state court. After Okun provided evidence that she was allowed to possess the marijuana under California law, the state dismissed its case against Okun.<sup>194</sup> Okun filed a request for the seized marijuana to be returned, which the trial court granted.<sup>195</sup> On appeal, the Sheriff argued that whoever returned the marijuana to Okun would be committing a federal crime, namely distribution of a controlled substance.<sup>196</sup> It is worth noting here that the crime of distribution is not limited to the sale of a controlled substance; the act of physically handing a controlled substance to someone else is considered to be distribution under the CSA.<sup>197</sup> As a result, the Sheriff’s concern that it would be a federal crime to return Okun’s marijuana to her was well founded. Nevertheless, relying on the CSA’s immunity provision, the Arizona Court of Appeals upheld the trial court’s order. The court reasoned that even if returning the marijuana would constitute a federal drug crime, 21 U.S.C. § 885(d) “immunizes law enforcement officers such as the Sheriff from any would-be federal prosecution for complying with a court order to return Okun’s marijuana to her.”<sup>198</sup> The court did not elaborate on this conclusion, perhaps viewing application of the CSA’s immunity provision to the case to be clear-cut.

Appellate courts in California and Oregon have reached the same conclusion in similar fashion. In 2002, in *Oregon v. Kama*, the Oregon Court of Appeals was the first court to address the immunity provision issue.<sup>199</sup> In a four page decision spent mostly relaying the factual and procedural background of the case, the court concluded that “[e]ven assuming that returning

<sup>193</sup> *Okun*, 296 P.3d at 999.

<sup>194</sup> *Id.* Arizona’s medical marijuana law includes a reciprocity provision for “visiting qualifying patient[s]” like Okun. ARIZ. REV. STAT. ANN. § 36-2801(17) (2017).

<sup>195</sup> *Okun*, 296 P.3d at 1000.

<sup>196</sup> *Id.* at 1001; see 21 U.S.C. § 841(a)(1) (2012) (making it a crime “for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”).

<sup>197</sup> See *United States v. Wallace*, 532 F.3d 126, 129 (2d Cir. 2008) (collecting cases and holding that “the sharing of drugs, without a sale, constitutes distribution for purposes of 21 U.S.C. § 841(a)”).

<sup>198</sup> *Okun*, 296 P.3d at 1002.

<sup>199</sup> *Kama*, 39 P.3d at 866.

the marijuana otherwise might constitute delivery of a controlled substance, the city does not explain—and we do not understand—why police officers would not be immune from any federal criminal liability that otherwise might arise from doing so.”<sup>200</sup> In 2007, in *City of Garden Grove v. Superior Court*, a California appeals court similarly found that because the CSA “makes law enforcement personnel immune from any civil or criminal liability arising out of their handling of controlled substances as part of their official duties,”<sup>201</sup> an order requiring the police to return seized marijuana would not put them at risk of federal criminal prosecution.

In addition to these three return of property cases, appeals courts in Arizona and California have suggested that the CSA’s immunity provision would shield officials from federal prosecution for issuing business licenses to marijuana stores (assuming that such conduct would otherwise constitute a federal crime).<sup>202</sup> Both of these cases involved preemption challenges to state and local medical marijuana laws. In the course of finding that the CSA did not preempt the laws, the courts cited the CSA’s immunity provision. In the 2016 California Court of Appeals case, *City of Palm Springs v. Luna Crest Inc.*, the court mentioned the immunity provision only in passing, as additional support for the proposition that the issuance of a license to a marijuana business would not violate federal law.<sup>203</sup> In the Arizona case, an Arizona County argued that its employees would be aiding and abetting a federal crime if they implemented the state’s medical marijuana law and so the law should be struck down as preempted by the CSA. The court disagreed and held that, in part because of the immunity provision, Arizona’s medical marijuana law did not pose a positive conflict with the federal ban on marijuana. The County argued that the CSA’s immunity provision was not sufficient to protect its employees because it was “limited to law enforcement personnel.”<sup>204</sup> The court disagreed, holding that “County officials are ‘engaged in the enforcement’ of state statutes by processing applications

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<sup>200</sup> *Id.* at 868 (citing the CSA’s immunity provision).

<sup>201</sup> *City of Garden Grove*, 68 Cal. Rptr. 3d at 664. In contrast to its relatively brief analysis of the CSA’s immunity provision, the *City of Garden Grove* decision included lengthy discussions of standing, California’s medical marijuana laws, and preemption.

<sup>202</sup> *White Mountain Health Ctr., Inc. v. Maricopa Cty.*, 386 P.3d 416, 432 (Ariz. Ct. App. 2016) (“County officials are ‘engaged in enforcement’ of state statutes by processing applications for the zoning permits and promulgating regulations to permit [Medical Marijuana Dispensaries] pursuant to state law.”) (citing 21 U.S.C. § 885(d)); *City of Palm Springs v. Luna Crest Inc.*, 200 Cal. Rptr. 3d 128, 132 (Ct. App. 2016) (concluding that because of the CSA’s immunity provision “Luna’s premise that the City’s implementation of its permitting and testing requirements for medical marijuana dispensaries is in violation of federal law is . . . false”).

<sup>203</sup> *Luna Crest Inc.*, 200 Cal. Rptr. 3d at 132.

<sup>204</sup> *White Mountain Health Ctr., Inc.*, 386 P.3d at 431.

for the zoning permits and promulgating reasonable regulations to permit [medical marijuana dispensaries] pursuant to state law.”<sup>205</sup>

To be sure, a handful of state court decisions can only be so helpful in analyzing a federal statute. But, if federal courts were to agree with the interpretation of the immunity provision adopted by their state counterparts in these cases, government-run safe injection sites would be on very firm ground. With respect to application of the immunity provision, it is hard to imagine a basis for distinguishing a state or local official operating a safe injection site from a police officer tasked with returning illegally seized marijuana or a land use department employee issuing a marijuana business license.

### C. Considering Possible Counter Arguments

Of course, not everyone agrees that the CSA’s immunity provision applies to conduct like returning illegally seized marijuana or issuing a marijuana business license. Three possible objections to the prevailing interpretation of the immunity statute present themselves, two based on the text of the statute and one based on its purpose and structure.

#### 1. Does Implementing a Safe Injection Site Constitute “Enforcement?”

First, one might question whether safe injection site operators (or police who return illegally seized marijuana or land use employees who issue marijuana business licenses) are “engaged in the enforcement” of a state or local law, as the CSA’s immunity statute requires.<sup>206</sup> In the law enforcement setting, “enforcement” typically means “to compel compliance with the law.”<sup>207</sup> If the word “enforcement” in the immunity statute were limited to this definition, safe injection sites might be excluded from its protection. This is because although the employees of government-run safe injection facilities would be “implementing or facilitating” the local policy,<sup>208</sup> they would not be compelling anyone to comply with a law.

A 2006 Ninth Circuit case, *United States v. Rosenthal*,<sup>209</sup> provides some support for reading the CSA’s immunity provision this way. *Rosenthal* involved somewhat unusual facts. Not long after Californians passed the first modern medical marijuana law in 1996, a handful of medical marijuana dispensaries opened, most of them in the San Francisco bay area. When the

<sup>205</sup> *Id.* at 432.

