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Safe Injection Facilities: Reconsidering American Drug Policy

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SAFE INJECTION FACILITIES: RECONSIDERING AMERICAN DRUG POLICY

Abstract: On January 12, 2021, in *United States v. Safehouse*, the U.S. Court of Appeals for the Third Circuit held that supervised injection facilities—sites where medical professionals monitor injection drug use—violate the Crack House Statute. The legality of supervised injection facilities was a matter of first impression at the circuit level. Research shows that supervised injection facilities reduce overdose deaths and the spread of infection and are important harm reduction measures for combatting the opioid epidemic. The Third Circuit held that these programs violate the Crack House Statute, 21 U.S.C. § 856(a)(2), because they act with the statutorily proscribed purpose of drug use. Within its opinion, the Third Circuit noted that the word "purpose" in the provision pertains to the drug users. The Third Circuit's determination that the statute does not require the property managers to hold an illicit purpose conflicted with the U.S. District Court for the Eastern District of Pennsylvania's opinion, which found supervised injection facilities to be legal. This Note maintains that the Third Circuit erred in concluding that "purpose" refers to the drug users and argues that it instead modifies the site operator. This Note further argues that American drug law is inapposite to treating and ending the opioid epidemic. Thus, this Note concludes by calling on Congress to incorporate addiction research findings into future drug policy.

INTRODUCTION

Approximately twenty-one million Americans struggle with addiction.[1] But, just ten percent of people with a substance use disorder access treatment.[2] A combination of stigma and laws criminalizing drug use largely explain the treatment gap.[3] Such laws are a facet of the War on Drugs, a campaign launched by the federal government to root out drug use through legal enforcement.[4]

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[1] *Addiction Statistics*, ADDICTION CTR., https://www.addictioncenter.com/addiction/addiction-statistics/ [https://perma.cc/9L8T-WUUU] (Nov. 23, 2021).

[2] *Id.*

[3] *See* Ben Longnecker, Note, *Federal Ignorance and the Battle for Supervised Injection Sites*, 74 U. MIA. L. REV. 1145, 1149, 1154 (2020) (citing Leo Beletsky, Corey S. Davis, Evan Anderson & Scott Burris, *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 AM J. PUB. HEALTH 231, 231 (2008)) (noting that fear of social ostracization and criminal liability discourage users from seeking treatment); *Addiction Statistics*, *supra* note 1 (calculating the treatment gap).

[4] Michelle Alexander, *The War on Drugs and the New Jim Crow*, RACE, POVERTY & ENV'T, Spring 2010, at 75, 76 [hereinafter Alexander, *The War on Drugs*]. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) [here-

The War on Drugs was a tremendous failure, with overdose deaths increasing twenty-three-fold since its initiation.[5] The drug war did not succeed, in part, because it devalued treatment and harm reduction, which are evidence-based methods of lowering addiction rates.[6]

Supervised injection facilities (SIFs), where users can inject drugs under the supervision of medical professionals, are a successful harm reduction measure.[7] Though widely implemented abroad, SIFs face legal challenges in the United States.[8] Opponents of SIFs claim the programs violate the United States' Crack House Statute, which prohibits making a space available "for the purpose of" drug activity.[9] A broad reading of the term "purpose" proscribes SIFs because people patronize SIFs to safely use drugs.[10] Alternatively, propo-

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inafter ALEXANDER, THE NEW JIM CROW] (discussing how the War on Drugs led to the mass incarceration of Black men, creating a new era of Jim Crow).

[5] Claire Suddath, *The War on Drugs*, TIME (Mar. 25, 2009), content.time.com/time/world/article/0,8599,1887488,00.html [https://perma.cc/9U7C-HLJ5] (stating that the War on Drugs failed). *Compare Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE, NAT'L INSTS. OF HEALTH fig.1 (Jan. 29, 2021), https://nida.nih.gov/drug-topics/trends-statistics/overdose-death-rates [https://perma.cc/6Q2H-A7LW] (reporting the number of overdose deaths in 2019), *with Compressed Mortality 1979–1998*, CDC, https://wonder.cdc.gov/cmf-icd9.html [https://perma.cc/8PWK-MSGD] (click "I Agree"; then scroll down to ICD-9 codes; then select "E800-E999 (External causes of injury and poisoning)" and "Open"; then select "E850-E858 (Accidental poisoning by drugs, medicinal substances, and biologicals)" and "Open"; then select "E850 (Accidental poisoning by analgesics, antipyretics, and antirheumatics)" and "Open"; then select "E850.0 (Opiates and related narcotics)"; then check "Show Totals" on; then click "Send") (reporting the number of overdose deaths in the 1980s, when the Reagan Administration waged the War on Drugs).

[6] *See* 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. PREVENTIVE MED. 919, 919 (2017) (discussing evidence-based harm reduction measures that the United States has yet to implement); Alex Kreit, *Safe Injection Sites and the Federal "Crack House" Statute*, 60 B.C. L. REV. 413, 466 (2019) (noting that the War on Drugs is antagonistic toward harm reduction strategies); Taylor Knopf, *The Streets Weren't Safe for Drug Users. So These Countries Created Spaces for Them.*, N.C. HEALTH NEWS (Feb. 4, 2019), https://www.northcarolinahealthnews.org/2019/02/04/the-streets-werent-safe-for-drug-users-so-these-countries-created-spaces-for-them/ [https://perma.cc/8FFC-PSN4] (reporting the decreases in overdose deaths in the countries that have supervised injection facilities).

[7] Kral & Davidson, *supra* note 6, at 919. Rather than attempting to limit drug use, harm reduction aspires to moderate the risk of overdose and disease related to drug use. Jonathan P. Caulkins & Peter Reuter, *Dealing More Effectively and Humanely with Illegal Drugs*, 46 CRIME & JUST. 95, 117 (2017); *see infra* notes 51–77 and accompanying text (detailing the rise of harm reduction strategies).

[8] Kral & Davidson, *supra* note 6, at 919; *see* United States v. Safehouse (*Safehouse II*), 985 F.3d 225, 232 (3d Cir.) (holding that supervised injection facilities (SIFs) violate the Crack House Statute), *cert. denied*, 142 S. Ct. 345 (2021); United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 585–86 (E.D. Pa. 2019) (holding that SIFs do not violate the Crack House Statute), *rev'd*, 985 F.3d 225 (3d. Cir. 2020), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021). SIFs currently operate in Canada, Switzerland, Luxembourg, the Netherlands, Norway, Spain, Australia, Denmark, Germany, and France. Kral & Davidson, *supra* note 6, at 919.

[9] 21 U.S.C. § 856(a)(2); *see Safehouse II*, 985 F.3d at 232 (interpreting the statute to require the drug user's significant purpose to use drugs); *Safehouse I*, 408 F. Supp. 3d at 585 (summarizing the government's argument that SIFs are illegal).

[10] *See Safehouse II*, 985 F.3d at 232 (reading "purpose" broadly and holding that SIFs violate the statute).

nents of SIFs assert that the statute permits these programs because Congress narrowly defined the word "purpose."[11] They assert that the primary purpose of SIFs is to reduce overdose deaths and that drug use is merely incidental to that objective.[12] Therefore, SIFs do not operate for the "purpose" of drug activity if courts adopt a narrow definition of the word.[13]

In 2019, in *United States v. Safehouse* (*Safehouse I*), the U.S. District Court for the Eastern District of Pennsylvania held that SIFs do not violate the Crack House Statute.[14] Specifically, the district court found that the word "purpose" modified the site operator, the SIF, rather than the SIF's drug-using patients.[15] The court relied on interpretive canons and legislative history to support its conclusion.[16] Thus, the district court held that the SIF did not violate the Crack House Statute because its requisite purpose was not to facilitate drug use, but rather to reduce opioid overdoses.[17] The U.S. Court of Appeals for the Third Circuit, deciding the matter on appeal, however, disagreed with the district court's analysis.[18] In 2021, in *United States v. Safehouse* (*Safehouse II*), the Third Circuit held that SIFs violate the Crack House Statute because "purpose" refers to the drug users, who harbor the illicit purpose of drug use.[19]

This Note argues that, in light of both public health policy and the canons of statutory interpretation, the Crack House Statute does not outlaw SIFs.[20] Part I of this Note discusses the underpinnings of the opioid epidemic, delineates the clinical presentation of opioid use disorder, explains how SIFs operate,

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[11] 21 U.S.C. § 856(a)(2); *Safehouse II*, 985 F.3d at 232 (explaining the argument made by the defendant, Safehouse, a SIF).

[12] *Safehouse I*, 408 F. Supp. 3d at 614, 618 (holding that the statute requires the property owner's "significant purpose [be] to facilitate drug use"). Incidental drug use at SIFs is less consequential than reducing the harm of the opioid crisis. *See id.* at 618 (finding that drug use at a SIF is incidental to the SIF's primary purpose of reducing the harms of the opioid epidemic); *Incidental*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining incidental).

[13] *See Safehouse I*, 408 F. Supp. 3d at 614 (holding that SIFs do not violate the Crack House Statute).

[14] *Id.* at 618.

[15] *Id.* at 595–605 (interpreting the Crack House Statute).

[16] *Safehouse I*, 408 F. Supp. 3d at 595–605. The court also noted that though the public was aware of harm reduction strategies in the context of the AIDS epidemic, applying those strategies to addiction had not yet been widely considered in the United States. *Id.* at 585, 616; *see* Don C. Des Jarlais, Commentary, *Harm Reduction in the USA: The Research Perspective and an Archive to David Purchase*, 14 HARM REDUCTION J., no. 51, 2017, at 1, 3, https://harmreductionjournal.biomedcentral.com/track/pdf/10.1186/s12954-017-0178-6.pdf [https://perma.cc/ZK2N-BF5J] (discussing how harm reduction theory gained traction in the United States during the AIDS epidemic).

[17] *Safehouse I*, 408 F. Supp. 3d at 614–18.

[18] United States v. Safehouse (*Safehouse II*), 985 F.3d 225, 232–38 (3d Cir.) (holding SIFs are illegal), *cert. denied*, 142 S. Ct. 345 (2021); *see Safehouse I*, 408 F. Supp. 3d at 618 (holding that SIFs do not violate the Crack House Statute).

[19] 985 F.3d at 237; *see* 21 U.S.C. § 856(a)(2) (forbidding maintaining a premises "for the purpose of" drug activity).

[20] *See infra* notes 241–319 and accompanying text.

and addresses the legal obstacles SIFs face, including the Crack House Statute.[21] Part I also situates the Crack House Statute within its cultural context and provides an overview of the way the U.S. federal system complicates drug control.[22] Part II compares the district court's holding in *Safehouse I* to the Third Circuit's holding in *Safehouse II*.[23] Part III argues that the Third Circuit incorrectly held that the word "purpose" in the Crack House Statute refers to drug users and opines on how the correct interpretation could permit SIFs under the current drug regulation framework.[24] Part III concludes that rather than working within the existing framework and creatively interpreting the word "purpose," the best path forward is sweeping drug reform.[25]

I. Positioning Supervised Injection Facilities Within the Cultural and Legal Context of the United States

The policy decisions and socio-political culture that shaped American drug law provide necessary context for the judicial opinions about SIFs.[26] Section A of this Part explains the development of the opioid epidemic and describes opioid use disorder.[27] Section B discusses the business model of SIFs and their role as harm reduction measures, and, given potential legal obstacles to SIF implementation, considers alternative harm reduction measures.[28] Section C discusses how the War on Drugs produced policies condemning drug use, including the Crack House Statute at issue in *Safehouse I* and *Safehouse II*.[29] Finally, Section D provides a brief overview of federalism and how federal drug law affects state drug law.[30]

A. The Opioid Epidemic

The number of lethal drug overdoses per year increased over the past decade, from 38,329 in 2010 to 70,630 in 2019.[31] These staggering numbers

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[21] *See infra* notes 26–77 and accompanying text.

[22] *See infra* notes 78–132 and accompanying text.

[23] *See infra* notes 133–240 and accompanying text. *Compare Safehouse II*, 985 F.3d at 229 (holding that SIFs violate the Crack House Statute), *with Safehouse I*, 408 F. Supp. 3d at 618 (holding that SIFs do not run afoul of the Crack House Statute).

[24] *See infra* notes 241–289 and accompanying text.

[25] *See infra* notes 290–319 and accompanying text.

[26] *See infra* notes 31–132 and accompanying text (providing context on the opioid epidemic, harm reduction principles, and how the War on Drugs complicates implementation of harm reduction strategies).

[27] *See infra* notes 31–61 and accompanying text.

[28] *See infra* notes 62–77 and accompanying text.

[29] *See infra* notes 78–108 and accompanying text.

[30] *See infra* notes 109–132 and accompanying text.

[31] *Overdose Death Rates*, *supra* note 5, fig.1. The number of opioid overdoses increased from 21,089 to 49,860 in the same period. *Id.* fig.3. The most recent data indicates that, from February 2020 to February 2021, 81,000 people fatally overdosed. Brian Mann, *As Overdose Deaths Surge, White*

prompted the federal government to declare the opioid epidemic a public health emergency in 2017.[32] The underpinnings of the crisis, however, were born almost thirty years prior to the announcement of the national public health emergency.[33] To develop a complete understanding of the Opioid Epidemic, Subsection 1 details the history of mass opioid addiction in the United States, and Subsection 2 discusses the rise of treatments and public health discourse that address the phenomena.[34]

1. The Roots of Mass Addiction and the Course of the Opioid Epidemic

Disturbingly, the medical community is largely to blame for the opioid epidemic.[35] In the 1980s, academic materials touted that prescription opioids were not addictive and encouraged physicians to treat chronic pain with such drugs.[36] At around the same time, states passed legislation that supported the prescription of controlled substances to treat pain.[37] In the 1990s, pharmaceutical businesses pioneered and promoted new opioid-based medicines like OxyContin.[38] The

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House Takes Steps to Build Drug Policy Team, NPR (Feb, 3, 2021), https://www.npr.org/sections/president-biden-takes-office/2021/02/03/963732520 [https://perma.cc/94NP-9FG9]. Further, the crisis is partially responsible for the decreased average life expectancy from 2013 to 2018. Sarah DeWeerdt, *The Natural History of an Epidemic*, 573 NATURE OUTLOOK OPIOIDS (SPECIAL ISSUE OF NATURE) S10, S11 (2019), https://media.nature.com/original/magazine-assets/d41586-019-02686-2/d41586-019-02686-2.pdf [https://perma.cc/G4ZX-CXK3].

[32] 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/U4QB-QKVH]. A handful of states named the opioid crisis a public health emergency before the federal declaration. Thomas Sullivan, *President Trump Declares Opioid Crisis a National Emergency*, POL'Y & MED., https://www.policymed.com/2017/08/president-trump-declares-opioid-crisis-a-national-emergency.html [https://perma.cc/AY5S-EVCF] (May 4, 2018).

[33] *See* DeWeerdt, *supra* note 31, at S10–11 (discussing the factors that set the opioid epidemic in motion, starting in the 1980s).

[34] *See infra* notes 35–61 and accompanying text.

[35] *See infra* notes 36–40 and accompanying text (detailing the genesis of modern opioid prescription in the United States and the incorrect notion that the drugs were not addictive).

[36] DeWeerdt, *supra* note 31, at S11. A now infamous letter to the editor in the *New England Journal of Medicine* in 1980 stated that prescription opioids were not addictive, as opposed to recreational opioids, which the medical community viewed as addictive. *Id.* Specifically, the letter stated that only four of the 11,882 patients to whom physicians prescribed opioids became addicted. *Id.* Additionally, a 1986 study with a small sample size—only thirty-eight people—encouraged treating chronic pain with opioids. *Id.* The medical community now questions the validity of these reports. *Id.* Current studies show that 21–29% of people taking prescription opioids for chronic pain abuse them, and 8–12% acquire an opioid use disorder (OUD). *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, NAT'L INSTS. OF HEALTH (Mar. 11, 2021), https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis [https://perma.cc/6CMT-QXTE].

[37] DeWeerdt, *supra* note 31, at S10.

[38] *Id.* at S11. OxyContin is a form of oxycodone, which Purdue Pharma produces. *Id.* While lobbying Members of Congress, funding continuing medical education courses, and directing sales representatives to promote the product to physicians, pharmaceutical companies underscored opioids' effectiveness, their harmless nature, and the improbability of addiction. *Id.* Purdue Pharma mislead the

drugs were deadlier than presented, and because the U.S. healthcare system incentivized patient volume and patient satisfaction, doctors overprescribed opioids.[39] Lethal prescription opioid overdose numbers progressively rose.[40]

The opioid crisis transitioned to a new stage in 2010.[41] State and federal agencies restricted the accessibility of opioids, and the Centers for Disease Control and Prevention (CDC) created opioid prescription guidelines that discouraged high doses and long-term opioid treatment.[42] In response, many users

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medical community, knowing that OxyContin was just as addictive as other prescription opioids. *Id.* This purposeful dishonesty cost Purdue Pharma $635,000,000 in damages in a 2007 lawsuit charging the company with criminal misrepresentation. Longnecker, *supra* note 3, at 1151; DeWeerdt, *supra* note 31, at S11.

[39] DeWeerdt, *supra* note 31, at S11. The traditional health plan reimbursement model is fee-for-service, which compensates medical professionals for the number of services they provide. Olivia M. Ramirez, Evaluating the Effects of Safe Injection Facility Legalization on Fatal and Non-fatal Overdose and Infectious Disease 11 (2019) (M.P.H. & Dr.P.H. dissertation, University of Kentucky) (UKnowledge), https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1256&context=cph_etds [https://perma.cc/6TZU-MSN7]; Jacqueline LaPointe, *What Is Value-Based Care, What It Means for Providers?*, REVCYCLE INTEL. (June 7, 2016), https://revcycleintelligence.com/features/what-is-value-based-care-what-it-means-for-providers [https://perma.cc/VV5Z-VZUV]. The fee-for-service paradigm encourages providers to order numerous, sometimes unnecessary, tests to increase payout and goads patients to overemploy healthcare services regardless of health improvement. LaPointe, *supra*. This structure incentivized and resulted in opioid overprescription. DeWeerdt, *supra* note 31, at S11.

Due to these perverse incentives, the Centers for Medicare and Medicaid Services, under the direction of the Department of Health & Human Services, began transitioning to value-based programs in 2012. *What Are the Value-Based Programs?*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Value-Based-Programs/Value-Based-Programs [https://perma.cc/5XAS-UEYT] (Dec. 1, 2021); LaPointe, *supra*. Value-based reimbursement, an alternative to fee-for-service reimbursement, pays providers for positive outcome measures—such as fewer hospitals readmissions and increased preemptive treatment—in order to reduce long-term healthcare costs. LaPointe, *supra*. Fee-for-service encourages quantity, whereas value-based care encourages quality, making patient satisfaction a linchpin for reimbursement, vital to health system ratings and penalty evasion. Ronald Hirsch, *The Opioid Epidemic: It's Time to Place Blame Where It Belongs*, 114 MO. MED. 82, 83–84 (2017); LaPointe, *supra*. Consequently, health administrators pressured physicians to fully gratify each patient or forgo payment. Hirsch, *supra*, at 90. In response, physicians often prescribed opioids when patients asked for them regardless of misgivings about the propriety of the prescriptions. *Id.* Thus, even the reforms made to this system continued to incentivize predatory prescription of opioids to unsuspecting patients. DeWeerdt, *supra* note 31, at S11.

This partially explains why the opioid epidemic is somewhat unique to the United States. *See id.* (noting that Canada is the only other country that parallels the United States' overdose rates). In Europe, for example, doctors have no financial incentive to prescribe, and marketing prescription drugs to patients is not allowed. *Id.*

[40] DeWeerdt, *supra* note 31, at S12.

[41] Kreit, *supra* note 6, at 424.

[42] DeWeerdt, *supra* note 31, at S12; Michael Eisenstein, *Easing the Pain*, 573 NATURE OUTLOOK OPIOIDS (SPECIAL EDITION OF NATURE) S13, S13–14 (2019), https://media.nature.com/original/magazine-assets/d41586-019-02687-1/d41586-019-02687-1.pdf [https://perma.cc/B2UD-X55S]. Before the Centers for Disease Control and Prevention (CDC) published guidelines, opioid prescriptions were almost entirely unregulated. Eisenstein, *supra*, at S13–14. The CDC urged physicians to prudently prescribe opioids to people with chronic pain and to not prescribe daily doses surpassing an equivalent of ninety milligrams of morphine. *Id.* at S14. The CDC also recommended physicians steadily

substituted prescription painkillers with heroin.[43] Heroin overdose deaths then increased dramatically, with the total deaths in 2016 over five times that of 2010.[44]

In 2013, the epidemic entered another phase when synthetic opioids became prominent.[45] Dealers began to dilute pure heroin with fentanyl, a synthetic opioid that is stronger and deadlier than heroin.[46] Since 2013, fentanyl-related overdose deaths have skyrocketed from under five thousand to over thirty-six thousand in 2019.[47] In 2017, the federal government recognized the need to address opioid addiction as a public health crisis.[48]

In addition to the spike in overdose deaths, the opioid epidemic caused an increased incidence of serious health issues, including neonatal abstinence syndrome, HIV, and hepatitis C.[49] Further, the rates of opioid use disorder (OUD) followed the same trajectory as overdose-related deaths, with elevated

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lower the dosage of opioids for patients taking elevated doses. *Id.* The steady, measured reduction in dosage is called tapering. *Id.* Further, for patients experiencing acute pain—such as from a surgery—rather than chronic pain, the CDC suggested doctors prescribe only three-days-worth of opioids. *Id.* Although published without much research on ideal opioid dosing, the authors believed that some, perhaps arbitrary, limits were better than none. *Id.*

[43] DeWeerdt, *supra* note 31, at S12. Replacing prescription opioids with heroin allowed users who possessed OxyContin to illegally sell the more expensive drug. *Id.* Research indicates that 4–6% of people who abuse prescription painkillers switch to heroin, and approximately 80% of heroin users abused prescription painkillers before switching to heroin. *Opioid Overdose Crisis*, *supra* note 36. Another study demonstrates that people who previously used prescription opioids are thirteen times more likely to use heroin than those without. DeWeerdt, *supra* note 31, at S12.

[44] DeWeerdt, *supra* note 31, at S12; *Overdose Death Rates*, *supra* note 5, fig.5 and accompanying text; *cf.* Kreit, *supra* note 6, at 424 (noting that, from 2010 to 2015, heroin overdose deaths increased threefold). There were approximately 3,000 heroin overdose deaths in 2010 and 15,469 in 2016. *Overdose Death Rates*, *supra* note 5.

[45] DeWeerdt, *supra* note 31, at S12.

[46] *Id.*

[47] *Overdose Death Rates*, *supra* note 5, fig.2.

[48] Ehley, *supra* note 32. With the exception of the 2017 opioid epidemic, the federal government has never declared a public health crisis for drug use. *See Public Health Emergency Declarations*, PUB. HEALTH EMERGENCY, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx [https://perma.cc/L9UL-KNWJ] (Jan. 14, 2022) (listing all declared public health crises, with the only one for drug use issued in 2017 for the opioid epidemic). Many believe the opioid epidemic's devastation of white communities generated more public outcry. Andrew Cohen, *How White Users Made Heroin a Public-Health Problem*, THE ATLANTIC (Aug. 12, 2015), https://www.theatlantic.com/politics/archive/2015/08/crack-heroin-and-race/401015/ [https://perma.cc/3JCQ-CV3W]. Research shows that in the past ten years, almost 90% of first-time heroin users were white. *Id.* White people in their twenties who live in rural areas are the principal users of heroin. *Id.*

[49] *Opioid Overdose Crisis*, *supra* note 36. Prenatal opioid use precipitates neonatal abstinence syndrome, which infants experience when they withdraw from prenatal drug exposure. *Id.* Additionally, sharing needles to inject drugs likely caused the era's high rates of HIV and hepatitis C. *Id.*

numbers in the 1990s that have since risen steeply, leading physicians and public health experts to explore new avenues of treatment for addiction.[50]

2. Medication-Assisted Treatment: A Revolution in Substance Abuse Treatment

Leading substance abuse researchers and practitioners stipulate that medication-assisted treatment (MAT) is the most effective method of treating OUD.[51] MAT involves patient participation in behavioral therapy and adherence to either buprenorphine, naltrexone, or methadone.[52] Depending on the

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[50] *See* Eric Strain, *Opioid Use Disorder: Epidemiology, Pharmacology, Clinical Manifestations, Course, Screening, Assessment, and Diagnosis*, UPTODATE, https://www.uptodate.com/contents/opioid-use-disorder-epidemiology-pharmacology-clinical-manifestations-course-screening-assessment-and-diagnosis [https://perma.cc/JAL2-5QLN] (Feb. 22, 2022) (tracking the ever-increasing prevalence of OUD since the 1990s); *see also Overdose Death Rates*, *supra* note 5, fig.3 (reporting the rise in the annual number of opioid-related overdose deaths). The incidence of OUD among pregnant patients admitted for hospital delivery rose over 400% from 1999 to 2014, tracking the increased rates of neonatal abstinence syndrome. Strain, *supra*. As a result, in 2013, in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) the American Psychiatric Association combined the previous conditions of opioid dependence and opioid abuse into the single condition of OUD. *Compare* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 483–84 (5th ed. 2013) [hereinafter DSM-5] (collapsing the previously separate diagnoses of opioid abuse and opioid dependence into OUD), *with* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 248–49 (4th ed. 1994) (describing the distinct diagnoses of opioid abuse and opioid dependence). Previously, the medical community conceived of substance abuse—continued drug use despite interference with one's health or occupational, familial, or social roles—in the absence of substance dependence as a separate disorder. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., IMPACT OF THE DSM-IV TO DSM-5 CHANGES ON THE NATIONAL SURVEY ON DRUG USE AND HEALTH § 2.4.1 (2016), https://www.ncbi.nlm.nih.gov/books/NBK519697/pdf/Bookshelf_NBK519697.pdf [https://perma.cc/2BLR-PT2M]. If a patient satisfied criteria for substance dependence, however, abuse merged into the single diagnosis of substance dependence, which incorporated physical tolerance to the drug as well as abusive use behaviors. *Id.* The DSM-V combined these separate disorders because treatment was largely similar. *Id.* Also, the minimum criteria across disorders meant that physicians did not diagnose or treat patients who, for example, only endorsed two substance dependence symptoms and no substance abuse symptoms. *Id.* The American Medical Association believes that the new conception of OUD better understands the relationship between abuse and dependence. *See id.* (explaining that one reason the DSM-5 removed the distinction was that the tiered organization evaluated abuse as more benign than dependence and did not comprehend the synergy between abuse and dependence).

[51] *Module 5: Assessing and Addressing Opioid Use Disorder (OUD)*, CDC, https://www.cdc.gov/drugoverdose/training/oud/accessible/index.html [https://perma.cc/CD3D-5WNJ]; *see* Hilary Smith Connery, Review, *Medication-Assisted Treatment of Opioid Use Disorder: Review of the Evidence and Future Directions*, 23 HARV. REV. PSYCHIATRY 63, 63 (2015) (finding that medication-assisted treatment (MAT) was twice as effective in maintaining opioid-abstinence compared to behavioral therapy of OUD with medication); *Opioid Use Disorder*, AM. PSYCHIATRIC ASS'N (Nov. 2018), https://www.psychiatry.org/patients-families/addiction/opioid-use-disorder/opioid-use-disorder [https://perma.cc/2QUC-ZW8A] (noting that MAT is a successful remedy for OUD and providing details about each of the medications MAT may involve). MAT increases treatment retention and diminishes opioid use and overdoses. *Opioid Use Disorder*, *supra*.

[52] *Module 5: Assessing and Addressing Opioid Use Disorder (OUD)*, *supra* note 51; *Opioid Use Disorder*, *supra* note 51. Methadone alleviates cravings and withdrawal symptoms, whereas Naltrex-

medication, providers may administer the drug orally or via injection, or they may prescribe for patient self-administration.[53]

Though MAT is the best treatment, many obstacles prohibit its widespread implementation.[54] On-site administration of a daily medication can be prohibitively inconvenient and result in poor treatment adherence.[55] On the other hand, at home administration presents its own challenges, such as patient abuse and illicit resale of prescriptions.[56] Another issue with MAT is its general unavailability.[57] Further, the requirement that patients be at least in mild to moderate withdrawal to receive MAT excludes frequent users who preempt withdrawal with further use.[58] Lastly, MAT is a treatment, not a harm reduction strategy.[59] MAT therefore does not address the harms that opioid use causes current users

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one impedes the "high" of opioids. *Opioid Use Disorder (OUD)*, *supra* note 51. Buprenorphine serves both functions. *Id.*

[53] *Module 5: Assessing and Addressing Opioid Use Disorder (OUD)*, *supra* note 51. Only a provider with a Drug Enforcement Agency license and a Drug Addiction Treatment Act waiver can prescribe buprenorphine. *Id.* Patients may take the oral drug daily at home or receive a monthly injection or implantation twice a year. *Id.* OUD manuals recommend that patients starting buprenorphine be in mild to moderate withdrawal; the drug then alleviates the symptoms of withdrawal. *Id.* If patients initiate buprenorphine administration before withdrawal, the drug triggers withdrawal symptoms. *Id.* Physicians recommend administering the drug six to twelve hours after a heroin injection *Id.* Alternatively, any licensed prescribing physician can prescribe naltrexone. *Id.* Like buprenorphine, providers offer naltrexone as either a daily at-home oral medication or a monthly injection by a healthcare professional. *Id.* People must refrain from using short-acting opioids like heroin for at least one week before starting naltrexone; otherwise, the drug instantly causes severe withdrawal, which elevates the risk of noncompliance. *Id.*; Connery, *supra* note 51, at 68.

Only opioid treatment programs approved by the Substance Abuse and Mental Health Services Administration (SAMHSA) may distribute methadone. *Module 5: Assessing and Addressing Opioid Use Disorder (OUD)*, *supra* note 51. Patients receiving methadone must visit the opioid treatment program daily to receive the medicine. *Id.* Like buprenorphine treatment, patients starting methadone therapy should first experience "mild to moderate withdrawal." *Id.* At first, administration occurs on site, but, once patients stabilize, they may self-administer the drug at home. *Id.*

[54] Connery, *supra* note 51, at 63 (discussing MAT's clinical efficacy).

[55] *See id.* at 66 (noting that due to the frequency of office visits, the monthly injections of either naltrexone or buprenorphine are the most convenient for patients).

[56] *Id.* at 68–69. Patients notoriously sell buprenorphine and methadone, resulting in misuse and overdoses. *Id.* at 69. The injection of naltrexone, on the other hand, enables OUD care without the risk of unlawful resale. *Id.*

[57] *Id.* at 69. Despite MAT's success compared to a placebo or no treatment, it is not commonly prescribed due to provider unease and unfamiliarity. *Id.* Health insurance plans also restrain the implementation of MAT by restricting doses and toxicity and requiring prior authorizations. *Id.*

[58] *See Module 5: Assessing and Addressing Opioid Use Disorder (OUD)*, *supra* note 51 (outlining the requirements for initiating MAT as (1) mild to moderate withdrawal for buprenorphine; and (2) methadone and at least one week of abstinence for naltrexone). Specifically, although MAT patients can technically still inject drugs between treatments, they must be actively in withdrawal when taking MAT drugs, thus excluding individuals from treatment who cannot periodically stop their drug use. *Id.*

[59] *See id.* (describing MAT as a treatment and not discussing harm reduction strategies for drug use).

who are not engaged in treatment.[60] At the same time, however, harm reduction measures—specifically SIFs—alleviate some of the risk current users face.[61]

B. Supervised Injection Facilities: An Advancement in Harm Reduction

Some activists proposed harm reduction programs that would operate in conjunction with MAT.[62] Harm reduction is a humanitarian approach to drug policy that aspires to help dependent drug users without trying to limit their use.[63] Harm reduction accepts that abstinence is not a pragmatic approach and

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[60] *Compare* Caulkins & Reuter, *supra* note 7, at 117 (defining harm reduction in the drug context as a measure that does not limit drug use but instead strives to moderate the harm of drug use), *with Module 5: Assessing and Addressing Opioid Use Disorder (OUD)*, *supra* note 51 (explaining that MAT is a treatment aimed at reducing heroin use by supplementing the patient with medicines that alleviate cravings and withdrawal symptoms).

[61] *See infra* notes 66–68 and accompanying text (detailing how SIFs reduce disease and overdose rates among other drug-related harms).

[62] *See* Kral & Davidson, *supra* note 6, at 920 (finding positive data from a SIF operating in secret in the United States and calling for more widespread implementation); Kreit, *supra* note 6, at 414 (describing the fringe movement for the legalization of SIFs, a harm reduction measure).

[63] Caulkins & Reuter, *supra* note 7, at 117. Harm reduction is "one of the four pillars of drug control, alongside enforcement, treatment, and prevention." *Id.* The approach focuses on the user's rights, rather than the rights of society, the user's family, or, if applicable, the user's victim. *Id.* Harm reduction strategies gained increased importance during the AIDS epidemic when intravenous drug users contracted the disease from shared needles. Des Jarlais, *supra* note 16, at 2. To proponents of the drug war, however, efforts to reduce the spread of AIDS among injection drug users, such as needle exchange programs, appear to approve of drug use and serve as a stepping stone toward legalization. *Id.* at 3–4; Caulkins & Reuter, *supra* note 7, at 117. People also hold contempt for harm reduction because of the inextricable association between illicit drug use and racial and ethnic minorities. Des Jarlais, *supra* note 16, at 2. For example, in the late 1800s, American physicians feared that Chinese immigrants would normalize opium smoking and, thus, endanger the country's morality, leading to anti-Chinese legislation like the Chinese Exclusion Act of 1882. Bill Sanders, *Ethnicity and Drug Policy in the USA*, *in* THE SAGE HANDBOOK OF DRUG AND ALCOHOL STUDIES 418, 421 (Torsten Kolind, Geoffrey Hunt & Betsy Thom eds., 2016). The American perception of opium use in Chinese culture existed even though only 6% of Chinese immigrants in the United States used opium. Sanders, *supra*, at 421. Although they continued to prescribe morphine and other forms of opiates, physicians believed that smoking opium increased libido and worried that opium, paired with prostitution in Chinese opium dens, would lead to miscegenation. *Id.* Similarly, in the 1930s, the media blamed Mexicans for contributing to the Great Depression, and published stories about Mexicans providing marijuana to minors and committing gruesome crimes related to their drug use. *Id.* at 422. Whereas the southwestern states heavily impacted by Mexican immigration panicked about Mexican crime and marijuana, eastern states did not share the sentiment, suggesting that southwestern panic was a cloaked call for stricter immigration policies. *Id.* Later, in the 1980s, the drug alarm shifted to the use of crack in Black communities. *Id.* Once again, the medical community helped create harmful stereotypes, including that cocaine made Black men stronger, more violent, and more eager to seduce white women. *Id.* In response, the federal government toughened its response to crack possession. *Id.* at 423. Currently, 80% of people imprisoned for federal crack violations are Black. *Id.* The history of American drug policy forced one scholar to conclude that "[t]he combination of moralistic intolerance of intoxication and stigmatization of minority groups often led to the demonization of many psychoactive drugs." Des Jarlais, *supra* note 16, at 2.

endeavors to diminish adverse outcomes of drug use.[64] The approach aims to help those excluded from treatment centers that mandate abstinence.[65]

Recently, advocates have pushed for the implementation of SIFs, a harm reduction measure.[66] SIFs are safe spaces to inject drugs under the supervision of healthcare professionals who provide counseling and education and counteract overdoses when necessary.[67] Although SIFs do not require patients to abstain from opioid use like MAT, they reduce the harm of drug use by decreasing disease and death rates, public drug usage, and discarded needles.[68]

Switzerland was at the forefront of SIF implementation, launching the first program of its kind in 1986.[69] Currently, almost one hundred SIFs operate in ten countries, most of which are in Europe.[70] The Unites States has yet to launch SIFs, although several cities have expressed interest in launching them.[71]

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[64] Karen Mary Leslie, Position Statement, *Harm Reduction: An Approach to Reducing Risky Health Behaviours in Adolescents*, 13 PAEDIATRICS & CHILD HEALTH 53, 53 (2008).