<sup>206</sup> 21 U.S.C. § 885(d).

<sup>207</sup> *United States v. Rosenthal*, 454 F.3d 943, 948 (9th Cir. 2006) (*disapproved of on other grounds by Godoy v. Spearman*, 861 F.3d 956, 968 n.6 (9th Cir. 2017)).

<sup>208</sup> *Id.*

<sup>209</sup> *See generally Rosenthal*, 454 F.3d 943.

federal government moved to shut the dispensaries down, some local elected officials began searching for ways to fight back. It was in this context that, in 1998, the Oakland City Council passed an ordinance to try to protect local medical marijuana providers from federal prosecution. Although Oakland's ordinance was designed with the CSA's immunity provision in mind, the city did not establish a city-run medical marijuana program. Instead, under the ordinance, Oakland would officially designate private marijuana growers and sellers as "individuals to help distribute medical cannabis to seriously ill persons."<sup>210</sup> Pursuant to the ordinance, the city deputized the Oakland Cannabis Buyers' Cooperative (OCBC) as "an official medical-cannabis-provider-association."<sup>211</sup> OCBC's executive director then designated a man named Ed Rosenthal "to be an agent of OCBC and to cultivate marijuana plants for distribution to authorized medical-cannabis users."<sup>212</sup> Ed Rosenthal was eventually arrested and convicted of three federal drug crimes for growing marijuana.<sup>213</sup>

On appeal, Rosenthal argued that his status under Oakland's marijuana ordinance entitled him to immunity under the CSA. The Ninth Circuit disagreed, homing in on the word "enforcement" in the immunity provision. Enforcement, the court wrote, "means 'to compel compliance with the law'" and Rosenthal was "not compelling anyone to do or not to do anything."<sup>214</sup> As a result, the court concluded that Rosenthal's cultivation of "marijuana for medical use does not constitute 'enforcement' within the meaning of [the CSA's immunity statute]."<sup>215</sup> Notably, despite this holding, the *Rosenthal* court approvingly cited and distinguished the only medical marijuana return-of-property decision that had been issued at the time, *Kama*.<sup>216</sup> In its discussion of *Kama*, the Ninth Circuit explained that Oregon law "mandated the return of marijuana to the individual from whom the marijuana had been seized, and therefore the officers in question were 'enforcing' the state law that required them to deliver the marijuana to that individual."<sup>217</sup> Oakland's ordinance, by contrast, did not require that Rosenthal sell medical marijuana.<sup>218</sup> For this reason, according to the Ninth Circuit, *Kama* was "not inconsistent with" its interpretation of the immunity provision.<sup>219</sup>

<sup>210</sup> *Id.* at 945.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 946–47.

<sup>214</sup> *Id.* at 948.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* (citing *Kama*, 39 P.3d at 868).

<sup>217</sup> *Id.* (quoting *Kama*, 39 P.3d at 868).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

Although *Rosenthal* would certainly provide some support for interpreting the word “enforcement” in the CSA’s immunity statute narrowly, the case is at-odds with how courts have defined “enforce” in other settings. Courts—including the United States Supreme Court—have consistently recognized that “[t]he word ‘enforce’ is defined as ‘to give force to’ or to ‘put in force: cause to take effect: give effect to.’”<sup>220</sup> Strangely, the *Rosenthal* court did not acknowledge the fact that leading dictionaries define the word enforce this way, nor did it attempt to distinguish or even cite any of the court decisions that have adopted this interpretation of the word enforce. Instead, the court stated without any elaboration that “enforce” means only “to compel compliance with the law” and that “implementing” a statute—in other words, giving effect to a statute—does not constitute enforcement for purposes of the immunity provision.<sup>221</sup> The oversight is conspicuous enough that one cannot help but wonder whether the argument that enforce can mean to “give effect to” was simply not presented to the court.

Indeed, limiting the definition of “enforcement” to official actions that “compel compliance with the law” would seem to exclude at least some traditional police work from the immunity provision. Consider police laboratories that need “to obtain and transfer controlled substances for use as standards in chemical analysis,” for example.<sup>222</sup> On the basis of the CSA’s immunity provision, the DEA has expressly exempted this type of activity from the registration requirements that would normally apply to analysts who handle controlled substances.<sup>223</sup> But, in contrast to testing a controlled substance seized from a suspect for purposes of prosecution, setting a lab’s chemical analysis standards does not compel anyone to comply with a drug law. Similarly, the police regularly display seized controlled substances at media press conferences. While displaying drugs to the media might promote the department’s work and send a message to other potential suspects, it certainly does not compel anyone to comply with the law in the sense that police investigations and prosecutions do.

Adding to the mystery of *Rosenthal*’s narrow interpretation of the word “enforce” is its discussion of *Kama*. The police did not compel Samuel Kama to comply with the law by returning marijuana to him. Rather,

<sup>220</sup> *Lacey v. Palatine*, 904 N.E.2d 18, 26 (Ill. 2009) (quoting *Webster’s Third New International Dictionary*); see *Merrill Lynch v. Manning*, 136 S. Ct. 1562, 1569 (2016) (finding that “‘enforce’ means ‘give force [or] effect to’”); see also *Bellagio v. Nat’l Labor Relations Bd.*, 863 F.3d 839, 848 (D.C. Cir. 2017) (“The leading law dictionary gives it a broad definition: to ‘enforce’ rules is ‘[t]o give force or effect to’ them.”).

<sup>221</sup> *Rosenthal*, 454 F.3d at 948.

<sup>222</sup> See 21 C.F.R. § 1301.24(c).

<sup>223</sup> *Id.*



*Kama* presented a case of enforcing a law by putting it into effect. But the Ninth Circuit approvingly cited *Kama* anyway, distinguishing it on the ground that Oregon “law mandated the return of marijuana” while Oakland’s ordinance did “not mandate that Rosenthal manufacture marijuana.”<sup>224</sup> This reasoning suggests that the court’s real objection to Ed Rosenthal’s argument was not that he was not compelling people to comply with Oakland’s law by growing marijuana, but that Oakland’s law did not compel Rosenthal to grow marijuana in the first place. In any case, based on its treatment of *Kama*, it seems that despite the *Rosenthal* court’s stated definition of the word “enforcement”, it understood the term to include at least some acts that give effect to a law without compelling compliance.<sup>225</sup>

In sum, although *Rosenthal* could be cited for the proposition that implementing a safe injection site statute does not constitute enforcement, there is little else to support such a constrained definition of the term. No other court decision appears to have limited the term “enforcement” to acts that compel compliance with the law. Instead, other court cases have consistently recognized that “enforce” means to give effect to a law.<sup>226</sup> Because operators of a government-run safe injection facility would cause the state or local law that establishes and regulates the facility to take effect, they would be engaged in enforcement under this definition. Similarly, because employees of a government-run safe injection site would be operating pursuant to a statutory mandate, they would be in the same position as the police officer from *Kama*, who the *Rosenthal* court seemed to agree was entitled to immunity under the CSA.