[65] *Id.*

[66] *See About*, SAFEHOUSE, https://www.safehousephilly.org/about [https://perma.cc/S93Q-44DM] (explaining that the organizers' regard for the sanctity of human life inspired their desire to open a SIF). The *Safehouse* cases were borne out of the non-profit organization Safehouse's attempt to open a SIF. United States v. Safehouse (*Safehouse II*), 985 F.3d 225, 231 (3d Cir.), *cert. denied*, 142 S. Ct. 345 (2021); United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 586 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d. Cir. 2020), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021).

[67] Kral & Davidson, *supra* note 6, at 919; Kreit, *supra* note 6, at 414. SIFs require users to procure drugs before arriving at the facility. Longnecker, *supra* note 3, at 1156. In the case of an overdose, healthcare professionals administer Naloxone, the remedy for opioid overdoses. *Id.*

[68] Kral & Davidson, *supra* note 6, at 919; Kreit, *supra* note 6, at 432. SIFs lower HIV and hepatitis C rates by providing clean needles and other sterile instruments, as well as screening and treatment for both diseases. Kreit, *supra* note 6, at 421; Knopf, *supra* note 6. In addition to preventing lethal overdoses with Naloxone, healthcare professionals employed at SIFs prevent deaths by testing for synthetic opioids in the user's drug supply and checking in with regulars when their dosage spikes. Jacqueline E. Goldman et al., Research, *Perspectives on Rapid Fentanyl Test Strips as a Harm Reduction Practice Among Young Adults Who Use Drugs: A Qualitative Study*, 16 HARM REDUCTION J., no. 3, 2019, at 1, 2, https://harmreductionjournal.biomedcentral.com/track/pdf/10.1186/s12954-018-0276-0.pdf [https://perma.cc/ZWW9-2VZV] (indicating that fentanyl testing decreases overdose rates); Knopf, *supra* note 6 (finding that increased dosage check-ins also decrease the number of addicted patients who overdose). Opponents to SIFs argue that they increase crime in the surrounding areas. Laura Huey, *What Is Known About the Impacts of Supervised Injection Sites on Community Safety and Wellbeing? A Systematic Review*, SOCIO. PUBL'NS, no. 48, 2019, at 10, https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1051&context=sociologypub [https://perma.cc/Y7RE-V5XN]. Research, however, indicates that SIFs do not elevate crime rates but rather improve the area by reducing public drug usage and the presence of discarded needles. *Id.* at 10–12. *But see id.* at 13 (noting that some SIFs are associated with a slight rise in minor drug sales in the immediate area).

[69] Kral & Davidson, *supra* note 6, at 919.

[70] *Id.* SIFs operate in Switzerland, Australia, Canada, Denmark, France, Germany, Luxembourg, the Netherlands, Norway, and Spain. *Id.*

[71] Kreit, *supra* note 6, at 426–27. Seattle, Philadelphia, San Francisco, New York City, and Denver considered opening SIFs. *Id.*; 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 [https://perma.cc/6AVW-Y6ZW]; David Gutman, *Seattle, King County Move to Open Nation's First Safe*

SIFs are not the only type of harm reduction program.[72] Needle exchange programs and services like Supportive Place for Observation and Treatment (SPOT) in Boston operate to reduce the impact of the opioid epidemic.[73] SPOT functions similarly to SIFs, providing medical supervision to users under the effect of opioids, though the drug injection cannot occur on-site.[74] Such medical supervision reduces the risk of overdose but not to the extent that SIFs do because they do not provide services from initial ingestion.[75] At SPOT, providers cannot render medical aid during overdoses because drug usage occurs off-site.[76] Therefore, the safest harm reduction option for currently addicted opioid users is SIFs.[77]

Injection Sites for Drug Users, SEATTLE TIMES, https://www.seattletimes.com/seattle-news/crime/seattle-king-county-move-to-create-2-injection-sites-for-drug-users [https://perma.cc/A9J3-ARRB] (Jan. 28, 2017); Heather Knight, *SF Safe Injection Sites Expected to Be First in Nation, Open Around July 1*, S.F. CHRON., https://www.sfchronicle.com/news/article/SF-safe-injection-sites-expected-to-be-first-in-12553616.php [https://perma.cc/J2UG-GZTQ] (Feb. 6, 2018); Blair Miller, *Denver City Council Approves Supervised Injection Site Pilot, Which Still Needs Legislative Approval*, DENVER7, https://www.thedenverchannel.com/news/politics/denver-city-council-approves-supervised-injection-site-pilot-which-still-needs-legislative-approval [https://perma.cc/7QUX-8W8E] (Nov. 27, 2018); 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/VKQ8-YG2X]. Philadelphia has come the closest to opening a SIF, perhaps because the city sought private donors to fund it. *See* Gordon, *supra* (highlighting that only Philadelphia promoted a privately-funded SIF).

[72] *See* Longnecker, *supra* note 3, at 1154–55 (discussing needle exchange programs as an additional harm reduction measure); *SPOT*, BOS. HEALTH CARE FOR THE HOMELESS PROGRAM, https://www.bhchp.org/spot [https://perma.cc/T8VY-LP2J] (describing a harm reduction facility in Boston that allows drug users to visit after they have injected opioids for the duration of the drug's effects).

[73] Longnecker, *supra* note 3, at 1154–55; *SPOT*, *supra* note 72. Needle programs dispose of used needles and give clean needles to participants to reduce the transmission of HIV and hepatitis C. Longnecker, *supra* note 3, at 1154–55. Congress funds syringe trade-in programs as part of medical treatment for addiction. Transcript of November 16, 2020 Oral Argument at 55, United States v. Safehouse (*Safehouse II*), 985 F.3d 225 (3d Cir.) (No. 20-1422) [hereinafter Oral Arg.], *cert. denied*, 142 S. Ct. 345 (2021).

[74] *See SPOT*, *supra* note 72 (outlining SPOT's business model, which only differs from SIFs in that SPOT does not allow for on-site injection). The Boston Health Care for the Homeless Program created SPOT because of the elevated rates of overdose among unhoused people. *Id.* SPOT provides medical monitoring, overdose treatment, and connection to primary care, behavioral health services, and substance use treatment. Jessie M. Gaeta, *Supportive Place for Observation and Treatment (SPOT)*, BOS. HEALTH CARE FOR THE HOMELESS PROGRAM (Nov. 2018), https://www.mass.gov/doc/hrc-spot-program-overview-gaeta-11-20-2018/download [https://perma.cc/Q5Q5-PPW6]. Though the Blue Cross Blue Shield of Massachusetts Foundation and other private entities initially funded SPOT, Medicaid now reimburses the program on a fee-for-service contract. Jessie Gaeta, Barry Bock & Mary Takach, *Providing a Safe Space and Medical Monitoring to Prevent Overdose Deaths*, HEALTH AFFS. (Aug. 31, 2016), https://www.healthaffairs.org/do/10.1377/hblog20160831.056280/full/ [https://perma.cc/FLU2-ZB6H].

[75] *See* Gaeta, *supra* note 74 (noting that a weakness in the model is that SPOT misses overdoses at initial ingestion).

[76] *Id.*

[77] *See* Knopf, *supra* note 6 (reviewing different countries' SIF models and research showing reduced overdoses, safer injection environments, and expanded access to health care).

C. Barriers to Effective Harm Reduction: The Crack House Statute

U.S. cities have been reluctant to open SIFs, in part, because the federal government has aggressively criminalized drug use since the 1960s through the War on Drugs.[78] The Nixon Administration devised the term "the War on Drugs" and passed legislation, such as the Controlled Substances Act (CSA), to penalize drug possession and trafficking.[79] The CSA categorized drugs into five "schedules" based on their safety, medical purpose, and potential for abuse.[80] A drug's schedule also determines the level of punishment appropriate for drug possession.[81] Schedule I drugs have a heightened capacity for misuse, are unsafe to use even under medical supervision, and have no recognized treatment purpose.[82] Schedule I drugs include heroin, marijuana, and ecstasy.[83] Though punishment for possession depends on the specific drug and amount possessed, those in possession of Schedule I drugs generally suffer harsher punishment than those possessing other scheduled drugs.[84]

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[78] Kreit, *supra* note 6, at 416. The government premised the War on Drugs on the notion that drug usage and violent crime were connected. Longnecker, *supra* note 3, at 1148 (citing Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 233 (2015)). The Controlled Substances Act (CSA) is a devastating result of the drug war, as it created severe mandatory minimum sentences for drug crimes and led to the mass incarceration of Black and Latino men for petty drug offenses. Alexander, *The War on Drugs*, *supra* note 4, at 75, 76. The CSA expanded the scope of drug crimes punishable by incarceration and now contains the Crack House Statute. Longnecker, *supra* note 3, at 1148 (citing Ti'a Latice Hazel, *Who Can Handle Marijuana the Best? The States' Failure to Regulate Marijuana and the Federal Government's Sole Power to Regulate Marijuana*, 11 CHARLESTON L. REV. 495, 498 (2017)). The mandatory minimum sentences for drug offenses in the United States exceed those for murder in other nations. Alexander, *The War on Drugs*, *supra* note 4, at 76. Further, the War on Drugs resulted in a tenfold increase in drug sentences. Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control,"* PBS FRONTLINE (Apr. 29, 2014), https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/ [https://perma.cc/PAR8-FTH6]. For instance, the number of people incarcerated for drug crimes alone as of 2014, exceeded the total prison population in 1980. *Id.* Additionally, despite similar usage rates across races, men of color are more often charged with drug possession, causing Black men in particular to be heavily overrepresented in jails and prisons. Alexander, *The War on Drugs*, *supra* note 4, at 76. Other notable outgrowths of the drug war are laws excluding people with criminal histories from public housing and barring those convicted of drug offenses access to food stamps. Childress, *supra*.

[79] Controlled Substances Act (CSA), Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–904); Childress, *supra* note 78.

[80] *CSA Schedules*, DRUGS.COM, https://www.drugs.com/csa-schedule.html [https://perma.cc/H23G-ZK47] (June 17, 2020) (medically reviewed by Leigh Ann Anderson). The CSA regulates the possession, manufacturing, importation, and distribution of drugs. Jeffrey Juergens, *Controlled Substances Act & Scheduling*, ADDICTION CTR., https://www.addictioncenter.com/addiction/controlled-substances-act-and-scheduling/ [https://perma.cc/A58W-GENY] (Oct. 27, 2021). *See generally* Controlled Substances Act (CSA), 84 Stat. 1236 (setting mandatory minimums for drug-related offenses and "scheduling" various illegaul drugs).

[81] Juergens, *supra* note 80.

[82] *CSA Schedules*, *supra* note 80.

[83] *Id.* Cocaine is a Schedule II drug. *Id.* Schedule II drugs have a heightened capacity for misuse and are unsafe but have an accepted medical use, such as sedation. *Id.*; Juergens, *supra* note 80.

[84] *See* 21 U.S.C. § 841 (listing the punishment for each scheduled drug per unit of measurement).

Some historians say the drug war existed only in name until the Reagan Administration, during which Congress passed mandatory minimum sentences and began to prosecute small-scale drug crimes.[85] Local, state, and federal policies instituted during the Reagan era resulted in the incarceration of hundreds of thousands of people.[86] Though it failed to diminish drug use, the drug war succeeded in imbedding the stigma of addiction into the American psyche, thus augmenting the dangers of drug use.[87] For example, because drug use is stigmatized in the United States, fear of rejection and criminal sanctions prevent users from seeking treatment.[88]

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[85] Alexander, *The War on Drugs*, *supra* note 4, at 76; Childress, *supra* note 78.

[86] Alexander, *The War on Drugs*, *supra* note 4, at 76; Childress, *supra* note 78; *see* Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, Mass Incarceration: The Whole Pie 2020 (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/2XJM-K3ZC] (reporting the number of people in prison and jail for drug offenses).

[87] Longnecker, *supra* note 3, at 1149 (first citing Baradaran, *supra* note 78, at 232; and then citing Scott Burris, Evan D. Anderson, Leo Beletsky & Corey S. Davis, *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 ST. LOUIS U. L.J. 1089, 1098 (2009)). Other artifacts of the drug war include First Lady Nancy Reagan's "Just Say No" campaign, created in 1982, and its corresponding program, Drug Abuse Resistance Education (DARE), created in 1983. Scott O. Lilienfeld & Hal Arkowitz, *Why "Just Say No" Doesn't Work*, SCI. AM. (Jan. 1, 2014), https://www.scientificamerican.com/article/why-just-say-no-doesnt-work/ [https://perma.cc/4HDF-E96C]. The focus on abstinence and self-control to prevent drug abuse became the gold standard for educating children about drugs. *Id.* The program further promoted that drug use was an individual failure rather than a public health crisis affecting millions. *Id.* Thereafter, police officers created the DARE program, which involved officers speaking at schools to educate students about the risks of drug use. *Id.* The months-long program focused on hard drugs and did not address alcohol or nicotine use. *Id.* In the end, DARE failed to reduce teenage substance use and, in some cases, increased it. *Id.* Research shows that the most successful drug prevention curricula include long-term communication between facilitators and students. *Id.* Thus, DARE was ineffective because of its short duration, little interaction between peers, and lack of opportunity to practice saying no. *Id.* Other critics argue that DARE failed because police officers, rather than addiction experts, taught the course. *Why the DARE Program Failed*, LANDMARK RECOVERY (May 18, 2020), https://landmarkrecovery.com/why-the-dare-program-failed/ [https://perma.cc/WGN3-VKK6]. In response to reports of the program's inefficacy, DARE lost funding in 1988 and "keepin' it REAL" (kiR) supplanted it. *Id.* Incorporating the feedback DARE received, kiR involved more substantial interaction between facilitators and students and opportunities to rehearse saying no to other adolescents, yielding positive effects. *Id.*

Today, a gradual shift against drug enforcement seems to be on the horizon, as Members of Congress from both parties have called for a new approach. Nicholas Kristof, Opinion, *Republicans and Democrats Agree: End the War on Drugs*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/07/opinion/sunday/election-marijuana-legalization.html [https://perma.cc/4XB2-4US8]. In 2018, Congress introduced legislation recognizing that the drug war failed to reduce drug use. Sofia Martinez, Opinion, *Maybe You Shouldn't Say 'Crackhead' So Much*, WASH. SQUARE NEWS (Oct. 9, 2019), https://nyunews.com/opinion/2019/10/10/maybe-you-shouldnt-say-crackhead-so-much/ [https://perma.cc/FZG3-VPEH]. Meanwhile, more and more states are legalizing marijuana, and, notably, Oregon became the first state to decriminalize all drugs, including hard drugs like heroin and cocaine. Kristof, *supra*.

[88] Longnecker, *supra* note 3, at 1154. Stigma can drive drug use into concealed locations that are ill-suited for sterile injection, thus increasing the risk of infection and lethal overdose. *Id.*

The Reagan era of the War on Drugs also produced numerous policies that focused on punishing crack cocaine users, who were predominately Black.[89] In 1986, Congress passed sentencing guidelines that punished crack possession one hundred times more severely than cocaine possession, which was more typical in wealthy communities.[90] Media campaigns depicting crack users as addicts who would commit any crime to obtain more crack contributed to this disparity.[91] The medical community and the media alike induced panic about a generation of mentally impaired "crack babies" who would inevitably grow up to be criminals.[92] Crack was commonly and incorrectly per-

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[89] *See* 21 U.S.C. § 856 (making it illegal to operate a crack house or any building for the purpose of drug use); *id.* § 801 (setting a higher sentence for crack cocaine than powder cocaine possession); Dahleen Glanton, *Race, the Crack Epidemic and the Effect on Today's Opioid Crisis*, CHI. TRIB. (Aug. 21, 2017), https://www.chicagotribune.com/columns/dahleen-glanton/ct-opioid-epidemic-dahleen-glanton-met-20170815-column.html [https://perma.cc/9JLA-9RN4] (discussing how law enforcement efforts against crack use disproportionately impact Black communities, in which crack use is more prevalent than in white communities).

[90] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 (codified as amended at 21 U.S.C. § 841(b)(1)) (amending section 401(b)(1) of the CSA); Cohen, *supra* note 48. The Anti-Drug Abuse Act's incongruent punishment of crack unduly affected Black people. Glanton, *supra* note 89. The director of the Sentencing Project, an organization that combats racial disparities in the penal system, noted that when the public views people of color as the main drug users, then the government's response has been to vilify and penalize drug users. Cohen, *supra* note 48. Then-Senator Joe Biden wrote the Anti-Drug Abuse Act, which produced the original disparities in mandatory sentencing minimums for crack and powder cocaine-related convictions. Zachary Siegel, *How Joe Biden's Policies Made the Opioid Crisis Harder to Treat*, POLITICO (May 23, 2019), https://www.politico.com/magazine/story/2019/05/23/joe-biden-2020-drug-war-policies-opioid-crisis-226933/ [https://perma.cc/4URU-G9F9]. Senator Biden later regretted the sentencing disparities, and, in 2007, he introduced a bill to remove the sentencing gap, although Congress never voted on it. *Id.* As Vice President, Biden worked behind the scenes with law enforcement to garner support for the Fair Sentencing Act of 2010, which diminished the draconian punishments for crack possession. *Id.* Although the Fair Sentencing Act reduced the sentencing gap, crack users are still punished eighteen more times harshly than cocaine users, perpetuating racial inequality. Cohen, *supra* note 48.