## 2. Safe Injection Sites and “Lawful” Enforcement

A second possible objection to the application of the CSA’s immunity statute to safe injection sites would focus on the word “lawful.” Recall that the immunity provision only protects state and local officials who are “lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.”<sup>227</sup> There is precedent suggesting that conduct is

<sup>224</sup> *Rosenthal*, 454 F.3d at 948.

<sup>225</sup> Indeed, *Rosenthal*’s discussion of *Kama* led a Colorado Supreme Court Justice to include a “see also” citation to *Rosenthal* for the proposition that enforce “means ‘giving force to.’” *Crouse*, 388 P.3d at 45 (Gabriel, J., dissenting) (citation omitted). In a parenthetical, Justice Gabriel described *Rosenthal* as “noting that in returning seized marijuana to an individual pursuant to a state law mandating the return of such marijuana, the officers were ‘enforcing’ that state law.” *Id.*

<sup>226</sup> See *Merrill Lynch v. Manning*, 136 S. Ct. 1562, 1569 (2016) (finding that “‘enforce’ means ‘give force [or] effect to’”); *Lacey*, 904 N.E.2d at 26 (quoting *Webster’s Third New International Dictionary*); see also *Bellagio* 863 F.3d at 848 (D.C. Cir. 2017) (“The leading law dictionary gives it a broad definition: to ‘enforce’ rules is ‘[t]o give force or effect to’ them.”).

<sup>227</sup> 21 U.S.C. § 885(d) (2012) (emphasis added).

“lawful” only if it is permitted under *both* federal and state law.<sup>228</sup> This could present a problem for immunizing safe injection site operators. Arguably, because a safe injection site violates the federal crack house statute, the officials running the site would not be engaged in “lawful” enforcement and so not entitled to immunity. This interpretation of the word “lawful” finds support in a 2017 Colorado Supreme Court decision, *People v. Crouse*, which is the only case to hold that the CSA does not grant immunity to a police officer who is ordered to return marijuana to someone in compliance with state law.<sup>229</sup>

*Crouse* involved a constitutional challenge to a provision of Colorado’s medical marijuana law that required officers to return seized medical marijuana to individuals if they were eventually acquitted of the charges.<sup>230</sup> The dispute began when a trial court ordered the Colorado Springs Police Department to return marijuana to a man who had been acquitted of growing a significant amount of marijuana for medical purposes.<sup>231</sup> The police appealed the order, arguing that because Colorado’s return of marijuana law required them to commit a federal crime—namely, distribution of marijuana—it was preempted by the federal CSA. By a 4–3 vote, the Colorado Supreme Court agreed. The court reasoned that compliance with Colorado’s return-of-marijuana law would “necessarily require[] noncompliance” with the CSA, thereby creating “a ‘positive conflict’ between [Colorado law] and the CSA such that the two cannot consistently stand together.”<sup>232</sup>

Relevant here, in the process of striking down Colorado’s return of marijuana statute on preemption grounds, the *Crouse* court rejected an argument that 21 U.S.C. § 885(d) resolved the apparent conflict between state and federal law by immunizing officers who return seized marijuana. The court’s analysis of the issue turned on what it means to be “lawfully engaged in the enforcement”<sup>233</sup> of the law. The *Crouse* majority found that to be lawfully engaged in the enforcement of a state or local drug law, an official’s actions must “compl[y] with both federal and state law.”<sup>234</sup> Because

<sup>228</sup> *Crouse*, 388 P.3d at 43.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 40; see 21 U.S.C. § 903 (2012) (“No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.”).

<sup>231</sup> *Crouse*, 388 P.3d at 40–41 (reporting that the police had seized 55 marijuana plants and 2.9 kilograms of marijuana product from Crouse’s home).

<sup>232</sup> *Id.* at 41.

<sup>233</sup> 21 U.S.C. § 885(d).

<sup>234</sup> *Crouse*, 388 P.3d at 43.

returning marijuana “necessarily requires law enforcement officials to violate federal law,” the court concluded, “officers complying with that provision cannot be said to be acting ‘lawfully’ and thus are not protected by § 885(d)’s exemption.”<sup>235</sup>

The *Crouse* court’s analysis has some intuitive appeal and might well be the most natural understanding of the word “lawful” in some contexts. Consider, for example, a labor law that protects employees from being fired for their “‘lawful’ outside-of-work activities.”<sup>236</sup> Because “the commonly accepted meaning of the term ‘lawful’ is ‘that which is ‘permitted by law,’”<sup>237</sup> it might be reasonable to conclude that an activity that violates federal criminal law is necessarily “unlawful” within the meaning of such a statute. The same does not hold true for the CSA’s immunity provision, however, because it only applies to conduct that would otherwise be unlawful. A grant of immunity presupposes that a government officer has done something that would normally be a crime under the CSA. The only thing that makes that government official’s otherwise illegal conduct legal is 21 U.S.C. § 885(d). As a result, the fact that a police officer’s conduct violates one of the CSA’s criminal provisions cannot possibly tell us whether her conduct is “permitted by law”<sup>238</sup> within the meaning of the immunity statute. After all, *every* state or local official who might seek protection under the immunity statute—whether an undercover officer or a safe injection site employee—will have necessarily done something that would normally be a federal crime.

The *Crouse* dissenters recognized this flaw in the majority’s reasoning. They argued that the majority’s definition of the term “lawful” was unsound because it did not provide a basis for distinguishing an officer who distributes marijuana as part of an undercover sting operation from one that returns marijuana in accordance with the CSA’s immunity provision. In both situations, officers “are distributing marijuana in violation of the CSA” and so “defin[ing] ‘lawful’ with reference to the CSA’s prohibition on distribution of controlled substances” is unhelpful.<sup>239</sup> Implicit in the majority’s ruling, the dissent submitted, was the premise that to be “lawful,” state and local officials must be “carry[ing] out the purpose of the CSA.”<sup>240</sup> But limiting immunity in this way cannot be squared with the immunity provision’s

<sup>235</sup> *Id.*

<sup>236</sup> *Coats v. Dish Network, LLC*, 350 P.3d 849, 850 (Colo. 2015).

<sup>237</sup> *Id.* at 852.

<sup>238</sup> *Crouse*, 388 P.3d at 43 (quoting *Coats*, 350 P.3d at 852).

<sup>239</sup> *Id.* at 45 (Gabriel, J., dissenting).

<sup>240</sup> *Id.*

text, “which makes no reference to any purpose of the CSA.”<sup>241</sup> The majority’s only response on this point was to write in a footnote, without any elaboration, that undercover “sting operations are ‘lawful’ enforcement and consistent with federal law.”<sup>242</sup>

If the *Crouse* majority got it wrong, what does it mean to be “lawfully” engaged in the enforcement of a law related to controlled substances? The text and structure of the statute, which applies to state and local officers who are “lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances,”<sup>243</sup> provides a clear answer. The term “lawful” must mean that the official has been given the authority to enforce a law or municipal ordinance in a way that, but for the grant of authority (and the existence of the immunity provision), would violate the CSA. The only possible source for this grant of enforcement authority is state or local law. This is because a state or local officer’s duties and authority are determined by state and local law. With respect to grants of immunity to state and local officials, then, the term “lawfully” is given meaning by state and local law.<sup>244</sup> Courts that have denied immunity under the CSA to rogue state and local officials have adopted exactly this interpretation.<sup>245</sup> As the Fifth Circuit held in a decision denying immunity to a parish prison guard, the immunity statute “require[s] the application of a state’s laws to determine the status of the state official and the legality of the state official’s actions.”<sup>246</sup> Officials charged with running government safe injection sites would be engaged in lawful enforcement under this definition, which is on much more solid footing with respect to the immunity provision’s text and precedent than the *Crouse* majority’s narrow interpretation.

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<sup>241</sup> *Id.* at 46.

<sup>242</sup> *Id.* at 43 n.2.

<sup>243</sup> 21 U.S.C. § 885(d).

<sup>244</sup> *Wright*, 634 F.3d at 776 (holding that the terms “duly authorized” and “lawfully engaged” in the CSA’s immunity provision “are given meaning through a state’s statutes regarding state officials and through other rules and policies that govern the actions and duties of law enforcement officers”).

<sup>245</sup> *Id.*; see *Fuller*, 162 F.3d at 261 (holding that the defendant was not lawfully engaged in the enforcement of the law where “nothing in the South Carolina statutes or case law supports Fuller’s belief that, as mayor, he possessed this enforcement power”).

<sup>246</sup> *Wright*, 634 F.3d at 776 (noting that the immunity provision “is silent as to what it means to be a ‘duly authorized’ state officer ‘lawfully engaged in the enforcement of’ the controlled substances laws” and concluding that “[w]e will therefore look to Louisiana law to determine whether Wright is covered by” the immunity provision).

### 3. Legislative Intent

Finally, one might argue against applying the CSA's immunity provision to safe injection facilities on the grounds that doing so would be inconsistent with the purpose of the immunity statute and the broader goals of the CSA. This argument immediately runs into a seemingly insurmountable problem. Courts have no reason to consider congressional intent when the text of a statute is dispositive.<sup>247</sup> For the reasons already discussed, the text of the immunity provision would plainly apply to state and local officials operating a government-run safe injection facility. In order to conclude otherwise, a court would need to find either that the term "enforce" does not mean what the dictionary says it does, or that the term "lawful" is impliedly limited to actions that "carry[] out the purposes of the CSA."<sup>248</sup> Although there is precedent for both of these propositions, as discussed above, they are not possible to square with the statute's text.

In addition to the points already discussed, the structure of the immunity provision underscores the breadth of its grant of immunity to state and local officials. The immunity provision's treatment of state and local officials is especially striking in comparison to its treatment of federal officials. With respect to federal officials, the immunity provision applies only to "any duly authorized Federal officer lawfully engaged in the enforcement of *this subchapter*."<sup>249</sup> Congress could have tied immunity for state and local officials to federal priorities by using identical or similar language for the state and local immunity clause. Specifically, the immunity statute could have been drafted to apply only to state and local officers engaged in the enforcement of any law or municipal ordinance *prohibiting* controlled substances, any law or municipal ordinance *consistent with the purposes of the federal Controlled Substances Act*, or even any law or municipal ordinance *not in conflict with the purposes of the Controlled Substances Act*. Instead, the CSA's state and local immunity clause protects officers who are "lawfully engaged in the enforcement of *any* law or municipal ordinance *relating to* controlled substances."<sup>250</sup>

Similarly, if Congress had wanted to reserve immunity for state and local officials whose enforcement furthers the purposes of the CSA, it could have given federal agencies oversight or control over state and local gov-

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<sup>247</sup> Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citation omitted).

<sup>248</sup> *Crouse*, 388 P.3d at 45 (Gabriel, J., dissenting).

<sup>249</sup> 21 U.S.C. § 885(d) (emphasis added).

<sup>250</sup> *Id.* (emphasis added).

ernment use of the immunity provision. Congress could have required the DEA or the DOJ to pre-clear state and local enforcement operations in order for the immunity provision to apply. Or it could have required state or local agencies to register and report their actions to the DEA, similar to the CSA’s registration and reporting requirements for physicians and researchers.<sup>251</sup> The fact that Congress did not include an oversight mechanism in the CSA’s immunity statute is especially telling when one considers the dynamics of undercover policing. Undercover police operations can risk causing harm to innocent third parties.<sup>252</sup> In so-called reverse stings, illegal drugs provided by undercover officers sometimes reach consumers.<sup>253</sup> For this reason, the Drug Enforcement Administration has adopted guidelines for undercover operations that involve furnishing a controlled substance.<sup>254</sup> Nevertheless, many state and local agencies grant their undercover officers nearly unfettered discretion with few guidelines.<sup>255</sup> As a result, in the absence of coordination with federal officials, there is always a risk that state and local undercover police operations may inadvertently undermine federal drug enforcement efforts. Indeed, it is not entirely unheard of for undercover officers from different agencies to unexpectedly encounter and then try to arrest one another.<sup>256</sup> Congress could have limited the CSA’s grant of immunity to make sure that state and local drug enforcement did not (wittingly or unwittingly) work at cross-purposes with federal goals. Instead, Congress enacted an immunity statute whose text gives broad deference to state and local governments to decide which officials and what conduct to immunize. In

<sup>251</sup> *Id.* §§ 821–31.

<sup>252</sup> Elizabeth E. Joh & Thomas W. Joo, *Sting Victims: Third-Party Harms in Undercover Police Operations*, 88 S. CAL. L. REV. 1309, 1323 (2015).

<sup>253</sup> For example, in one of the leading Supreme Court decisions on the entrapment defense, an undercover police officer supplied the defendant with a difficult-to-get chemical for use in manufacturing methamphetamine. The defendant manufactured methamphetamine using the chemical that the undercover agent had supplied and kept a portion of it. The defendant was not arrested until a little over one month later. *United States v. Russell*, 411 U.S. 423, 425–26 (1973).

<sup>254</sup> *United States v. Mustakeem*, 759 F. Supp. 1172, 1176 (W.D. Pa. 1991) (discussing DEA guidelines regarding reverse sting operations that involve the furnishing of a controlled substance).

<sup>255</sup> Joh, *supra* note 177, at 183.