[91] Autumn Gilbert, *The "Crack Head": How Systemic Inequality Informs Popular Discourse*, MEDIUM (May 14, 2015), https://medium.com/@autumngilbert/the-crack-head-how-systematic-inequality-informs-popular-discourse-8e2f5d9eb3e0 [https://perma.cc/NVD8-3MBT]. The media pilloried crack use more intensely than any other drug. *Id.* It illustrated crack users as criminals who needed to steal to purchase their next fix, which connected crack to impoverishment. *Id.*

[92] Vann R. Newkirk II, *What the 'Crack Baby' Panic Reveals About the Opioid Epidemic*, THE ATLANTIC (July 16, 2017), https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763/ [https://perma.cc/3F73-KPSF]. The thought of an intellectually disabled "crack baby" harmonized with racist stereotypes about Black Americans and became as much of a racial trope as it was a stereotype of drug users. *See* The Editorial Board, *Slandering the Unborn*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html [https://perma.cc/8VGL-J8QR] [hereinafter Editorial, *Slandering the Unborn*] (discussing how media and politicians used racial stereotypes to villainize crack use). A stinging 1989 Washington Post opinion piece discussed these children as a permanent "bio-underclass" who would be better off dead. *Id.* (citing Charles Krauthammer, Opinion, *Children of Cocaine*, WASH. POST (July 30, 1989), https://www.washingtonpost.com/archive/opinions/1989/07/30/children-of-cocaine/41a8b4db-dee2-4906-a686-a8a5720bf52a/?utm_term=.377dd1ee0a27 [https://perma.cc/CB5Z-SKFX]). Inherent in the notion of the "crack baby" is the neglectful Black mother who intentionally

ceived as more addictive than other drugs.[93] The legislation that codified disproportionate sentencing guidelines also included the Crack House Statute.[94] This statute, officially named Maintaining Drug-Involved Premises, is frequently called the Crack House Statute because Congress enacted it to outlaw the use and existence of crack houses.[95] Congress passed the Crack House Statute, codified at 21 U.S.C. § 856, in response to the heightened concern for the 1980s drug epidemic.[96] The statute prohibits entities from making their space available "for the purpose of" drug-related activity.[97]

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exposed her baby to crack. Newkirk II, *supra*. The national media often ran stories worrying about when "crack babies" would age into students, who would bankrupt school resources with their need for special education, or grow into dangerous crack-addicted criminals. *Id.* Centering the delinquency of "crack babies" in the media and blaming their mothers resulted in laws that further marginalized Black Americans. *Id.* States and local prosecutors interpreted existing child neglect and abuse statutes to allow them to jail mothers of "crack babies" or remove the babies from their mothers' care. *Id.* Instead of encouraging women to abstain from drug use, this tactic often prevents substance-using pregnant women from entering treatment. Editorial, *Slandering the Unborn*, *supra*. Additionally, the fear that a generation of "crack babies" would develop into "super predators" produced laws, like the 1994 Crime Bill, that prosecutors used to disproportionately incarcerate young Black men. Newkirk II, *supra.* Research later discredited the notion that prenatal exposure to crack causes long-term disability. Editorial, *Slandering the Unborn*, *supra*. Instead, other drugs, such as alcohol and nicotine, and issues related to poverty caused the conditions medical professionals observed at the height of "crack baby" panic. *Id.*

[93] Hilary Pollack, *Snack Foods Are Not Crack, and It's Not Cute to Compare Them*, VICE (Dec. 5, 2018), https://www.vice.com/en/article/qvqwwx/snack-foods-are-not-crack-and-its-not-cute-to-compare-them [https://perma.cc/7QN2-CQBD]. This perception is particularly ironic given that practitioners can prescribe cocaine, a Schedule II drug, therapeutically. *See CSA Schedules*, *supra* note 80 (noting that cocaine is a Schedule II drug that has a permitted medical use). Modern research disproves the notion that crack is exceptionally addictive, showing that between 80–90% of people who consume the drug do not become habitual users. Pollack, *supra*.

[94] Anti-Drug Abuse Act § 1841(a) (codified as amended at 21 U.S.C. § 856) (adding section 416 to the CSA).

[95] Kreit, *supra* note 6, at 429. Prosecutors principally apply the Crack House Statute to charge owners who use their property for drug pursuits. *Id.* at 431. Because then-Senator Biden authored the Anti-Drug Abuse Act, he also had a hand in drafting the Crack House Statute, a section of the Act. Siegel, *supra* note 90. President Biden has since downplayed his role in crafting drug control statutes that continue to disproportionately affect Black communities. *See id.* (explaining that President Biden maintains that Congress tasked him with authoring those bills because he was the chairman of the Judiciary Committee at the time). He now acknowledges that treating crack differently than cocaine was a mistake. *Id.* During his 2020 presidential run, campaign spokespeople reminded the public that there was cross-party support for the bills that then-Senator Biden authored due to widespread anxiety about the crack epidemic. *Id.*

[96] *See* 132 CONG. REC. S14270-01 (daily ed. Sept. 30, 1986) (statements of Sens. Chafee, Kennedy, Trible, Biden, Bumpers, Long, Leady, Byrd, Gorton, and Riegle) (containing references by various Members of Congress to the drug epidemic). At the time, annual drug overdose deaths were in the four thousands, compared to the over seventy thousand overdose deaths in 2019. *Compressed Mortality 1979–1998*, *supra* note 5; *Overdose Death Rates*, *supra* note 5, Figure 1. During the congressional debate concerning the Anti-Drug Abuse Act, Democratic Representative Barney Frank of Massachusetts foresaw the possibility that the legislation would fail to decrease drug use, observing that ferocious criminalization of drug use does not necessarily cause less drug use. 132 CONG. REC. H6679-02 (daily ed. Sept. 11, 1986) (statement of Rep. Frank).

[97] 21 U.S.C. § 856(a)(2).

Initially, Congress only intended for § 856 to apply to dens for crack use and quarters where crack cocaine was manufactured.[98] Shifting drug distribution patterns, however, encouraged Congress to revisit the provision in 2003.[99] Particularly, Congress sought to criminalize rave promoters' drug activities, which were previously exempt because raves are temporary events not covered in the 1986 version of the statute.[100] The 2003 amendment expanded the statute's application to all premises where drug activities occur, including temporary sites, such as outdoor venues and special events.[101] Then-Senator Joe Biden, who sponsored the bill, responded to business owners' fear of crippling liability by assuring them that the bill focused on "predatory" conduct.[102] Senator Biden explained that the bill only targeted devious promoters who organized events "for the purpose of" drug activity.[103]

Much litigation involving the Crack House Statute turns on the word "purpose."[104] There are two questions: (1) whose purpose is at issue; and (2)

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[98] *See* 132 CONG. REC. H9455-05 (daily ed. Oct. 8, 1986) (statement of Sen. Hughes) (explaining the 1986 rationale for § 856 as targeting places where people used and made crack).

[99] *See* 146 CONG. REC. H8206-06 (daily ed. Sept. 27, 2000) (explaining that the distribution of ecstasy at commercial dance parties like raves required Congress to expand the scope of § 856).

[100] *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1841(a), 100 Stat. 3207, 3207-52 (codified as amended at 21 U.S.C. § 856) (adding section 416 to the CSA) (excluding temporary places, such as events, from the statute's reach). Congress expanded the statute to cover temporary premises, including unique events, like raves. Kreit, *supra* note 6, at 430. The purpose of the amendment, within what was originally titled the Reducing Americans' Vulnerability to Ecstasy (RAVE) Act, was to create a mode of liability for the promoters of raves, which are electronic music dance parties where contraband such as ecstasy was frequently distributed and consumed. Longnecker, *supra* note 3, at 1168–69 (citing MARK EDDY, CONG. RSCH. SERV., IB10113, WAR ON DRUGS: LEGISLATION IN THE 108TH CONGRESS AND RELATED DEVELOPMENTS 9 (2004), https://www.everycrsreport.com/files/20041003_IB10113_f4eaca992365ffd47c407e5391ece1ee7712229b.pdf [https://perma.cc/9Q8N-8KDJ]).

[101] PROTECT Act, Pub. L. No. 108-21, § 608(b)–(c), 117 Stat. 650, 691 (2003) (codified at 21 U.S.C. § 856) (amending section 416 of the CSA).

[102] 149 CONG. REC. 9383 (2003) (statement of Sen. Biden). Business owners worried that the statute created liability for all drug activity on their properties. United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 601 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021). Senator Biden clarified that they would only be liable if they profited from or authorized the drug activity. 149 CONG. REC. 9384 (statement of Sen. Biden). Because Senator Biden sponsored the bill and served on the Conference Committee, his comments are a testament to the text's meaning. *Safehouse I*, 408 F. Supp. 3d at 597 (citing VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 69 (2016)).

[103] 149 CONG. REC. 9384 (statement of Sen. Biden). Senator Biden provided examples of scenarios that would not generate club owner liability, such as concert attendees bringing drugs without the owner's knowledge. *Id.* He also described a situation that would create liability—promoters receiving kickbacks from drug sales. *Id.*

[104] *See* United States v. Safehouse (*Safehouse II*), 985 F.3d 225, 232–38 (3d Cir.) (determining to whom "purpose" in § 856(a)(2) refers), *cert. denied*, 142 S. Ct. 345 (2021); United States v. Tebeau, 713 F.3d 955, 960–61 (8th Cir. 2013) (same); United States v. Wilson, 503 F.3d 195, 197–98 (2d Cir. 2007) (same); United States v. Ramsey, 406 F.3d 426, 431 (7th Cir. 2005) (same); United States v. Banks, 987 F.2d 463, 467 (7th Cir. 1993) (same); United States v. Tamez, 941 F.2d 770, 774 (9th Cir. 1991) (same); United States v. Chen, 913 F.2d 183, 190 (5th Cir. 1990) (same); *cf.* United States v.

what is the degree of purpose required to violate the statute.[105] The purpose could either belong to the operator of the drug-involved premises or those using drugs there.[106] The degree of purpose could either be incidental, significant, or sole, depending on the interpretation.[107] Part II comprehensively addresses these questions of statutory interpretation.[108]

D. The Federalist Approach to Drug Control

Though the federal government outlaws all drugs other than alcohol and tobacco, states are free to decide whether to punish drug activity.[109] The United States' federalist system enables states to pursue innovative policies that address their constituents' unique needs.[110] State-level reforms act as policy ex-

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Shetler, 665 F.3d 1150, 1161–62 (9th Cir. 2011) (determining the level of purpose § 856(a) requires); United States v. Russell, 595 F.3d 633, 642–43 (6th Cir. 2010) (same); United States v. Verners, 53 F.3d 291, 296 (10th Cir. 1995) (same); United States v. Lancaster, 968 F.2d 1250, 1253 (D.C. Cir. 1992) (same). An interesting wrinkle in the case law is the dearth of cases convicting a property manager for allowing drug use on his premises in the absence of drug manufacturing or distribution. *See* Richard Belfiore, Annotation, *Validity, Construction, and Application of Federal "Crack-House Statute" Criminalizing Maintaining Place for Purpose of Making, Distributing, or Using Controlled Drugs (21 U.S.C.A. § 856)*, 116 A.L.R. FED. 345 § 7[a] (1993) (collecting cases that apply § 856(a) and finding no cases concerning drug use in the absence of manufacturing or distribution). Further evidencing this trend, Democratic Senator Patrick Leahy of Vermont noted that, at the time of the 2003 amendment, the government had solely prosecuted property owners who were principally engaged in drug-related crime. 149 CONG. REC. S5137-01 (daily ed. Apr. 10, 2003) (statement of Sen. Leahy).

[105] *See Safehouse II*, 985 F.3d at 232–38 (determining who "purpose" modified and the level of purpose the statute requires); *Safehouse I*, 408 F. Supp. 3d at 595–614 (same).

[106] *Safehouse II*, 985 F.3d at 232–236; *Safehouse I*, 408 F. Supp. 3d at 595–605. This statute presents legal issues for SIFs. *See Safehouse II*, 985 F.3d at 232 (holding that a SIF could not open because it violated the Crack House Statute). To gain community acceptance, American SIFs must win a battle against decades of messaging that the best response to addiction is criminal enforcement. *See* Kreit, *supra* note 6, at 416 (noting that SIFs are irreconcilable with the drug war); *cf.* Knopf, *supra* note 6 (reporting that in France, police who encounter people publicly injecting routinely take them to SIFs instead of charging them). This Note uses "operator" interchangeably with "property operator," "manager," "property manager," "owner," and "actor."

[107] *Safehouse II*, 985 F.3d at 236–38; *Safehouse I*, 408 F. Supp. 3d at 605–14. For an explanation of incidental, significant, and sole purposes, see *infra* notes 233–236 and accompanying text.

[108] *See infra* notes 133–240 and accompanying text.

[109] *See* Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 103 (2015) (explaining how the federalist system allows for a state to decriminalize an activity that the federal government proscribes but that the state cannot protect its constituents from federal prosecution).

[110] *See* Jonathan H. Adler, *Introduction: Our Federalism on Drugs*, *in* MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE 1, 6 (Jonathan H. Adler ed., 2020) (quoting Justice Louis Brandeis on the proposition that federalism allows for local governments to be "laboratories of democracy" by implementing pioneering policies that, if they fail, do not affect the rest of the country (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Federalism is an institutional arrangement in which power is distributed between the federal government and the state governments. Chemerinsky et al., *supra* note 109, at 103. State innovation enhances democratic rule by

periments for the rest of the country and produce vital data about the successes, pitfalls, and other consequences of different initiatives.[111]

Federalism has allowed some states to punish drug possession more harshly than the federal government and others to legalize drugs even in the face of federal prohibition.[112] Because of the anti-commandeering doctrine, the CSA does not require states to enforce federal drug law with their own police powers.[113] Derived from the Tenth Amendment, the anti-commandeering doctrine asserts that the federal government cannot compel states to carry out federal law.[114] Therefore, the federal government is unable to compel state officers to enforce its drug ban.[115] The anti-commandeering doctrine does not, however, protect state constituents from federal prosecution.[116]

The federal government typically does not investigate or prosecute minor drug crimes and instead concentrates its resources on significant drug ventures, leaving states to deal with low-level drug users.[117] President Barack Obama's administration clarified this approach in the Cole Memo, which stated that federal law enforcement did not intend to pursue drug possession or sales con-

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providing government "closer to the people." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 127 (5th ed. 2017).

[111] Adler, *supra* note 110, at 6.

[112] Chemerinsky et al., *supra* note 109, at 103. Though the states often cooperate in enforcing national drug laws, the federal government may not force such cooperation. Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 11 (2013).

[113] Grabarsky, *supra* note 112, at 11; Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the federal government could not force state police officers to enforce federal law). *See generally* U.S. CONST. amend. X (reserving powers not expressly bestowed on the federal government to the states). Though the Supremacy Clause states that federal law trumps state law when they conflict, the anti-commandeering doctrine prohibits the national government from forcing states to expend resources enforcing federal law. *Printz*, 521 U.S. at 935; *see* U.S. CONST. art. VI, cl. 2 (stating that federal law prevails against contradictory state law).

[114] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018) (relying on the anti-commandeering principle to invalidate a federal law that prohibited gambling schemes and forced New Jersey officers to enforce the law); *Printz*, 521 U.S. at 902, 935 (invalidating a federal statute that required state law enforcement to conduct background checks on people wishing to purchase guns); New York v. United States, 505 U.S. 144, 188 (1992) (holding that the federal government cannot coerce the states to discard waste); *see* U.S. CONST. amend. X (creating the basis for the anti-commandeering doctrine). The Tenth Amendment is the codification of the Framers' intent to limit the federal government's powers by enumerating them and to reserve the unenumerated powers for the states. Adler, *supra* note 110.

[115] *See supra* notes 113–114 and accompanying text (explaining the consequences of the anti-commandeering doctrine). The anticommandeering doctrine also encourages political accountability and precludes the federal government from transferring the financial burden of regulation to the states. *Murphy*, 138 S. Ct. at 1467.

[116] Jonathan H. Adler, Opinion, *Will Marijuana Make Federalism Go Up in Smoke?*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/14/will-marijuana-make-federalism-go-up-in-smoke/ [https://perma.cc/WRL4-P4G8]; *see* U.S. CONST. art. VI, cl. 2 (declaring federal law as supreme against conflicting state law).

[117] Adler, *supra* note 116.

forming to state law.[118] Though Attorney General Jeff Sessions revoked the Cole Memo in 2018, the withdrawal did not affect the government's allocation of resources.[119] Federal law enforcement carries out only one percent of marijuana arrests per year, illustrating the federal government's disinterest in prosecuting petty drug crime.[120]

Despite this pattern of practice, it is currently unclear if the government would take a hands-off approach to SIFs operating in a state that decriminalized heroin or otherwise allows for SIFs.[121] On the one hand, prosecuting every SIF may not be worth the federal government's time.[122] Evolving public perception of drug use and the opioid epidemic may also dissuade the government from prosecuting SIFs.[123] On the other hand, the government may have incentives to target SIFs, rather than the opioid users therein, because en-

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[118] *Id.* Deputy Attorney General James Cole wrote the Cole Memo, indicating the Department of Justice's drug policy under the Obama Administration. *Id.* For a few years, an appropriations rider precluded the Department of Justice from spending federal funds to charge marijuana users in the states that have decriminalized the drug. Ilya Shapiro, *This Is Your Constitution on Drugs*, NAT'L AFFS., Summer 2020, at 115, 116. Because appropriations riders must be renewed every year, Congress sought to extend the protection with an amendment to the First Step Act. Ilya Shapiro & Matthew Larosiere, *High on Federalism: Marijuana's Challenge to Federal-State Relations*, 11 KY. J. EQUINE AGRIC. & NAT. RES. L. 341, 349 (2018–2019). The amendment failed, and currently the federal government may prosecute people who use drugs pursuant to state laws. *Id.*

[119] Shapiro & Larosiere, *supra* note 118, at 356 (citing Memorandum from Jefferson B. Sessions, III, Att'y Gen., Dep't. of Just. (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download [https://perma.cc/CU3S-MN83]); Adler, *supra* note 110, at 4 (quoting Jeff Sessions's clarification that the withdrawal did not mean that the federal government would start prosecuting minor marijuana infractions).

[120] Shapiro, *supra* note 118, at 116. Law enforcement arrests approximately eight hundred thousand people for marijuana charges per year. *Id.*

[121] *See* United States v. Safehouse (*Safehouse II*), 985 F.3d 225, 232 (3d Cir.) (stemming from the government prosecuting a SIF), *cert. denied*, 142 S. Ct. 345 (2021); United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 585 (E.D. Pa. 2019) (same), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021). In the *Safehouse* cases, the government sued a SIF attempting to open absent a local law allowing for hard drug use. *Safehouse I*, 408 F. Supp. 3d at 593. Such prosecutorial behavior indicates that the government's approach to SIFs may not change in light of state decriminalization. *See Safehouse II*, 985 F.3d at 232 (finding SIFs to be illegal and not indicating that federalism concerns would alter the analysis). Different administrations could, however, approach drug enforcement differently. *See* Ian Lopez & Valerie Bauman, *Biden's Opioid Focus Will Be on Treatment, Acting Drug Czar Says*, BLOOMBERG L. (Feb. 4, 2021), https://news.bloomberglaw.com/health-law-and-business/bidens-opioid-focus-will-be-on-treatment-acting-drug-czar-says [https://perma.cc/QH4C-DTMY] (noting that the Biden Administration plans for sweeping drug reform, including harm reduction measures).

[122] *See* Shapiro & Larosiere, *supra* note 118, at 356 (explaining that Jeff Sessions'-withdrawal of the Cole Memo was mostly symbolic and did not indicate the federal government's intent to begin charging minor drug offenses); Adler, *supra* note 116 (reporting that the federal government does not concentrate its drug control priorities on people who use marijuana pursuant to state law).

[123] *See Marijuana*, CTR. FOR THE STUDY OF FEDERALISM, https://encyclopedia.federalism.org/index.php/Marijuana [https://perma.cc/P6HG-6EED] (Mar. 2018) (opining that the federal government is hesitant to prosecute marijuana use when decriminalization efforts have become increasingly popular, suggesting the government could adopt the same approach for SIFs).

forcement would not expend as many resources.[124] Fewer SIFs are likely to open if the government prosecutes them to stretch the impact of the resources expended.[125] Furthermore, no state had decriminalized hard drugs at the time of the Cole Memo, so it is unclear whether the federal government will continue to forgo prosecution of low level drug offenses that involve hard drugs like heroin.[126]

Federalism was not at issue in the *Safehouse* cases, which concerned a SIF attempting to open in the absence of city or state laws decriminalizing heroin.[127] Given the movement toward hard drug decriminalization, however, the federalist paradigm will play a role in SIF implementation.[128] In a referendum concurrent with the 2020 presidential election, Oregon decriminalized heroin and other hard drugs.[129] In February 2021, Massachusetts state representatives introduced similar legislation.[130] Though neither Oregon's law nor Massachusetts's proposed bill clears a path to SIF legalization, states seem to be slowly moving in that direction.[131] Therefore, whether and how federal laws, particu-

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[124] *See Safehouse II*, 985 F.3d at 232 (ruling on the federal government's prosecution of a SIF); *Safehouse I*, 408 F. Supp. 3d at 585 (same).

[125] *See Supervised Injection Sites Are Coming to the United States: Here's What You Should Know*, USC DEP'T OF NURSING (May 2, 2019), https://nursing.usc.edu/blog/supervised-injection-sites/ [https://perma.cc/RZB2-AREX] (reporting that federal government warnings stifled cities' plans to implement SIFs).

[126] *See* Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Just. 3 (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/WPS3-WPLF] (underlining that prosecution of low-level drug offenses, such as possession of drugs pursuant to state law, was not among the government's priorities); Kristof, *supra* note 87 (reporting on Oregon's decriminalization of narcotics in 2020).

[127] *Safehouse I*, 408 F. Supp. 3d at 593; *see Safehouse II*, 985 F.3d at 232 (dealing with the same facts as *Safehouse I* but not addressing federalism).

[128] *See infra* notes 129–131 and accompanying text (discussing recent state trends toward decriminalization of hard drugs).

[129] Kristof, *supra* note 87.

[130] Bos. Herald Ed. Staff, Editorial, *Massachusetts Lawmakers Raise White Flag in War on Drugs*, BOS. HERALD, https://www.bostonherald.com/2021/02/23/lawmakers-raise-white-flag-in-war-on-drugs/ [https://perma.cc/QTL6-RU4P] (Feb. 23, 2021, 8:24 AM).

[131] *See* Associated Press, *Oregon Measure Decriminalizing Possession of Drugs Takes Effect, in a First in U.S.*, NBC NEWS (Feb. 2, 2021), https://www.nbcnews.com/news/us-news/oregon-measure-decriminalizing-possession-drugs-takes-effect-first-u-s-n1256436 [https://perma.cc/LAL4-N5YN] (reporting that Oregon can fine people $100 if found possessing the decriminalized drugs); Bos. Herald Ed. Staff, *supra* note 130 (reporting that a $50 civil fine would still apply to hard drug possession in Massachusetts); Kreit, *supra* note 6, at 414 (noting that Seattle, Philadelphia, San Francisco, New York City, and Denver have considered opening SIFs). The legalization of drugs occurs when governments eliminate all legal restrictions governing them. Dragan M. Svrakic et al., *Legalization, Decriminalization & Medicinal Use of Cannabis: A Scientific and Public Health Perspective*, 109 MO. MED. 90, 90 (2012). If legalized, adults could buy drugs "at will." *Id.* Decriminalization, on the other hand, involves eliminating criminal penalties for drug possession. *Id.* Under the decriminalization model, drugs would continue to be illegal, but the government would not charge for possession under some stipulated amount. *Id.*

larly the Crack House Statute, apply to these facilities is highly relevant to the viability of SIF legalization.[132]

II. The Judiciary Considers the Legality of Supervised Injection Facilities

In 2019, in *United States v. Safehouse* (*Safehouse I*), the U.S. District Court for the Eastern District of Pennsylvania held that the Crack House Statute permits SIFs.[133] Two years later, in 2021, in *United States v. Safehouse* (*Safehouse II*), the U.S. Court of Appeals for the Third Circuit overturned the district court and held that SIFs violate the Crack House Statute.[134] Section A of this Part discusses the district court's construction of the Crack House Statute.[135] Section B then explains the Third Circuit's interpretation that spurred the court's conclusion that SIFs violate the statute.[136]

A. Safehouse I: *Supervised Injection Facilities Do Not Violate the Crack House Statute*

In 2019, a SIF called Safehouse announced plans to open in South Philadelphia, a neighborhood plagued by drug activity.[137] Responding to resident outrage, a city councilman proposed to modify the area's industrial-commercial zoning classification to single-family residential to prevent Safehouse from opening.[138] After corresponding with the leaders of Safehouse, the U.S. gov-

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[132] *See* Chemerinsky et al., *supra* note 109, at 106 (discussing how both state and federal laws apply to individual actors); *see also Safehouse II*, 985 F.3d at 232 (determining whether SIFs violate the Crack House Statute); *Safehouse I*, 408 F. Supp. 3d at 618 (same).

[133] United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 618 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021).

[134] United States v. Safehouse (*Safehouse II*), 985 F.3d 225, 232 (3d Cir.) (holding that SIFs do not violate the Crack House Statute), *cert. denied*, 142 S. Ct. 345 (2021); *Safehouse I*, 408 F. Supp. 3d at 618.

[135] *See infra* notes 137–202 and accompanying text; *Safehouse I*, 408 F. Supp. 3d at 591–617 (analyzing the Crack House Statute and determining that SIFs do not violate it).

[136] *See infra* notes 203–240 and accompanying text; *Safehouse II*, 985 F.3d at 232–53 (interpreting the Crack House Statute and concluding that SIFs violate it).

[137] Jake Blumgart, *Kensington Neighbors Dismayed by Ruling on Supervised Injection Site*, Phila. Trib. (Oct. 3, 2019), https://www.phillytrib.com/news/local_news/kensington-neighbors-dismayed-by-ruling-on-supervised-injection-site/article_a9095d35-d5c8-53ee-97a9-b7791d3cb994.html [https://perma.cc/J272-AHK5].

[138] Blumgart, *supra* note 137. After Safehouse announced plans to open in Kensington, a South Philadelphia neighborhood, residents voiced their condemnation of the local SIF at civic meetings. Michaela Winberg, *Safehouse Drops South Philly Plans, Looks to Kensington After Judge Suspends Launch*, Billy Penn (June 26, 2020), https://billypenn.com/2020/06/26/safehouse-drops-south-philly-plans-looks-to-kensington-after-judge-suspends-launch/ [https://perma.cc/C6YV-BHJV]. After City Councilman Mark Squilla attempted to rezone the area to create an obstacle for Safehouse but before the district court ruled for Safehouse, the building owner abandoned the deal. *Id.*; Blumgart, *supra* note 137.

ernment then brought an action for declaratory judgment against Safehouse and its president to prevent it from opening in Philadelphia.[139]

The District Court for the Eastern District of Pennsylvania considered the matter in *Safehouse I* and held that SIFs do not violate the Crack House Statute.[140] There are two main areas of ambiguity in this provision: (1) which actor's purpose is at issue; and (2) the level of purpose the statute requires.[141] Subsection 1 of this Section addresses whose purpose the statute references: the site operator's or the drug user's.[142] Subsection 2 discusses the level of purpose the statute requires: any, incidental, significant, or sole.[143]

A similar phenomenon occurred in McLean, Virginia in 2019. *See* Peggy Fox, *Anger Erupts in McLean over Youth Treatment Center*, WUSA, https://www.wusa9.com/article/news/anger-erupts-in-mclean-over-youth-treatment-center/65-5a598bb8-c0dc-4a17-9092-141286ffbcb6 [https://perma.cc/4MQ7-U4VT] (Apr. 25, 2019, 11:36 PM) (reporting local backlash to the proposed opening of a residential treatment facility and the subsequent zoning war that attempted to re-classify the facilities from "group homes for people with disabilities" to another category to kick them out of residentially zoned neighborhoods).

[139] *Safehouse I*, 408 F. Supp. 3d at 585. Safehouse's mission is to prevent the spread of infection, provide medical care as needed, and promote substance use treatment. *Id.* at 586. Safehouse offers MAT, the paragon of substance use treatment. *Id.*; *see* Cara Angelotta, Carol J. Weiss, John W. Angelotta & Richard A. Friedman, *A Moral or Medical Problem? The Relationship Between Legal Penalties and Treatment Practices for Opioid Use Disorders in Pregnant Women*, 26 WOMEN'S HEALTH ISSUES 595, 595 (2016) (describing MAT as the gold standard treatment for OUD); *supra* notes 51–61 and accompanying text (explaining MAT treatment in more detail). Safehouse's model is similar to other SIFs: users start in the injection or consumption room, then move to the observation room to receive assistance and supplies, including clean injection equipment and medicine such as Naloxone, under the constant supervision of medical professionals. *Safehouse I*, 408 F. Supp. 3d at 586; Knopf, *supra* note 6 (describing SIFs abroad). Additionally, peer counselors, recovery specialists, social workers, and case managers offer care and recommend treatment at three points during a user's visit. *Safehouse I*, 408 F. Supp. 3d at 586. Unlike SIFs abroad, where the staff tests the drugs for fentanyl themselves, Safehouse offers fentanyl test strips. *See id.* (explaining Safehouse's business model); Knopf, *supra* note 6 (describing SIFs in France that test for fentanyl before visitors use their drug supply). Test strips prevent staff from handling the drugs themselves, likely as an extra precaution against legal enforcement against site operators. *See* 21 U.S.C. § 856(a) (criminalizing those managing a premises for the purpose of drug use and those directly involved in the drug operation); *Safehouse I*, 408 F. Supp. 3d at 586 (emphasizing how the staff does not handle drugs).

[140] *Safehouse I*, 408 F. Supp. 3d at 618.

[141] *Id.* at 595, 605; *see* 21 U.S.C. § 856(a)(2) (proscribing the "manage[ment] or control [of] any place . . . and knowingly and intentionally . . . mak[ing] available for use . . . the place for the purpose of . . . using a controlled substance").

[142] *See infra* notes 144–184 and accompanying text. The government contended that the statute referred to the drug user's purpose, whereas Safehouse asserted the statute's focus was the property's purpose. *Safehouse I*, 408 F. Supp. 3d at 592.

[143] *See infra* notes 185–202 and accompanying text. The government maintained that purpose referred to any purpose of the operator, user, or property itself. *Safehouse I*, 408 F. Supp. 3d at 605. Safehouse interpreted the statute to require a primary or significant purpose to encourage drug use. *Id.*

1. The District Court Rules That "Purpose" Refers to the Actor

The district court considered whose illicit purpose 21 U.S.C. § 856(a)(2) proscribes.[144] If purpose refers to the drug users, the users must have some level of purpose to use drugs—the exact level of which is discussed in Subsection 2 of this Section.[145] If it refers to the operator, the operator must have some level of purpose to use drugs.[146] Drug users more easily satisfy the requisite purpose of drug activity.[147] Therefore, the government argued that purpose referred to the third-party drug users, whereas Safehouse contended purpose referred to the property itself.[148] The court rejected both arguments and held that "purpose" referred to the site operator.[149]

The court found that the whole-text canon reinforced this interpretation.[150] A whole-text interpretation considers an ambiguous section within the context of the section's associated parts and the statute as a cohesive whole.[151] The provision preceding the one at issue, § 856(a)(1), also requires someone to

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[144] *Safehouse I*, 408 F. Supp. 3d at 595.

[145] *Id.* at 592 (explaining the government's argument); *see infra* notes 185–202.

[146] *See Safehouse I*, 408 F. Supp. 3d at 592 (explaining the court's ultimate holding that the SIF operator must have the purpose of drug use to violate the statue).

[147] *See id.* (reiterating the government's argument that the statute requires third parties, in this case the drug users, to have the proscribed purpose of drug use).

[148] *Id.* The government argued in the alternative that if purpose referred to Safehouse, the entity still violated the statute because it had the purpose of drug use. *Id.* Specifically, the government argued SIFs violate 21 U.S.C. § 865(a)(2) of the Crack House Statute, instead of § 865(a)(1), because SIFs do not operate for the purpose of the entity's drug activity but rather for outside drug users' drug consumption. *Id.* at 595–96; *see* 21 U.S.C. § 865(a)(1) (prohibiting opening a space for the purpose of one's own drug operation); *id.* § 856(a)(2) (prohibiting maintaining a space for the purpose of drug activity generally). Safehouse's defense included that because the CSA "authorizes" the implementation of SIFs, the Crack House Statute does not outlaw them. *Safehouse I*, 408 F. Supp. 3d at 592. The court rebuffed the notion that Congress's failure to criminalize an activity established its approval, reasoning that the statute does not "authorize" SIFs because Congress did not consider them when passing the Act. *Id.* at 593. Though federal law does not prohibit an activity just because Congress did not expressly permit it, the court reasoned that SIFs are not authorized by § 856. *Id.*

Safehouse also argued that the statute cannot apply to SIFs because its provisions fail to define "unlawfully . . . using." *Id.* at 592 (quoting 21 U.S.C. § 856(a)(2)). The court rejected this claim. *Id.* at 594. "[U]nlawfully . . . using" means using a drug that is illegal to possess because the CSA penalizes drug possession as a "necessary predicate to use" and because someone cannot legally use a drug they cannot legally possess. *Id.* For example, where the drug in question is clearly illegal—like heroin—consuming the substance is clearly "unlawfully . . . using." *Id.* at 595. Safehouse finally counterclaimed that the Commerce Clause does not permit Congress to regulate SIFs through the Crack House Statute, though the court did not address the issue. *Id.* at 587.

[149] *Safehouse I*, 408 F. Supp. 3d at 595.

[150] *Id.*

[151] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012).

act "for the purpose of" substance use.[152] Case law unanimously holds that § 856(a)(1) refers to the property manager.[153]

"[P]urpose" in § 856(a)(2), which has the same structure as § 856(a)(1), would logically also refer to the property manager.[154] Responding to the government's contention that this interpretation makes the provisions duplicative, the court explained the difference between the two subsections.[155] Section 856(a)(1) concerns defendants who use a premises to conduct drug activities, whereas § 856(a)(2) applies to those who oversee the premises and then open it to third parties who conduct drug activities.[156]

In addition to the whole-text canon, the court utilized the surplusage canon, which supported the notion that "purpose" modified the actor.[157] The surplusage canon stipulates that each term in a statute has meaning.[158] Using this lens, the court concluded that § 856(a)(2)'s use of "intentionally" in addition to "knowingly" means that the provision requires the manager to intend for drug activity to occur.[159] Federal circuit courts and the government alike agree that the combination of "knowingly" and "for the purpose of" in § 856(a)(1) re-

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[152] *Safehouse I*, 408 F. Supp. 3d at 595.

[153] *Id.* (citing to authority supporting the notion that courts agree that § 856(a)(1) refers to the person opening the property to drug activity).

[154] 21 U.S.C. § 856(a); *Safehouse I*, 408 F. Supp. 3d at 595. Both sections have matching subjects, similar mens rea, and the same "for the purpose of" drug activity requirement. *Safehouse I*, 408 F. Supp. 3d at 595. Mens rea is the mental state defendants must have had, or the prosecution must prove they had, during the commission of the crime to satisfy the criminal statute. *Mens Rea*, BLACK'S LAW DICTIONARY, *supra* note 12.

[155] *See Safehouse I*, 408 F. Supp. 3d at 596; *infra* note 156 and accompanying text (comparing the language of the two provisions).

[156] *Id. Compare* 21 U.S.C. § 856(a)(1) (making it unlawful to "open, lease, rent, use, or maintain any place . . . for the purpose of" drug activity), *with id.* § 856(a)(2) (making it unlawful to "manage or control any place . . . and make [it] available for use . . . for the purpose of" drug activity).