<sup>256</sup> See, e.g., Harriet Sinclair, *Detroit Cops Fight Each Other in ‘Very Embarrassing’ Undercover Mix-up*, NEWSWEEK (Nov. 13, 2017), <https://www.newsweek.com/detroit-cops-fight-each-other-very-embarrassing-undercover-mix-710270> [<https://perma.cc/8RC3-NLP7>] (“Officers from the 12th precinct, who were pretending to sell drugs in an attempt to arrest drug users, were approached by two officers from the 11th precinct, who treated them as they would any other ‘drug dealers’ and attempted to arrest them.”); Scott Morgan, *Undercover Cop Arrested for Selling Drugs to an Undercover Cop*, STOPTHEDRUGWAR.ORG (July 21, 2009), [https://stopthedrugwar.org/speakeasy/2009/jul/21/undercover\\_cop\\_arrested\\_selling](https://stopthedrugwar.org/speakeasy/2009/jul/21/undercover_cop_arrested_selling) [<https://perma.cc/Q92M-RCKA>] (describing how officers from one county arrested an officer from another county when he tried to buy a small amount of marijuana).

sum, only by engaging in a strained reading of terms like “enforcement” and “lawfully” and ignoring the breadth of the phrase “any law or municipal ordinance relating to controlled substances,” would it be possible to conclude there is any ambiguity about how the immunity statute should apply to a government-run safe injection site.<sup>257</sup>

It bears noting here that interpreting a statute to apply more broadly than its drafters likely envisioned would not be at all unusual. We need look no further than the court decisions interpreting the crack house statute for an example. The legislative history of that law leaves little doubt that Congress enacted it with crack houses in mind. Both “the short title and the Congressional record synopsis refer to crack houses.”<sup>258</sup> The Senate summarized the new law as one “that ‘outlaws operation of houses or buildings, so-called ‘crack houses’ where ‘crack,’ cocaine and other drugs are manufactured and used.’”<sup>259</sup> Nevertheless, courts have not limited application of the law to so-called crack houses or even to defendants who personally act with the purpose of promoting drug activity. Instead, they have adopted a much broader interpretation than the legislative history would suggest because “the words of the statute clearly imply more expansive coverage.”<sup>260</sup> Courts should not hesitate to apply these same principles to the CSA’s immunity provision. Because the words of the immunity statute unambiguously include state or local officials charged with operating a government supervised injection facility, congressional intent is irrelevant.

Even if a court were to find ambiguity in the immunity provision’s text, however, the argument that applying it to safe injection sites is inconsistent with congressional intent is not nearly as strong as one might assume. As noted before, in contrast to the crack house statute, there does not appear to be any legislative history on the CSA’s immunity provision.<sup>261</sup> It may be reasonable to assume lawmakers did not contemplate in 1970 that the statute might one day immunize a manager of a government safe injection site or a police officer returning marijuana to an acquitted defendant.<sup>262</sup>

<sup>257</sup> See 21 U.S.C. § 885(d).

<sup>258</sup> *Tamez*, 941 F.2d at 773.

<sup>259</sup> *United States v. Sturmoski*, 971 F.2d 452, 462 (10th Cir. 1992) (quoting 132 CONG. REC. S13, 780 (daily ed. Sept. 26, 1986)).

<sup>260</sup> *Tamez*, 941 F.2d at 773.

<sup>261</sup> See *supra* note 174 and accompanying text.

<sup>262</sup> The CSA was enacted in 1970. The first modern state medical marijuana law was not passed until 1996, and cities and states only recently began to seriously consider establishing safe injection sites. Proposals for states and cities to pass drug laws at-odds with prohibition were not entirely unheard of in the late 1960s and early 1970s, however. Perhaps the most notable examples of this were proposals for so-called heroin maintenance programs (also known as heroin-assisted treatment programs), which had been endorsed “by the New York County Medical Society, the New York Academy of Medicine, the New York State Bar Association, the *New York Times*, New

But there is no legislative history that demonstrates or even suggests any congressional intent to limit application of the immunity provision only to state and local officers who are “carry[ing] out the purposes of the CSA.”<sup>263</sup> In fact, there is at least as much reason to think that Congress meant to give states and localities the broad deference that the immunity provision’s text suggests as there is to think that Congress intended for the provision to apply only to state and local enforcement that furthers federal goals. As the Supreme Court has recognized, “[t]he CSA explicitly contemplates a role for the States in regulating controlled substances.”<sup>264</sup> The immunity provision itself is evidence of this fact.<sup>265</sup> So too is the CSA’s preemption provision, which “indicates that, absent a positive conflict, none of the Act’s provisions should be ‘construed as indicating an intent on the part of Congress to occupy the field in which the provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State.’”<sup>266</sup>

Finally, even if it were possible to divine a congressional intent to exclude the enforcement of state and local laws that are at-odds with the CSA’s goals from its immunity provision, it is far from clear that this would doom safe injection sites. In passing the CSA, Congress’s primary purposes were to combat drug abuse and trafficking.<sup>267</sup> Safe injection sites do not appear to be in tension with either of these goals. With respect to the goal of

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York City Comptroller Abraham Beam,” and others in the late 1960s and early 1970s. Cyril D. Robinson, *A Proposal for a Heroin Maintenance Experiment in New York City: The Limits of Reform Strategy*, 2 CONTEMP. CRISES 1, 7 (1978). In 1971, officials in New York City began to seriously consider a concrete proposal to establish a heroin-assisted treatment program, under which the city or a non-profit partner would distribute heroin to a small segment of people with substance use disorders as part of a more comprehensive treatment program. *Id.* at 7–9. Although the proposal never came close to becoming reality, it did reach the point of an application to the Food and Drug Administration (FDA) for approval. *Id.* at 10. Notably, in response to the proposal, a few members of the House introduced bills intending to stop heroin usage in drug maintenance programs, like the one proposed in the application to the FDA. *Id.* To be sure, this does not bear directly on legislative intent regarding the immunity provision. The move suggests, however, that at least some members of Congress were unsure that the CSA, which at the time had only recently been enacted, would prevent New York City from enacting such a policy. And importantly, the pre-1970 calls for heroin maintenance programs reveal that Congress was aware of the possibility that a state or locality might enact a policy in conflict with the CSA’s criminal provision when it was writing the CSA’s immunity provision.

<sup>263</sup> *Crouse*, 388 P.3d at 45 (Gabriel, J., dissenting).

<sup>264</sup> *Gonzales*, 546 U.S. at 251.

<sup>265</sup> *Crouse*, 388 P.3d at 46 (Gabriel, J., dissenting) (arguing that the immunity provision “is also part of the CSA and thus must be considered in determining the CSA’s purposes”).

<sup>266</sup> *Gonzales*, 546 U.S. at 270–71 (quoting 21 U.S.C. § 903).

<sup>267</sup> *Gonzales v. Raich*, 545 U.S. 1, 12–13 (2005) (finding that in passing the CSA Congress’s “main objectives . . . were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances”).



controlling traffic in illegal drugs, unlike the typical drug offender—or the typical undercover officer for that matter—safe injection facilities do not manufacture, distribute, or possess drugs. Here, a comparison to the relationship between the immunity provision and the medical marijuana laws at issue in *Crouse* and *Rosenthal* is helpful. It is clear enough that allowing the City of Oakland to deputize people as “officers” empowered to grow and sell marijuana would undermine the goal of controlling the traffic in controlled substances. The same is true of requiring the police to return seized marijuana to an arrestee. In both cases, government officials would be placing marijuana into an “illicit channel[]”<sup>268</sup> in the market. In contrast, safe injection sites are not involved in the illegal drug market in any way. They allow injection drug users to possess and use illegal drugs on their premises, but this does nothing to undermine federal efforts to control the traffic in illegal drugs.