[157] *Safehouse I*, 408 F. Supp. 3d at 595, 600 (citing SCALIA & GARNER, *supra* note 151, at 174–79). Additionally, the court considered the grammar and presumption of consistent usage canons. *Id.* at 597. The grammar canon requires the judicial interpreter to respect recognized grammatical standards. SCALIA & GARNER, *supra* note 151, at 140. Using this canon, the court found that "purpose" modified the manager's actions that would trigger liability. *Safehouse I*, 408 F. Supp. 3d at 597. The presumption of consistent usage canon requires the attribution of a phrase's clear meaning in one section to the ambiguous meaning of the same phrase in another related section. SCALIA & GARNER, *supra* note 151, at 170. The court observed that the overall structure and history of the statute compelled this canon's application. *See* 21 U.S.C. § 856(a) (containing parallel language and structure among subsections); *Safehouse I*, 408 F. Supp. 3d at 597 (noting that § 856(a)(1) and § 856(a)(2) are in "the same subsection, were enacted together, and use the phrase in the same way," and that the government's proffered interpretation would read the provisions erratically).

[158] *Safehouse I*, 408 F. Supp. 3d at 600; SCALIA & GARNER, *supra* note 151, at 174 (defining the surplusage canon).

[159] 21 U.S.C. § 856(a)(2) ("[I]t shall be unlawful to . . . manage or control any place . . . and knowingly and intentionally . . . make available for use . . . the place for the purpose of unlawfully . . . using a controlled substance."); *Safehouse I*, 408 F. Supp. 3d at 598.

quires the owner to maintain the property for drug activity.[160] Adding "intentionally" to that same combination would, if anything, increase the requisite mens rea, not lower it as the government argued.[161]

The statute's legislative history supported the court's reading.[162] During the 2003 debate on the Conference Report, some Senators criticized the amendment, worrying it would permit prosecution of business owners who were not involved in drug activity for knowingly tolerating drug use on their property.[163] Then-Senator Joe Biden, both a sponsor of the 2003 amendment and a member of the Conference Committee, elucidated that the bill required that the manager not only know that drug use was occurring, but also make his space available for the purpose of drug activity.[164] Biden's comments underline that the actor must hold the illicit purpose.[165]

The court then addressed the prior-construction canon, or case precedent, which contradicted the court's understanding of § 856(a)(2).[166] Five federal circuit courts have held that "purpose" in § 856(a)(2) refers to the drug users, so the canon weighed in the government's favor.[167] The court, however, noted that the Third Circuit was not one of the five circuits to have decided the issue.[168]

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[160] *Safehouse I*, 408 F. Supp. 3d at 598–604 (citing United States v. Chen, 913 F.2d 183, 190 (5th Cir. 1990) (interpreting § 856(a)(1) to require the person opening the place for drug use to have the proscribed purpose); then citing United States v. Tamez, 941 F.2d 770, 774 (9th Cir. 1991) (same); then citing United States v. Banks, 987 F.2d 463, 466 (7th Cir. 1993) (same); then citing United States v. Wilson, 503 F.3d 195, 196–97 (2d Cir. 2007) (same); then citing United States v. Tebeau, 713 F.3d 955, 959–61 (8th Cir. 2013); and then citing United States v. Ramsey, 406 F.3d 426, 429 (7th Cir. 2005) (same)).

[161] *Id.* at 598. Section 856(a)(1) requires that the owner act for the purpose of drug use. *Id.* The government argued that "purpose" in § 856(a)(2) referred to a third party's purpose of drug use. *Id.* The court reasoned that lowering the owner or manager's mens rea in § 856(a)(2), which includes both "knowingly" and "intentionally," was illogical. *Id.* The government's construction would lower the mens rea in a way that completely ignored the provision's context. *Id.*; *see* SCALIA & GARNER, *supra* note 151, at 140 (explaining that the whole-text canon requires consideration of the statute in the context of its surrounding parts).

[162] *Safehouse I*, 408 F. Supp. 3d at 596.

[163] *Id.* at 602 (citing 132 CONG. REC. 9378 (1986)).

[164] *Id.* at 597 (quoting 149 CONG. REC. 9383–84 (statement of Sen. Biden)). Both the bill's sponsors' and Conference Committee's comments, the court noted, carry particular influence when considering the bill's meaning. *Id.* (citing NOURSE, *supra* note 102, at 69).

[165] *Id.* (citing 149 CONG. REC. 9383–84 (statement of Sen. Biden)).

[166] *See* SCALIA & GARNER, *supra* note 151, at 322 (defining the prior-construction canon as a form of interpretation that requires judges to consider how previous courts have construed the statute at issue); *infra* note 167 (discussing the adverse circuit court precedent in more detail).

[167] *See Safehouse I*, 408 F. Supp. 3d at 598 (outlining circuits holding that "purpose" refers to the drug users); *see also* United States v. Tebeau, 713 F.3d 955, 960–61 (8th Cir. 2013) (interpreting the term "purpose" in § 856(a)(2) to apply to the drug users); United States v. Wilson, 503 F.3d 195, 197–98 (2d Cir. 2007) (same); United States v. Ramsey, 406 F.3d 426, 431 (7th Cir. 2005) (same); United States v. Banks, 987 F.2d 463, 467 (7th Cir. 1993) (same); United States v. Tamez, 941 F.2d 770, 774 (9th Cir. 1991) (same); United States v. Chen, 913 F.2d 183, 190 (5th Cir. 1990) (same).

[168] *Safehouse I*, 408 F. Supp. 3d at 598.

The court further observed that all of the circuit court opinions relied on the U.S. Court of Appeals for the Fifth Circuit's 1990 holding in *United States v. Chen*.[169]

The Fifth Circuit in *Chen* assessed the 1986 edition of § 856(a) to ascertain if a deliberate ignorance instruction was appropriate for either (a)(1) or (a)(2).[170] The Fifth Circuit held that the instruction was apt for (a)(2), which did not require the actor to hold the purpose of drug activity, but was improper for (a)(1), which required the actor to have an illicit purpose.[171] The Fifth Circuit's conclusion, that the combination of "knowingly" and "for the purpose of" in (a)(1) referred to the actor, guided its holding.[172]

The District Court for the Eastern District of Pennsylvania chided the Fifth Circuit for refusing to apply that conclusion to (a)(2), which included the same wording fortified by the inclusion of "intentionally."[173] The Fifth Circuit read the same phrasing in (a)(2) differently because it claimed that to do otherwise would render the provision duplicative of (a)(1) and violate the rule against surplusage.[174] The district court disagreed, finding the sections unique both for their disparate actus reus requirements and for whom the provisions

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[169] *Id.*; *see Tebeau*, 713 F.3d at 960–61 (citing to four other circuit courts that have held that § 856(a)(2) does not require the property manager to have the purpose of drug use so long as the manager intentionally makes the premises available to those who do harbor that purpose); *Wilson*, 503 F.3d at 197–98 (citing to *Chen* and *Tamez*, but not completing its own analysis); *Ramsey*, 406 F.3d at 431 (citing to *Banks*, *Chen*, and *Tamez* to support its holding that the actor in § 856(a)(2) need not have a purpose of drug use); *Tamez*, 941 F.2d at 774 (citing *Chen* to hold that § 856(a)(2) does not require the defendant's proscribed purpose); *Chen*, 913 F.2d at 190 (holding that "purpose" in § 856(a)(2) refers to drug users); *cf. Banks*, 987 F.2d at 467 (citing *Chen* for the proposition that § 856(a)(2) does not require the actor have the proscribed purpose but ultimately applying § 856(a)(1) because the defendant was directly involved in the drug operation). The Third Circuit has, however, instructed juries to consider the actor's mental state in convicting a defendant for violating § 856(a)(2). *Safehouse I*, 408 F. Supp. 3d at 604 (citing United States v. Coles, 558 F. App'x 173, 181 (3d Cir. 2014)). Further, at oral argument, the government reasoned that parents who ask their child to use drugs under their supervision in order for them to provide life-saving care would not violate the statute because the parents' purpose is not for their child to use drugs. *Safehouse I*, 408 F. Supp. 3d at 609. The court noted that this further underlines the inherent logic of attributing purpose to the property manager and not the drug users. *Id.*

[170] *Chen*, 913 F.2d at 190; *Safehouse I*, 408 F. Supp. 3d at 599.

[171] *Chen*, 913 F.2d at 190; *Safehouse I*, 408 F. Supp. 3d at 599.

[172] 21 U.S.C. § 856(a)(1); *Chen*, 913 F.2d at 190; *Safehouse I*, 408 F. Supp. 3d at 599.

[173] 21 U.S.C. § 856(a)(2); *Safehouse I*, 408 F. Supp. 3d at 599–600; *see Chen*, 913 F.2d at 190 (holding that the combination of "knowingly" and "for the purpose of" in (a)(1) referred to the actor, while also holding that the same language in (a)(2) referred to a third party not mentioned in the statute). The Fifth Circuit noted that sixteen federal statutes combine "knowingly" and "for the purpose of" to signal the actor's purpose. *Chen*, 913 F.2d at 190 n.9. The District Court for the Eastern District of Pennsylvania, however, pointed out that those federal statutes should likewise apply to (a)(2)'s identical phrasing, but the Fifth Circuit failed to state why they did not. *Safehouse I*, 408 F. Supp. 3d at 600.

[174] *Chen*, 913 F.2d at 190; *see Safehouse I*, 408 F. Supp. 3d at 599 (explaining that the Fifth Circuit analyzed the provisions differently because otherwise, (a)(2) would be redundant of (a)(1)); SCALIA & GARNER, *supra* note 151, at 174 (explaining that the rule against surplusage guides juridical interpreters to avoid interpretations that would render a word, provision, or section superfluous).

applied.[175] Subsection (a)(1) applies to people who open or maintain the property, whereas (a)(2) concerns people who are potentially further removed.[176] The varying actus reus requirements underline the provisions' distinct actors, with (a)(1) prohibiting maintaining and (a)(2) prohibiting managing "as an owner, lessee, agent, employee, occupant, or mortgagee."[177] The 1986 provisions only partially overlapped in their mens rea, specifically the pairing of "knowingly" with "for the purpose of" drug activity, but differing still in (a)(2)'s inclusion of "intentionally."[178] Thus, the Fifth Circuit invoked the rule against surplusage to negate a fictional redundancy and then contravened the canon by reading "intentionally" out of (a)(2).[179]

The district court further noted that the aforementioned legislative history repudiated the Fifth Circuit's interpretation.[180] Specifically, the Fifth Circuit and some of the circuit cases after *Chen* did not have the 2003 legislative history.[181] The circuits that followed *Chen* after Congress passed the 2003 amendment did so blindly without separately scrutinizing the statute, even

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[175] *Safehouse I*, 408 F. Supp. 3d at 599–600. Actus reus is "the physical components of a crime," which when combined with a particular state of mind—mens rea—forms liability. *Actus Reus*, BLACK'S LAW DICTIONARY, *supra* note 12. Whereas § 856(a)(1) pertains to actors using their property for their own drug activity, (a)(2) concerns actors making property available to others for the purpose of those third parties' drug activity. *Safehouse I*, 408 F. Supp. 3d at 599–600. Therefore, both provisions requiring the site operator's illicit purpose does not render them superfluous. *Id.* at 600.

[176] *Safehouse I*, 408 F. Supp. 3d at 599–600. For a comparison of the two provisions' language, *see infra* note 177 and accompanying text.

[177] 21 U.S.C. § 856(a)(2); *Safehouse I*, 408 F. Supp. 3d at 599–600. *Compare* 21 U.S.C. § 856(a)(1) (proscribing "open[ing] . . . or maintain[ing] any place" for drug activity), *with id.* § 856(a)(2) (proscribing "manag[ing] . . . or control[ling] any place" for drug activity).

[178] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1841(a), 100 Stat. 3207, 3207-52 (codified as amended at 21 U.S.C. § 856) (adding section 416 to the CSA). The 2003 amendment added "lease, rent, use" to (a)(1), creating an overlap in actus reus. PROTECT Act, Pub. L. No. 108-21, § 608(b)–(c), 117 Stat. 650, 691 (2003) (codified at 21 U.S.C. § 856).

[179] *Safehouse I*, 408 F. Supp. 3d at 599, 600 (citing SCALIA & GARNER, *supra* note 151, at 174–79); *see Chen*, 913 F.2d at 190 (perceiving a redundancy that was not wholly repetitive). The District Court for the Eastern District of Pennsylvania observed that the Fifth Circuit inconsistently employed the canon. *Safehouse I*, 408 F. Supp. 3d at 601.

[180] *Safehouse I*, 408 F. Supp. 3d at 601–02; *see Chen*, 913 F.2d at 190 (holding that "purpose" in (a)(2) referred to the drug users).

[181] *Safehouse I*, 408 F. Supp. 3d at 603; *see* United States v. Banks, 987 F.2d 463, 467 (7th Cir. 1993) (interpreting the term "purpose" in § 856(a)(2) to apply to the drug users prior to the 2003 amendment); United States v. Tamez, 941 F.2d 770, 774 (9th Cir. 1991) (same); *Chen*, 913 F.2d at 190 (same). Further, the circuits that adopted *Chen*'s reasoning prior to the 2003 amendment merely cited to *Chen* and did not complete their own individual evaluation. *Safehouse I*, 408 F. Supp. 3d at 603; *see Tamez*, 941 F.2d at 774 (citing *Chen* to hold that § 856(a)(2) does not require the defendant's proscribed purpose); *cf. Banks*, 987 F.2d at 467 (citing *Chen* for the proposition that (a)(2) does not require the actor have the proscribed purpose but ultimately applying (a)(1) because the defendant was directly involved in the drug operation).

though its language had changed since *Chen*.[182] The district court therefore concluded that none of the circuit opinions should decide the issue.[183]

Ultimately, the district court found that "purpose" referred to the actor, which, in this case, was Safehouse.[184]

2. The District Court Concludes That "Purpose" Must Be Significant

The court then addressed the second ambiguity, the level of purpose the statute requires: any, incidental, significant, or sole purpose of drug use.[185] A sole purpose of drug use would allow the SIF to escape liability regardless of who "purpose" referred to because both the site operators and the drug users may have multiple purposes for using SIFs.[186] If any purpose, or even an incidental purpose, satisfied the statute's requirements, SIFs would likely violate the law because SIFs intend to provide a safe site for drug consumption.[187] Significant purpose is a middle ground between sole and any purpose and, though drug users would likely satisfy that level of intent, it is unclear whether SIFs would.[188]

The government argued that any purpose of drug use satisfies the statute, whereas Safehouse contended that the statute demands a primary purpose.[189] If the statute requires the actor to hold the sole purpose of drug activity, the court reasoned it would not cover crack house operators who reside on the property and use it for drug manufacture.[190] Because the statute clearly targets crack

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[182] *Safehouse I*, 408 F. Supp. 3d at 603; *see* United States v. Tebeau, 713 F.3d 955, 960–61 (8th Cir. 2013) (merely citing to the previous five circuits that have held that § 856(a)(2) does not require the property manager to have the purpose of drug use so long as the manager intentionally makes the premises available to those who do harbor that purpose); United States v. Wilson, 503 F.3d 195, 197–98 (2d Cir. 2007) (citing to *Chen* and *Tamez*, both decided before the 2003 amendment, to support the proposition that "purpose" in (a)(2) does not refer to the actor); United States v. Ramsey, 406 F.3d 426, 431 (7th Cir. 2005) (citing to *Banks*, *Chen*, and *Tamez*, all decided before the 2003 amendment, to support its holding that the actor in (a)(2) need not have a purpose of drug use); *Chen*, 913 F.2d at 190 (holding that "purpose" in (a)(2) referred to the drug users, not the property manager).

[183] *Safehouse I*, 408 F. Supp. 3d at 604.

[184] *Id.* at 605.

[185] *See id.* at 606–14 (analyzing the level of purpose that § 856(a)(2) requires).

[186] *See id.* at 607 (explaining that the statute must require more than a sole purpose because otherwise it would not reach the intended targets of rave promoters and crack house operators).

[187] *See id.* at 606 (summarizing the government's argument that any purpose violates the statute).

[188] *Compare id.* at 618 (holding that the statute requires a significant purpose of drug activity and that Safehouse did not violate the statute), *with* United States v. Safehouse (*Safehouse II*), 985 F.3d 255, 232 (3d Cir.) (also holding that the statute required a significant purpose of drug activity but holding that Safehouse violated the statute), *cert. denied*, 142 S. Ct. 345 (2021).

[189] *Safehouse I*, 408 F. Supp. 3d at 618. Purpose's definition—one's end goal—supported Safehouse's argument but did not conclusively determine the statute's meaning. *Id.* at 606–07 (first citing *Purpose*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003); then citing *Purpose*, BLACK'S LAW DICTIONARY (7th ed. 1999); and then citing *Purpose*, OXFORD ENGLISH DICTIONARY (1st ed. Supp. 1986)).

[190] *Id.* at 607.

house operators, the drug-related purpose can be one of many purposes the actor harbors.[191]

After incorporating precedent exempting casual drug users from § 856(a)(1) prosecution, the district court concluded that the actor must have at least a significant purpose of drug use.[192] Requiring a significant purpose is sensical given the legislative history's emphasis on nefarious actors and the harsh punishment for violating § 856(a)(2): twenty years imprisonment.[193]

The court then determined that the statute requires the significant purpose of *facilitating* drug use.[194] Safehouse argued that providing a space to supervise drug use and counteract overdoses did not violate § 856(a)(2).[195] The district court agreed, noting that the legislative history suggested that the statute requires an avaricious purpose to enable drug use.[196] Specifically, the 1986 statute targeted crack houses and the 2003 amendment targeted raves—both instances of manipulative facilitation of drug use.[197] Interpreting (a)(2) to forbid efforts to diminish drug addiction would stretch the statute far beyond its intended aim of convicting people who prey upon drug users.[198] Therefore, to violate the Crack House Statute, the actor must harbor a significant purpose to enable drug use.[199]

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[191] *Id.*; *see* 21 U.S.C. § 856(a) (criminalizing the use of crack houses).