Nor are safe injection sites in conflict with the CSA’s purpose of combatting drug abuse. Their aim is to provide medical services to drug users and reduce the harms associated with drug use, not to encourage drug use. Indeed, the cities and states that are considering safe injection sites see them as part of a strategy for treating people with a substance use disorder by “transition[ing] . . . [them] into detox services.”<sup>269</sup> Far from undermining the CSA’s goals, supervised injection sites seek to *further* them. To be sure, some safe injection site opponents argue that they will “normalize drug use and facilitate addiction by sending a powerful message to teenagers that the government thinks illegal drugs can be used safely.”<sup>270</sup> But disagreement over whether safe injection sites will succeed at achieving their stated goals does not mean they are at-odds with the purposes of the CSA. On this point, it is especially important to remember that supervised injection facilities do not violate any of the original criminal provisions of the CSA. Injection site operators do not manufacture, distribute, or possess illegal drugs.<sup>271</sup> If a city or state had established a supervised injection facility in 1971, the year after passage of the CSA, there would have been little reason to question their legal status under federal law. It is only because of the 1986 crack house statute that they violate the CSA. And, although safe injection sites may violate the letter of the crack house statute, they clearly fall outside of the

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<sup>268</sup> *Id.* at 13.

<sup>269</sup> S.F. DEP’T OF PUB. HEALTH, *supra* note 62, at 4.

<sup>270</sup> Rosenstein, *supra* note 22.

<sup>271</sup> Safe injection site *clients* who use drugs onsite are guilty of possession of a controlled substance, of course. But as noted previously, because safe injection site operators do not intend to encourage the possession of illegal drugs, it is very unlikely that they would be accomplices to the crime of possession. *See supra* note 17 and accompanying text.

congressional purpose behind that law, which was to criminalize “so called ‘crack houses.’”<sup>272</sup> For these reasons, the argument that safe injection sites are in conflict with the CSA’s goals of combating drug abuse and traffic in controlled substances is not a particularly compelling one. As a result, even if courts were to reserve immunity under the CSA for state and local enforcement that does not violate the purposes of the CSA, safe injection sites might very well still qualify for protection.

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The case for applying the CSA’s immunity provision to government-run safe injection sites may not quite be open-and-shut. There is a very strong argument that the immunity provision’s text is unambiguous. Even if legislative intent is considered, the claim that immunizing safe injection sites undermines the purposes of the CSA is not nearly as strong as one might assume. On the other hand, there is some precedent in support of applying the statute more narrowly than its text would suggest—specifically, the Ninth Circuit’s decision in *Rosenthal* and the Colorado Supreme Court’s decision in *Crouse*.

Even though the CSA’s immunity provision may not give supervised injection sites a certain path to federal legitimacy, it appears to be their best hope, at least for now. Unless and until federal officials can be convinced to adopt a non-enforcement policy with respect to safe injection sites, cities and states that hope to establish them have only a few options available. The proposals that have received the most attention to date—convincing courts to narrowly interpret the crack house statute or to defer to states on federalism grounds—appear to be long-shots. But there is a solid argument that the CSA’s immunity provision, which has so far gone entirely unnoticed in the public debate over safe injection sites, could allow them to go forward without federal interference.

Two final caveats merit comment. First, because the immunity provision applies only to “duly authorized officer[s]” of a state or locality,<sup>273</sup> it would not shield a purely privately-run safe injection site. This is especially notable because Philadelphia, which has gone the furthest towards establishing a safe injection facility, plans for its site(s) to be privately run.<sup>274</sup> Indeed, the DOJ filed suit against Safehouse, a Philadelphia nonprofit that has been working with the City, to stop them from opening a safe injection

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<sup>272</sup> *Tamez*, 941 F.2d at 773 (internal citation omitted); cf. Burris et al., *supra* note 17, at 1117–28 (arguing that courts should adopt a narrower interpretation of the crack house statute that would exclude safe injection sites from its reach based on congressional intent).

<sup>273</sup> 21 U.S.C. § 885(d).

<sup>274</sup> Gordon, *supra* note 14.

site.<sup>275</sup> Based on the above analysis, Philadelphia might be well-advised to reconsider its strategy in favor of opening a government-run facility or, at least, passing an ordinance to closely regulate safe injection sites and designating all Safehouse employees as “duly authorized officer[s]” of the city.<sup>276</sup> Second, in order to test whether the CSA immunizes government-run safe injection sites, a city or state will need to get the issue into federal court. Whether this can be done without putting city or state employees at risk of federal criminal prosecution is not entirely clear. As the DOJ’s lawsuit against Safehouse shows, United States Attorneys have more tools at their disposal than criminal enforcement; they can seek declaratory relief in advance of a site opening. But the decision to file suit against Safehouse may have been driven by the nonprofit’s apparent commitment to opening a safe injection site in the face of threats of criminal prosecution. Understandably, government attorneys are unlikely to sign-off on a plan that would have city or state employees break federal law in order to get a test case into court. As a result, federal prosecutors may decide it is not necessary to preemptively sue a city that expresses interest in opening a safe injection site, on the belief that local officials will not actually go through with it. Thus, unless a city or state is willing to openly defy federal law, risking their employees in the process, they may need to sue the federal government in order to press the issue. To do this, they will need standing, which may be difficult to achieve.<sup>277</sup>

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<sup>275</sup> See *supra* note 23 and accompanying text.

<sup>276</sup> 21 U.S.C. § 885(d). This approach would be similar to what Oakland tried to do with certain medical marijuana providers in the late 1990s and early 2000s. Whether such an arrangement would be enough to make private employees “duly authorized officer[s]” within the meaning of the immunity provision is far from clear. *Id.* While a government-run site would give cities the best chance of winning an immunity argument, countervailing considerations may weigh in favor of a privately run facility. Private parties may be more willing to risk violating federal law than city officials. As a result, even if a privately run facility might have a weaker legal argument against federal prosecution than a government-run site, city lawmakers might believe that it will be easier for them to get a privately run site to open than it would be to open a site that is run by the city.

<sup>277</sup> While an analysis of the issue of standing is beyond the scope of this Article, it is not impossible to imagine a set of facts in which a city or state might have standing to sue the government to enjoin them from prosecuting a planned safe injection site. After all, the Supreme Court’s decision upholding the federal government’s power to reach intrastate medical marijuana activity under the Commerce Clause involved a lawsuit *against* the government by medical marijuana patients, and not a criminal prosecution. See *generally Raich*, 545 U.S. 1. Although the Supreme Court did not consider whether the plaintiffs in *Raich* had standing, the Ninth Circuit panel that heard the case split on the question. *Raich v. Ashcroft*, 352 F.3d 1222, 1226 n.1 (9th Cir. 2003). Of course, *Raich* involved a constitutional challenge to the CSA, whereas a claim based on the CSA’s immunity provision would be statutory.

## IV. SAFE INJECTION SITES AND THE FUTURE OF THE WAR ON DRUGS

Only time will tell how the looming conflict between cities and the federal government over safe injection sites will be resolved. Regardless of the outcome, the relationship between the crack house statute and the effort to establish safe injection sites reveals a great deal about the status of the drug war in the United States. The beginning of this decade saw a consensus begin to emerge that the war on drugs has failed.<sup>278</sup> Prominent politicians from across the political spectrum have called for an end to the war on drugs.<sup>279</sup> But it is far from clear what “ending the drug war” would mean. This is in part because drug war critics do not appear to agree about what should come next. As just one example, those who have labeled the drug war a “failure” include politicians who vehemently oppose marijuana legalization (like former New Jersey Governor Chris Christie) and those who strongly support it (like California Lieutenant Governor Gavin Newsom).<sup>280</sup> It is possible, of course, that the political winds will shift again, especially since the Trump administration has taken steps to revive the drug war. But, if support for replacing the war on drugs with a new strategy does continue to grow, questions regarding what the new strategy should look like will linger. Safe injection sites may provide a perfect test case.