[192] *Safehouse I*, 408 F. Supp. 3d at 608; *see* United States v. Soto-Silva, 129 F.3d 340, 342, 346–47 (5th Cir. 1997) (holding that a renter who had a significant purpose of drug distribution violated § 856(a)(1) even though her primary purpose was caring for her ailing mother); United States v. Verners, 53 F.3d 291, 296 (10th Cir. 1995) (holding that § 856(a) requires drug activity be at least one of the primary uses of the property). This interpretation aligns with the generally accepted idea that casual drug users do not violate § 856(a)(1) because drug use is merely incidental to their purpose of habitation. *Safehouse I*, 408 F. Supp. 3d at 608; *see* United States v. Shetler, 665 F.3d 1150, 1161–62 (9th Cir. 2011) (reasoning that because Congress used "the" instead of "a" to modify "purpose" in § 856(a)(1), the actor's drug use must be his primary purpose in using the property); United States v. Russell, 595 F.3d 633, 643 (6th Cir. 2010) (holding that the § 856(a)(1) requires a significant or important purpose of drug activity). In *Safehouse I*, the district court inferred that the reasoning of these cases logically extends to § 856(a)(2). 408 F. Supp. 3d at 608. Therefore, making a space available to a casual drug user for habitation does not violate (a)(2). *Id.* Based on this line of thought, the actor must have a significant purpose of drug use. *Id.*

[193] *Safehouse I*, 408 F. Supp. 3d at 608; *see* 21 U.S.C. § 856(b) (dictating that violation of subsection (a) could result in twenty years imprisonment, a $500,000 fine, or both).

[194] *Safehouse I*, 408 F. Supp. 3d at 609.

[195] *Id.* at 610–11.

[196] *Id.* at 611 (citing 149 CONG. REC. 9383 (2003)).

[197] *Id.* at 613–14.

[198] *Id.* at 614. During the Conference Report for the 2003 amendment, Republican Senator Chuck Grassley of Iowa asserted that drug reduction endeavors were not efforts that the statute's illicit purpose requirement intends to capture. *Id.* at 612 (citing 149 CONG. REC. 1849 (statement of Sen. Grassley)).

[199] *Id.* at 618.

Finally, the district court applied the analysis to the facts and held that Safehouse does not have a significant purpose of facilitating drug use.[200] The court observed that the drug use projected to occur at Safehouse would be subordinate to the organization's purpose of guaranteeing necessary overdose prevention services.[201] The court therefore held that Safehouse would not violate the Crack House Statute.[202]

B. Safehouse II: *The Third Circuit Holds That Supervised Injection Facilities Violate the Crack House Statute*

The Third Circuit, in *Safehouse II*, held that SIFs violate the Crack House Statute.[203] The case turned on how to interpret the phrase "for the purpose of" in 21 U.S.C. § 856(a)(2).[204] Subsection 1 of this Section tracks the Third Circuit's reasoning regarding whose purpose is at issue.[205] Subsection 2 then explains the court's holding that the statute requires a significant purpose of drug activity.[206]

1. The Third Circuit Finds That "Purpose" Refers to the Drug Users

The court first addressed whether the word "purpose" referred to that of the site operator or the drug user.[207] Safehouse argued that the phrase referred to the site operator, Safehouse, whereas the government maintained that it referred to Safehouse's guests.[208] The Third Circuit agreed with the government,

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[200] *Id.* at 614. Safehouse intends to provide medical intervention if necessary, counsel patients to seek treatment, and refer users to resources. *Id.* The court noted that none of these intentions enables drug use. *Id.*

[201] *Id.*

[202] *Id.* Because Safehouse's fundamental objective is to combat drug use, Safehouse would not be making its space available for the purpose of drug use within the meaning of § 856(a)(2). *Id.* The court also stated that the judiciary should only apply criminal statutes narrowly absent clear congressional intent to criminalize the activity at issue. *Id.* at 616 (citing United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (requiring the judiciary to narrowly construe criminal laws because it is Congress's duty to define criminal conduct)). Because Safehouse's proposed business is not obviously disreputable, the court reasoned that a narrow application of the statute appropriately safeguards the separation of powers. *Id.* at 617.

[203] United States v. Safehouse (*Safehouse II*), 985 F.3d 255, 232 (3d Cir.), *cert. denied*, 142 S. Ct. 345 (2021).

[204] 21 U.S.C. § 856(a)(2); *Safehouse II*, 985 F.3d at 232.

[205] *See infra* notes 207–228 and accompanying text.

[206] *See infra* notes 229–240 and accompanying text.

[207] *Safehouse II*, 985 F.3d at 232–36.

[208] *Id.* at 232. The government claimed that the statute prohibited Safehouse from allowing on the premises third parties with the purpose of using drugs. *Id.* The government's argument rested on several circuit cases, all interpreting § 856(a)(2) as requiring the third parties using the property to harbor the illicit purpose. *See* Reply Brief of Appellants at 7–9, *Safehouse II*, 985 F.3d 225 (No. 20-1422) (listing case precedent that holds that § 856(a)(2) refers to the drug user's purpose). Safehouse disputed the applicability of the cases because none concerned a SIF and all involved drug distribution. Brief of Appellees Safehouse and José Benitez at 25, *Safehouse II*, 985 F.3d 225 (No. 20-1422). Safehouse further contended that the support for the government's argument was not as strong as the

finding that the word "purpose" referred to the third party's intention to consume drugs, not the site operator's objectives.[209]

The court arrived at this inference by analyzing the statute's plain text and avoiding superfluity across provisions.[210] The plain text of § 856(a)(1), the section preceding the one at issue, requires one actor—the owner or operator—and two actions: maintaining the site and engaging in drug activity.[211] Section 856(a)(2), however, considers multiple actors—the site operator and one or more third parties.[212] The court reasoned that § 856(a)(2) considers multiple actors because the verbs Congress chose, such as "rent" and "lease," anticipate someone other than the operator.[213]

To violate the statute, the government must show that the operator and the third-party user collectively engaged in three acts.[214] The operator must (1) oversee the property and (2) open it to drug use by third parties.[215] The third-party user must (3) consume drugs on the premises.[216] Though the Third Circuit's analysis indicates that § 856(a)(2) is discrete from (a)(1) because it involves a third party's drug activity, the court nonetheless concluded that the provisions would be superfluous if both required the property manager's illicit

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wealth of cases suggested because most circuits deferred to *Chen* and did not conduct their own analysis. United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 603 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021); Brief of Appellees Safehouse and José Benitez, *supra*, at 35–36; *see* United States v. Chen, 913 F.2d 183, 190 (5th Cir. 1990) (holding that the word "purpose" in § 856(a)(2) refers to the site operator because interpreting "purpose" to refer to those engaged in drug activity would make (a)(2) duplicative of (a)(1)).

[209] *Safehouse II*, 985 F.3d at 232. The court reasoned that because § 856(a)(2) bases liability on a third party's actions, the statute includes an additional mens rea—"intentionally"—to protect unwitting owners. 21 U.S.C. § 856(a)(2); *Safehouse II*, 985 F.3d at 233. The court held that even if the section referred to Safehouse's purpose, Safehouse would still violate the statute because its purpose also encompasses drug use. *Safehouse II*, 985 F.3d at 232. Prevention Point, a facility neighboring Safehouse's proposed site, offers all the same services as Safehouse except for a consumption room. Oral Arg., *supra* note 73, at 16–18, 25; Reply Brief of Appellants, *supra* note 208, at 44. The government therefore argued that Safehouse exists to offer a place for drug use and thus has the purpose of drug use. Oral Arg., *supra* note 73, at 16–18, 25; Reply Brief of Appellants, *supra* note 208, at 17.

[210] *Safehouse II*, 985 F.3d at 233. A plain text analysis, also called the ordinary-meaning canon, requires the judicial interpreter to consider the actual words of the statute and their definitions based on the context. SCALIA & GARNER, *supra* note 151, at 69–70.

[211] 21 U.S.C. § 856(a)(1); *Safehouse II*, 985 F.3d at 234. The parties did not dispute this interpretation of § 856(a)(1). *Safehouse II*, 985 F.3d at 234.

[212] 21 U.S.C. § 856(a)(2); *Safehouse II*, 985 F.3d at 234.

[213] 21 U.S.C. § 856(a)(2); *Safehouse II*, 985 F.3d at 234. *But see* 21 U.S.C. § 856(a)(1) (including the same words: "rent" and "lease").

[214] 21 U.S.C. § 856(a)(2); *Safehouse II*, 985 F.3d at 234–35. The actor in the statute oversees the site "as an owner, lessee, agent, employee, occupant, or mortgagee." 21 U.S.C. § 856(a)(2). The third party is a tenant, customer, or guest. *Safehouse II*, 985 F.3d at 234. The court observed that the statute does not reference the third party but its verbs imply one. *Id.*; *see* 21 U.S.C. § 856(a)(2) (including verbiage such as "rent" and "lease").

[215] 21 U.S.C. § 856(a)(2); *Safehouse II*, 985 F.3d at 234–35.

[216] 21 U.S.C. § 856(a)(2); *Safehouse II*, 985 F.3d at 234–35.

purpose.[217] To further distinguish the two provisions, the court held that "purpose" in (a)(2) referred to the drug user.[218]

Other circuit courts' analyses of § 856 contributed to the Third Circuit's holding.[219] The Third Circuit emphasized that no other court had adopted Safehouse's interpretation that "purpose" referred to the site operator, and all five circuits that had considered § 856(a) held that "purpose" referred to the drug user.[220] The court concluded that Safehouse's operation would therefore violate § 856(a)(2) because it would control the site and make it available for use while knowing that visitors intend to use drugs there.[221]

Conversely, Circuit Judge Jane Roth argued in her dissent that the statute required the site operator to have an illicit purpose.[222] She reasoned that no other statute requires an unspecified third party to satisfy the mens rea required for its violation.[223] Judge Roth derided *Chen*, in which the Fifth Circuit concluded that,

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[217] *Safehouse II*, 985 F.3d at 235; *see* 21 U.S.C. § 856(a) (including similar actus rei across the two provisions). Because § 856(a)(1) requires the operator's purpose of drug use and does not foreclose the involvement of additional actors, the court held that (a)(2) would only add meaning if the word "purpose" in that section does not refer to the operator but rather to a third party that the statute contemplates. 21 U.S.C. § 856(a); *Safehouse II*, 985 F.3d at 235. Assuming Congress drafted the statute without superfluity, the statute's structure, separating the provisions to describe separate crimes, suggests a different actor ought to hold the purpose of drug use. 21 U.S.C. § 856(a); *Safehouse II*, 985 F.3d at 235 (citing Yates v. United States, 574 U.S. 528, 543 (2015)); *see* SCALIA & GARNER, *supra* note 151, at 174 (explaining the presumption against redundant text in statutory interpretation). Safehouse, in turn, argued that though (a)(2)'s "purpose" referred to the operator, (a)(2) was nonetheless unique from (a)(1) and not superfluous because (a)(1) applies to the site manager but only (a)(2) would embrace a "distant landlord." *Safehouse II*, 985 F.3d at 235. The court refused to compress the two sections into one. *Id*.

[218] *Safehouse II*, 985 F.3d at 234.

[219] *Id*. at 236. Five circuits held that "purpose" in § 856(a)(2) referred to the drug user's purpose because otherwise (a)(2) would be duplicative of (a)(1). United States v. Tebeau, 713 F.3d 955, 960–61 (8th Cir. 2013); United States v. Wilson, 503 F.3d 195, 197–98 (2d Cir. 2007); United States v. Ramsey, 406 F.3d 426, 431 (7th Cir. 2005); United States v. Banks, 987 F.2d 463, 467 (7th Cir. 1993); United States v. Tamez, 941 F.2d 770, 774 (9th Cir. 1991); United States v. Chen, 913 F.2d 183, 190 (5th Cir. 1990). These circuits maintain that violation of (a)(1) requires the site operator to have an illegal purpose of drug activity, whereas a violation of (a)(2) only requires the site operator to make the property available to others who have that purpose. *Tebeau*, 713 F.3d at 960–61; *Wilson*, 503 F.3d at 197–98; *Ramsey*, 406 F.3d at 431; *Banks*, 987 F.2d at 467; *Tamez*, 941 F.2d at 774; *Chen*, 913 F.2d at 190.

[220] *Safehouse II*, 985 F.3d at 236. Safehouse disputed the applicability of the previous circuit courts' holdings because no circuit had contemplated the legality of SIFs. *Id*. In fact, the legislative history corroborates the contention that Congress did not intend § 856 to apply to medical facilities. Jennifer H. Diggles, Note, *Supervising Consumption: The Argument for Supervised Injection Facilities as a Valid Exercise of States' Police Power*, 42 W. NEW ENG. L. REV. 95, 106 (2020) (noting that the statute has never been applied to a medical facility). The Third Circuit, however, rebuffed Safehouse's argument because the circuits' differentiation between the two sections would not change when applied to different facts. *Safehouse II*, 985 F.3d at 236.

[221] *Safehouse II*, 985 F.3d at 237.

[222] *Id*. at 245 (Roth, J., dissenting in part and dissenting in judgment).

[223] *Id*. The government argued that several other criminal statutes require a third party to satisfy a mens rea element, including conspiracy and sex crimes. Oral Arg., *supra* note 73, at 95.

to circumvent redundancy, the only words that § 856(a)(1) and (a)(2) share—"for the purpose of"—must have distinct meanings.[224] Instead of each subsection requiring a different mens rea as the government argued, Judge Roth contended that the subsections have unique actus rei.[225] Specifically, (a)(2) requires making the property available to third parties, whereas (a)(1) does not.[226] Judge Roth observed the absurdity in differentiating the identical mens rea elements while also holding that the discrete actus reus elements are duplicative.[227] She preferred Safehouse's interpretation because it better aligned with the text and did not create a redundancy, which the majority asserted was present.[228]

2. The Third Circuit Holds That the Statute Requires a Significant Purpose

The court then turned to the level of purpose required.[229] First, the court noted that not all purposes meet the requirements of § 856(a)(2).[230] The government argued that even if the defendant satisfied the act and mental state requirements, drug use would not trigger the statute unless it was concentrated, like that in a crack house or at a rave.[231] The Third Circuit rejected the government's atextual reading of the statute.[232]

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[224] *Safehouse II*, 985 F.3d at 246 (Roth, J., dissenting in part and dissenting in judgment); *see Chen*, 913 F.2d at 190 (holding that "purpose" in § 856(a)(2) refers to a different person than it does in (a)(1)). The government, in *Safehouse II*, argued that "purpose" retains its meaning but simply modifies different subjects, such that the interpretation does not give two different meanings to the same word. Oral Arg., *supra* note 73, at 15.

[225] *Safehouse II*, 985 F.3d at 247 (Roth, J., dissenting in part and dissenting in judgment). Until 2003, when Congress added "rent" and "lease" to § 856(a)(1), the provisions' actus rei did not overlap. *Id.* Judge Roth argued that the Third Circuit need not interpret the mens rea in each provision differently because the actus rei were initially unique and now barely overlap. *Id.*

[226] *Id.* Judge Roth agreed with the majority that § 856(a)(1) has a single actus reus element whereas (a)(2) has two; she disagreed that the provisions overlap. *Id.*

[227] *Id.* Judge Roth explained the difference between the subsections' actus rei with two examples: (1) a property owner distributing drugs from his or her residence but who did not allow people to consume drugs on the property would disobey (a)(1) but not (a)(2); and (2) a rave promoter who urged dealers to come to events to boost attendance would violate (a)(2) but not (a)(1). *Id.*

[228] *Id.*

[229] *Id.* at 237–38 (majority opinion).

[230] *Id.* at 237; *see* 21 U.S.C. § 856(a)(2) (criminalizing the use of certain premises for "the purpose of" drug activity).

[231] Oral Arg., *supra* note 73, at 23, 29–30, 32. The government argued that Congress passed the Crack House Statute out of concern for the nuisance and illegal activity from concentrated drug use. *Id.* at 23. Per the government's reasoning, one drug user does not trigger the statute, but as more people join in the illegal activity, the use further resembles the conduct Congress intended to target. *Id.* at 29–31. Safehouse noted that this logic contradicts the government's previous prosecution of the statute, which has included charging lone drug users. *Id.* at 67.

[232] *See Safehouse II*, 985 F.3d at 237 (adopting a metric that hinges upon the degree of purpose, not the concentration of drug use).

The court reasoned that the word "the" in "for *the* purpose of" requires more than an incidental purpose of drug use.[233] The statute does not, however, require drug use to be the visitor's sole purpose.[234] Opting for a level of purpose between incidental and sole, the Third Circuit affirmed the district court's holding that the statute requires a significant purpose of drug use.[235] Thus, the Third Circuit held that a property operator, to violate the statute, must intentionally allow third parties, who have a significant purpose of drug activity, to engage in drug activity on the premises.[236]

Although Safehouse offers other services, the only feature not shared by Safehouse's neighboring facilities is its consumption room.[237] Therefore, the Third Circuit concluded that visitors will choose Safehouse for the significant purpose of drug consumption.[238] Ultimately, the court held that Safehouse

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[233] 21 U.S.C. § 856(a) (emphasis added); *Safehouse II*, 985 F.3d at 237 (citing United States v. Lancaster, 968 F.2d 1250, 1253 (D.C. Cir. 1992)).

[234] *Safehouse II*, 985 F.3d at 237 (citing United States v. Shetler, 665 F.3d 1150, 1161 (9th Cir. 2011)). The court inferred that if Congress intended drug use to be the visitor's sole purpose, it would have written "sole purpose" as it has done in other sections of the U.S. Code. *Id.*; *see, e.g.*, 15 U.S.C. § 62 (including the language, "for the *sole purpose* of engaging in export trade" (emphasis added)); 18 U.S.C. § 48(d)(2)(B) (including the language, "for the *sole purpose* of analysis" (emphasis added)).