As I have argued elsewhere,<sup>281</sup> one of things that has separated the U.S. war on drugs from drug prohibition in other countries is the view that any policy that is inconsistent with a drug-free society, even if only in appearance, is a “form[] of surrender”<sup>282</sup> and accordingly unacceptable. The drug war frames prohibition as a life and death struggle in which, as Reagan’s Attorney General Edwin Meese put it, “there are no neutrals.”<sup>283</sup> Under the ideology of the drug war, ideas like safe injection sites or needle exchange programs are rejected out of hand.<sup>284</sup> There is no need to debate the costs and benefits. In fact, the debate might itself be a concession to the enemy. Former drug czar William J. Bennett characterized “[b]uzzwords like ‘harm reduction’” as a type of surrender because they “crowd[] out

<sup>278</sup> Kreit, *supra* note 10, at 1324–26.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 1325–26.

<sup>281</sup> *Id.*

<sup>282</sup> Bennett, *supra* note 11; see Caulkins & Reuter, *supra* note 32, at 117 (“In the United States ‘harm reduction’ became a toxic term, seen within law enforcement circles as a Trojan horse for legalization.”).

<sup>283</sup> DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE 214 (1996) (quoting Edwin Meese).

<sup>284</sup> See Vallejo, *supra* note 32, at 1192–93 (discussing opposition to syringe exchange programs in the drug war era).

clear no-use messages.”<sup>285</sup> In the drug war, there can be no allowance for states and cities to tryout harm reduction policies to gather evidence about what works and what does not. The only acceptable measures are those that take a zero-tolerance approach to drug use.

This outlook led Congress to pass increasingly punitive and far-reaching anti-drug legislation in the 1980s, the crack house statute being a prime example. The law had no connection to any significant federal enforcement interest and was largely unnecessary in any event. Crack houses are essentially a land use concern; they are blighted properties that happen to involve drug activity rather than some other type of nuisance. To the extent that crack houses contribute to the drug trade, Congress did not need to pass a new law to address the problem. The great majority of people who maintain a place for the purpose of manufacturing, selling, or using drugs are guilty of other federal drug crimes—namely manufacturing, distributing, or possessing drugs—either as a principal or an accomplice.<sup>286</sup> A law like the crack house statute is not necessary to prosecute drug manufacturers or sellers, or even landlords who rent their property to drug dealers at a premium. Nevertheless, Congress created a new crime to address the problem of crack houses and wrote the statute so broadly that it applies to a person who knows someone is using her property for a prohibited purpose, even if she does not share that purpose.<sup>287</sup> As a result, the statute sweeps in people with a tenuous connection to the drug trade who would be guilty of no crime under traditional accomplice liability principles<sup>288</sup> including, very likely, government-run safe injection sites.

If calls to end the drug war are ever going to move beyond rhetoric, federal lawmakers must reconsider laws like the crack house statute and give cities and states room to experiment with policies like safe injection facilities. The war on drugs may require a uniformity of purpose among federal, state, and local laws. But a drug policy that is focused on public health can allow—and, indeed, should encourage—innovation and a diversity of approaches.<sup>289</sup> If we are no longer fixated on achieving a drug-free society, there is no reason to insist that all state and local drug laws be di-

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<sup>285</sup> Bennett, *supra* note 11.

<sup>286</sup> Indeed, published decisions involving crack house prosecutions often involve defendants who have also been convicted of other drug offenses. See Sachdev, *supra* note 96, at 596 (discussing crack house statute prosecutions).

<sup>287</sup> See generally *United States v. Tebeau*, 713 F.3d 955 (8th Cir. 2013).

<sup>288</sup> See *United States v. Wilson*, 503 F.3d 195, 195 (2d Cir. 2007) (upholding the conviction for maintaining a drug-involved premise of a woman who shared an apartment with a drug dealer).

<sup>289</sup> See Kreit, *supra* note 10, at 1375–78 (arguing that giving states room to adopt policies that may be inconsistent with a zero-tolerance strategy should be viewed as one of three guiding principles for a post-war drug policy).

rected exclusively, or even primarily, toward use reduction. Instead, cities and states should have the space to try out new policies that prioritize goals like harm reduction over concerns about sending a message of permissiveness. The federal government has already recognized as much when it comes to state marijuana legalization laws, albeit somewhat reluctantly. Through its (formal and now informal) non-enforcement policy and a congressional budget rider that shields state medical marijuana businesses from prosecution,<sup>290</sup> the federal government has let states try new approaches to marijuana policy.

The argument for deferring to states and cities is even stronger when it comes to policies like supervised injection sites that do not implicate federal or cross-state concerns. In contrast to the legal manufacture and sale of marijuana, which has the potential to impact neighboring states,<sup>291</sup> the effects of safe injection sites are almost entirely limited to the city (even more likely, just the neighborhood) where they are located.<sup>292</sup> They neither distribute nor purchase drugs, nor do they promote drug use. Any conceivable influence they might have on the demand for illegal drugs would be negligible. Not surprisingly, then, federal opposition to letting states and cities test safe injection sites appears to be premised on a belief that they are incompatible with the war on drugs strategy. As Deputy Attorney General Rod Rosenstein recently put it, instead of opening supervised injection sites, cities and states “should join [the federal government] and fight drug abuse.”<sup>293</sup> In Rosenstein’s view, the “fight” is waged by “aggressively prosecut[ing] criminals who supply the deadly poison,”<sup>294</sup> and the only acceptable goal is reducing drug use. Safe injection sites, which are designed to reduce harm among users (rather than use itself), are seen as little more than a way to “help people abuse drugs by providing needles [with staff] stand[ing] ready to resuscitate addicts who overdose.”<sup>295</sup> There is no serious claim that safe injection sites would contribute to the market for illegal drugs or have any real effect outside of the cities in which they would operate. But, among drug warriors,

<sup>290</sup> See Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 WASH. & LEE L. REV. 779, 802–03 (2018) (discussing the appropriations rider that precludes the DOJ from using funds to prevent states from implementing medical marijuana laws).

<sup>291</sup> Chad DeVeaux & Anne Mostad-Jensen, *Fear and Loathing in Colorado: Invoking the Supreme Court’s State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*, 56 B.C. L. REV. 1829, 1837–43 (2015) (arguing that Colorado’s marijuana law has a negative impact on neighboring states).

<sup>292</sup> Cf. Marshall et al., *supra* note 48 (finding that overdose deaths in the immediate vicinity of Vancouver’s safe injection site fell by 35% after its opening, but the rate for the city as a whole decreased by only 9.3% during the same period).

<sup>293</sup> Rosenstein, *supra* note 22.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

they are a federal concern because they would “normalize drug use” and send the wrong “message to teenagers.”<sup>296</sup>

For this reason, the movement to establish safe injection sites raises fundamental questions about our national approach to drug policy. Should we return to the strategy of the drug war, with every level of government marching in lockstep toward the elusive goal of a drug free society? Or should we continue moving toward a public health strategy, with a focus on trying out new policies and gathering evidence to determine what works? As cities and states continue their effort to establish safe injection sites, federal officials will be forced to wrestle with these questions. This includes courts that, in the words of Justice John Paul Stevens, acted mostly as “loyal foot soldier[s]”<sup>297</sup> in the war on drugs. If judges view the CSA’s immunity provision through the lens of the drug war, they will be much more willing to read it narrowly and exclude harm reduction measures that conflict with a zero-tolerance approach from its reach.

More important than the courts when it comes to the future of federal drug policy, however, is Congress. So far, Congress has been absent from the debate over supervised injection sites. People on both sides of the issue have been operating on the assumption that federal law will remain as it is. From the perspective of safe injection site advocates and opponents, this makes some sense. In light of Congress’s failure to resolve the much more pressing conflict between federal and state marijuana laws, it seems unlikely that federal lawmakers would take up the issue of safe injection sites now. But if interest in safe injection sites continues to grow at the state and local level, it will only be a matter of time before the issue reaches Congress.

## CONCLUSION

Safe injection sites are currently operating in ten countries, including Canada. There is a good deal of evidence that they can reduce overdose deaths and the spread of blood-borne diseases among injection drug users. Only recently have they begun to receive serious attention from policymakers in the United States, however. For years, harm reduction measures like safe injection sites were rejected out-of-hand on the grounds that they were incompatible with the war on drugs. Somewhat suddenly, the landscape has changed. Waning enthusiasm for the drug war, coupled with the opioid cri-

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<sup>296</sup> *Id.* To be sure, safe injection site opponents believe that they would “create serious public health risks.” *Id.* But these alleged risks involve mostly uniquely local concerns such as the possibility that they might “destroy the surrounding community.” *Id.*

<sup>297</sup> *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

sis, have led a number of cities and states to take concrete steps toward establishing safe injection sites. A few cities have even held press conferences to announce their plans to open the first safe injection site in the United States. But, so far, none of these efforts has moved beyond the planning stage because federal law stands in the way. The federal crack house statute makes it a crime to maintain a building for the purpose of using a controlled substance. Safe injection sites almost surely violate that law.

This Article proposes a novel solution to the conflict between cities and the federal government over safe injection sites in the form of an obscure provision of the Controlled Substances Act that immunizes officials who are engaged in the enforcement of state and local laws relating to controlled substances. Although the CSA’s immunity provision was likely written with undercover police officers in mind, the plain language of the law seems to apply to a government-run safe injection site. A handful of courts have already relied on the statute to immunize government officials who were engaged in the enforcement of state medical marijuana laws. The logic of those decisions supports immunizing the operators of government-run safe injection sites. To be sure, there is other precedent that points toward a narrower reading of the immunity provision, so the case for applying it to safe injection sites is not open-and-shut. But if courts were to agree with the interpretation of the immunity provision outlined in this Article, cities would be free to open safe injection sites without putting their employees at risk of federal prosecution.

Even if the threat of federal prosecution were removed for safe injection site operators, other challenges would remain. Most notably, the federal government could try to interfere with the operation of safe injection sites by targeting users for arrest and prosecution. Although simple drug possession is rarely prosecuted in federal court, it is a federal crime.<sup>298</sup> A grant of immunity to safe injection site employees would not prevent Drug Enforcement Administration agents from “camp[ing] out in front of the site and arrest[ing] anyone in possession” of drugs.<sup>299</sup> Whether a strategy like

<sup>298</sup> 21 U.S.C. § 844 (2012).

<sup>299</sup> Katie Zezima, *Awash in Overdoses, Seattle Creates Safe Sites for Addicts to Inject Illegal Drugs*, WASH. POST (Jan. 27, 2017), [https://www.washingtonpost.com/politics/awash-in-overdoses-seattle-creates-safe-sites-for-addicts-to-inject-illegal-drugs/2017/01/27/ddc58842-e415-11e6-ba11-63c4b4fb5a63\\_story.html?noredirect=on&utm\\_term=.d88bfd200ee7](https://www.washingtonpost.com/politics/awash-in-overdoses-seattle-creates-safe-sites-for-addicts-to-inject-illegal-drugs/2017/01/27/ddc58842-e415-11e6-ba11-63c4b4fb5a63_story.html?noredirect=on&utm_term=.d88bfd200ee7) [https://perma.cc/D4WK-D4U2] (quoting King County Sheriff John Urquhart). This risk is not limited to the DEA. Unless a state was to decriminalize drug possession, local police and prosecutors would have the authority to arrest and prosecute safe injection site clients. Police and prosecutors in some of the cities that are considering safe injection sites have pledged not to do this, however. See, e.g., Roebuck & Palmer, *supra* note 146 (reporting that Philadelphia District Attorney Larry Krasner has “pledged that his office would not target the operators or users at a safe injection site”); Zezima, *supra* (reporting that



this would succeed in effectively blocking the implementation of safe injection sites is far from clear, however.<sup>300</sup> Still, the prospect of the federal government arresting and prosecuting safe injection site clients would at the very least present another problem for cities and states to consider.

Whether cities and states will succeed in their efforts to establish safe injection sites in the face of federal opposition remains to be seen. Safe injection site advocates are understandably focused on how this conflict will impact the opioid crisis. But the outcome will also say a lot about the state of drug policy in the United States more broadly. United States drug policy appears to stand at a crossroads. Throughout the Obama administration, the country seemed to be moving slowly but steadily toward an end to the war on drugs. Well-known politicians from both parties denounced the drug war as a failure. The Trump administration has worked to “reverse”<sup>301</sup> this trend, however. Under Attorney General Sessions, the DOJ withdrew the modest limits that the Obama administration had placed on applying mandatory minimum penalties to low-level drug offenders. Sessions also rescinded the DOJ’s policy of non-enforcement against people who comply with state marijuana laws, although that move has not had much practical effect. In a sign that the federal government has given up the fight over marijuana legalization, it has continued to take a hands-off approach when it comes to state marijuana legalization laws. By all appearances, the next battle between state and federal drug laws will concern safe injection sites. The result may tell us whether the United States is willing to put an end to the war on drugs or merely to the war on marijuana.

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the King County Sheriff, where Seattle is located, would instruct his deputies not to target individuals who are coming or going from a safe injection facility).

<sup>300</sup> It seems unlikely that merely entering or exiting a safe injection site would give agents probable cause to search or arrest, especially if the site were housed in a building with other government services or agencies. *State v. Weyand*, 399 P.3d 530, 536 (Wash. 2017) (holding that “walking quickly and looking around, even after leaving a house with extensive drug history at 2:40 in the morning, is not enough to create a reasonable, articulable suspicion of criminal activity”). In addition, targeting users would be incredibly resource intensive in comparison to targeting site operators. As the example of state marijuana reform demonstrates, the legal authority to prosecute people for violating federal law means very little if federal officials do not have the money and manpower to act as a credible deterrent.

<sup>301</sup> Rosenstein, *supra* note 22.

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