[235] *Safehouse II*, 985 F.3d at 237; *see* United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 608 (E.D. Pa. 2019) (holding that § 856(a)(2) requires a significant purpose of drug use), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021). The operator would violate the statute by having multiple significant purposes, so long as one of them was drug activity. *Safehouse II*, 985 F.3d at 237 (citing United States v. Soto-Silva, 129 F.3d 340, 342, 347 (5th Cir. 1997)). Safehouse argued that the court's accepted interpretation would penalize parents for providing shelter to substance-using children and homeless shelters for providing lodging to known addicts. *Id.* at 238. The court responded that drug use would be incidental in situations where shelter is the primary purpose. *Id.*

Judge Roth, in her dissent, scoffed at the irrationality of the majority's reading. *Id.* at 247 (Roth, J., dissenting in part and dissenting in judgment). Judge Roth proposed a hypothetical in which a landowner hired a house sitter, who the owner knew would smoke marijuana in the residence. *Id.* at 248. According to the majority's construction, the owner's liability would hinge on whether the owner knew if the sitter cared more about the job opportunity or having a location to smoke. *Id.* at 248–49. In other words, the owner's culpability would depend on which activity was incidental to the sitter. *Id.* The majority failed to clarify why shelter is automatically the user's significant purpose in the parent-child scenario, indicating "arbitrary line-drawing." *Id.* at 249. Judge Roth further argued that the majority's interpretation clashed with federal laws. *Id.* For example, the majority could force landlords to evict tenants for drug activity, or face criminal liability, despite the U.S. Department of Housing and Urban Development's policy against eviction for drug use alone). Judge Roth claimed that, in these scenarios, owners do not want drug use to occur, and, therefore, "owners act despite their knowledge that drug use will occur, not for the purpose that drug use occur." *Id.* at 249–50 (emphasis omitted) (referencing congressionally funded syringe programs, which have the knowledge that people will use those syringes to consume illegal drugs and, under the court's interpretation, would be subject to a twenty-year prison sentence). Judge Roth would have held that Safehouse did not satisfy § 856(a)(2)'s mens rea requirement because Safehouse's preference that drug use occurs in its consumption room under medical supervision does not indicate that Safehouse wants its patients to use drugs at all. *Id.* at 251–52.

[236] *Safehouse II*, 985 F.3d at 237 (majority opinion).

[237] *Id.*; Oral Arg., *supra* note 73, at 16–18, 25.

[238] *Safehouse II*, 985 F.3d at 237.

would violate the Crack House Statute by making its property available to drug users who have the purpose of using drugs on the premises.[239]

Following the Third Circuit's ruling, Safehouse petitioned for an en banc hearing, and the Third Circuit denied the petition.[240]

III. THE THIRD CIRCUIT ACED THE LEGAL ANALYSIS, BUT THE CRACK HOUSE STATUTE FORCED IT TO FLUNK THE POLICY TEST

The U.S. Court of Appeals for the Third Circuit's interpretation of the Crack House Statute, in 2021, in *United States v. Safehouse* (*Safehouse II*), was riddled with errors.[241] In 2019, in *United States v. Safehouse* (*Safehouse I*), the U.S. District Court for the Eastern District of Pennsylvania employed better reasoning, but one district court's analysis should not necessarily decide the issue.[242] Further, the clearest path forward for SIF implementation, and the end of the opioid epidemic, lies not in creative interpretations of the Crack House Statute but rather in the federal government rethinking its drug laws, which are currently inapposite to harm reduction.[243] Section A of this Part argues that the Third Circuit employed flawed reasoning, and it considers how different analyses impact SIF implementation.[244] Section B then weighs different options going forward and ultimately concludes that the United States must reevaluate its current drug laws given their futility in preventing and treating addiction.[245]

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[239] *Id.* Safehouse contended that the application of the Crack House Statute to a SIF violated the Commerce Clause because Safehouse's activity is local and non-economic. *Id.* at 239. The Third Circuit disagreed with Safehouse's Commerce Clause defense, which the district court did not consider, noting that Congress has the power to regulate SIFs because drug control is part of a national regulatory scheme and SIFs are economic. *Id.* at 239, 241–43; *see Safehouse I*, 408 F. Supp. 3d at 587 (deciding not to address the Commerce Clause defense after ruling that Safehouse did not violate the Crack House Statute).

[240] United States v. Safehouse, 991 F.3d 503, 505 (3d Cir. 2021). An en banc hearing is presented to the full court, as opposed to a smaller panel of judges. *En Banc*, BLACK'S LAW DICTIONARY, *supra* note 12. Three of the eleven presiding judges dissented from the decision, stating that the important issue deserved a full court hearing. *Safehouse*, 991 F.3d at 505–06, 511 (McKee, J., opinion sur denial of petition for rehearing).

[241] *See infra* notes 251–270 and accompanying text (arguing that "purpose" in § 856(a)(2) must refer to the site operator and that the Third Circuit's interpretation is not administrable).

[242] *See infra* notes 271–289 and accompanying text (contending that the district court's interpretation of § 856(a)(2) as referring to the site operator rather than the third-party drug users is the most logical interpretation).

[243] *See infra* notes 290–319 and accompanying text (proposing that revamping federal drug law would provide a more direct route to SIF implementation than analyzing the Crack House Statute); *see also* United States v. Safehouse (*Safehouse II*), 985 F.3d 225, 232 (3d Cir.) (holding that the mens rea requirement of 21 U.S.C. § 856(a)(2), a subsection of the Crack House Statute, refers to third parties rather than the acting site operator), *cert. denied*, 142 S. Ct. 345 (2021).

[244] *See infra* notes 246–289 and accompanying text.

[245] *See infra* notes 290–319 and accompanying text.

A. The Third Circuit Analyzed the Statute Incorrectly, Creating Some Hope for Supervised Injection Facilities

In *Safehouse II*, the Third Circuit held that SIFs violate the Crack House Statute.[246] This Section maintains that the Third Circuit employed flawed reasoning in arriving at its result and encourages future courts to independently analyze the statute.[247] Subsection 1 disputes the Third Circuit's inference that the word "purpose" modifies a third party not mentioned in the statute and argues that purpose instead refers to the site operator.[248] Subsection 2 begins by evaluating the district court's holding in *Safehouse I* that the Crack House Statute requires a purpose to facilitate drug use.[249] Subsection 2 concludes that, rather than relying on one lone court's analysis to decide the issue, future courts should independently analyze the statute to determine whether its original objectives require a purpose to facilitate drug use.[250]

1. The Statute Requires the Site Operator's Proscribed Purpose

Canons of statutory interpretation and the Crack House Statute's legislative history indicate that the Third Circuit incorrectly concluded that "purpose" refers to the drug users.[251] The word "purpose" modifies the operator, not some unnamed third party.[252] It is completely illogical to construe the statute to require a specific intention by third parties, who the statute does not mention, in order to hold the property manager liable.[253] The Third Circuit's construction violates the principle against reading elements that do not appear—here, third parties—into a statute.[254]

Additionally, legislative history indicates that the purpose is the operator's.[255] Congress initially passed the Crack House Statute to create a mode of

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[246] *Safehouse II*, 985 F.3d at 232.

[247] *See infra* notes 251–289 and accompanying text.

[248] *See infra* notes 251–270 and accompanying text.

[249] *See infra* notes 271–282 and accompanying text.

[250] *See infra* notes 283–289 and accompanying text.

[251] *See infra* notes 252–259 and accompanying text (arguing that "purpose" in § 856(a)(2) refers to the property manager, as the district court held).

[252] United States v. Safehouse (*Safehouse II*), 985 F.3d 225, 251 (3d Cir.) (Roth, J., dissenting in part and dissenting in judgment), *cert. denied*, 142 S. Ct. 345 (2021); United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 597–98 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021); *see* 21 U.S.C. § 856(a)(2) (forbidding maintaining a premises "for the purpose of" drug activity).

[253] *See Safehouse II*, 985 F.3d at 245 (Roth, J., dissenting in part and dissenting in judgment) (reasoning that "purpose" does not refer to the third party because no other statute requires an unspecified third party to satisfy the mens rea necessary for the defendant to break the law).

[254] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2160–61 (2016) (book review) (warning against inserting limitations that the statute drafters did not).

[255] *See infra* notes 256–259 and accompanying text (detailing the legislative history of the Crack House Statute, specifically its targeting of crack house operators).

liability for owners or operators of drug-involved premises.[256] The focus on operators indicates that the third party's purpose does not matter so long as the operator knowingly made the premises available for drug use.[257] When Congress amended the statute in 2003, then-Senator Joe Biden expressed the intention that the statute be limited to bad actors encouraging or involved in drug activity.[258] His comments underline that "purpose" modifies the operator rather than the drug user, because the latter would result in broad liability for business owners, which Biden explicitly dispelled.[259]

Lastly, the Third Circuit's overall reading presents huge administrability issues.[260] Assume that the Third Circuit correctly held that the statute requires a significant purpose.[261] That interpretation supposes that the property manager

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[256] 132 CONG. REC. H9455-05 (daily ed. Oct. 8, 1986) (statement of Rep. Hughes); Kreit, *supra* note 6, at 429.

[257] *See* 132 CONG. REC. H9455-05 (discussing how Congress has "[made] it a crime to *operate* a crack house" (statement of Rep. Hughes) (emphasis added)). As Judge Roth noted, this interpretation does not make either subsection superfluous. *Safehouse II*, 985 F.3d at 246–47 (Roth, J., dissenting in part and dissenting in judgment). Subsection (a)(1) does not require management or control over the space, whereas (a)(2) does. 21 U.S.C. § 856(a); *Safehouse II*, 985 F.3d at 247 (Roth, J., dissenting in part and dissenting in judgment). In that respect, (a)(1) may be understood as a mode of liability for anyone directly embroiled in opening drug-involved premises, whereas (a)(2) is a mode of liability specific to more distant managers of those spaces. 21 U.S.C. § 856(a); *Safehouse II*, 985 F.3d at 247 (Roth, J., dissenting in part and dissenting in judgment). Subsection (a)(1)—but not (a)(2)—would apply to someone who does not control the premises, perhaps a long-term guest that does not satisfy the definition of occupant, who makes the space available for drug activity. *See* 21 U.S.C. § 856(a); *Safehouse II*, 985 F.3d at 247 (endorsing Safehouse's argument that only (a)(2) would reach a distant landlord). Judge Roth correctly illustrates that the key distinction between the provisions is that (a)(1) has one actus reus requirement and (a)(2) has two. *See Safehouse II*, 985 F.3d at 247 (Roth, J., dissenting in part and dissenting in judgment) (explaining the difference between the provisions of the Crack House Statute).

[258] *Safehouse II*, 985 F.3d at 245 (Roth, J., dissenting in part and dissenting in judgment) (quoting 149 CONG. REC. S1678 (daily ed. Jan. 28, 2003)). Specifically, then-Senator Biden stated that rave promoters must hold the event for the purpose of drug activity to incur liability. *Id.* This requirement tracks the language of (a)(2) but clearly refers to the operator's purpose, not the drug user's. *Id.* at 245 (majority opinion); *see* 149 CONG. REC. 9383 (2003) (statement of Sen. Biden) (asserting that liability under (a)(2) is reserved for those who hold events for the purpose of drug activity); 21 U.S.C. § 856(a)(2) ("[I]t shall be unlawful to . . . manage or control any place . . . and knowingly and intentionally . . . make available for use . . . the place for the purpose of . . . using a controlled substance.").

[259] *See Safehouse II*, 985 F.3d at 245 (Roth, J., dissenting in part and dissenting in judgment) (quoting 149 CONG. REC. S1678) (arguing that legislative evidence, particularly Senator Biden's statements, contradict the majority's interpretation that "purpose" refers to third parties).

[260] *See infra* notes 261–270 and accompanying text (emphasizing the difficulty in determining the line between incidental and significant purpose of drug use, as the Third Circuit did not articulate a standard). "Administrable" means able to be managed. *Administrable*, WEBSTER'S 1913 DICTIONARY, https://www.webster-dictionary.org/definition/Administrable [https://perma.cc/APQ3-LQP9].

[261] *See Safehouse II*, 985 F.3d at 237 (holding that a violation of § 856(a)(2) requires a significant purpose of drug activity). The Third Circuit's construction requiring a significant purpose, in accord with the district court opinion and the several circuit cases cited, is correct. *See id.* (holding that § 856(a)(2) requires a significant purpose of drug activity); *see also* United States v. Shetler, 665 F.3d 1150, 1161–62 (9th Cir. 2011) (reasoning that because Congress used "the" instead of "a" to modify "purpose" in § 856(a)(1), the actor's drug use must be more than casual but need not be the sole pur-

can realistically determine whether a third party has an incidental or significant purpose of drug use.[262] Exacerbating the manager's impossible task is the fact that neither the government nor the Third Circuit articulated a clear test to determine whether certain scenarios evoke the statute, leaving it unclear when a property manager's conduct triggers liability.[263]

The government propounded a concentration test, which allows owners to make their space available to one drug user but not an assembly of them.[264] Because the government did not derive the test from the statute's text, the Third Circuit developed a different way to draw the line.[265] The Third Circuit decided the distinction was whether drug activity was an incidental or significant purpose of the third party's property use.[266] The court, however, offered no explanation of the difference between incidental and significant.[267] The

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pose in using the property); United States v. Russell, 595 F.3d 633, 643 (6th Cir. 2010) (holding that § 856(a)(1) requires a significant or important purpose of drug activity); United States v. Soto-Silva, 129 F.3d 340, 342, 347 (5th Cir. 1997) (holding that a renter who had a significant purpose of drug distribution violated § 856(a)(1) even though her primary purpose was to care for her ailing mother); United States v. Lancaster, 968 F.2d 1250, 1253 (D.C. Cir. 1992) (reasoning that the actor's drug use must be more than incidental to the user's purpose of residence); United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 608 (E.D. Pa. 2019) (holding that § 856(a)(2) requires a significant purpose of drug use), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021); *cf.* United States v. Verners, 53 F.3d 291, 296 (10th Cir. 1995) (holding that § 856(a) requires drug activity to be a primary use of the property). Coupling the correct conception of the level of purpose with the wrong beholder of the purpose is unworkable. *See infra* notes 262–270 and accompanying text (underlining the difficulty that site operators would have in determining a drug user's level of purpose).

[262] *See Safehouse II*, 985 F.3d at 238 (providing an exemption for parents and homeless shelters accommodating known addicts but offering no guidance to owners regarding whether that exemption applies outside of those specific scenarios).

[263] *See id.* (noting that parents and homeless shelters that house known drug addicts do not violate the statute because their drug use is incidental to their residence, but not defining why the drug use is incidental or where the line between incidental and significant purpose falls); *id.* at 248–29 (Roth, J., dissenting in part and dissenting in judgment) (observing the absurd results that would follow from the majority's construction, such as the prosecution of a vacationing homeowner hinging upon whether his house sitter's drug use was incidental to shelter or not); Oral Arg., *supra* note 73, at 29–30 (arguing for the government that the statute would not apply to a single drug user but not stipulating, or providing a test to determine, the number of drug users that would trigger the statute).

[264] Oral Arg., *supra* note 73, at 29–30, 32. The government argued that one person using drugs on a property would not violate the statute but refused to decide whether two people using drugs would trigger liability, merely stating that the property manager would be more likely to violate the Crack House Statute with more people on the property. *Id.* at 29–30. The government's proposed spectrum of drug use, ranging from too minimal to invoke the Crack House Statute to certainly triggering the statute, is essentially a concentration test. *See id.* at 29, 31 (explaining that concentrated drug activity would trigger the statute). Safehouse retorted that if the facility can only house one person at a time, it would reduce its size to comply with the government's conception of the statute. Oral Arg., *supra* note 73, at 92.

[265] *See* Oral Arg., *supra* note 73, at 32 (observing that the concentration test is based on legislative history, not on the statute's text).

[266] *Safehouse II*, 985 F.3d at 237.

[267] *Id.* at 248 (Roth, J., dissenting in part and dissenting in judgment); *see id.* at 237 (majority opinion) (avoiding defining incidental or significant purpose).

court's only discussion of incidental use was in response to Safehouse's concern that the interpretation would penalize homeless shelters and concerned parents who housed known drug users.[268] Instead of defining either incidental or significant, the court simply wrote off Safehouse's point by noting that the drug use in those examples would be incidental.[269] Therefore, the property owners and managers who the Crack House Statute affects have no guidance in differentiating between drug use on their properties that confers liability on them and drug use on their properties that does not.[270]

2. Calling Future Courts to Independently Analyze the Statute and Decide Whether It Requires a Purpose to Facilitate Drug Use

Although the correct interpretation of the statute requires the SIF's "purpose," SIFs may still violate the Crack House Statute.[271] The Third Circuit persuasively reasoned that because drug use is central to SIFs' operations, a beneficent motive does not override the significant purpose of drug use.[272] SIFs therefore harbor a significant purpose of drug use.[273]

The question remains whether 21 U.S.C. § 856(a)(2) requires a significant purpose to *facilitate* drug activity.[274] The Third Circuit did not address the issue, perhaps because limiting the scope of "purpose" to facilitating drug use would not impact the analysis when applied to drug users rather than the site operators.[275] Drug users inherently facilitate their own drug use, so reading "facilitating" into the purpose requirement would not affect the result.[276]

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[268] *Id.* at 238.

[269] *See id.* (avoiding creating a test to determine whether purpose is incidental or significant).

[270] *See supra* notes 264–269 and accompanying text (explaining how the Third Circuit's differentiation between incidental and significant drug use does not help site operators in practice). Actors do not necessarily know whether the third party's use would be significant unless it is the third party's sole purpose. *See Safehouse II*, 985 F.3d at 237–38 (discussing that § 856 does not require a sole purpose and explaining that owners can make their property available to known drug users because drug use is incidental to the primary purpose of shelter).

[271] *Safehouse II*, 985 F.3d at 232, 238. Safehouse satisfies § 856(a)(2)'s actus rei requirements because it will control the site and make the site available for drug use. *Id.* at 237. Safehouse may also satisfy the statute's mens rea because one of its significant purposes is drug use. *Id.* at 238.

[272] *Id*. Safehouse's significant purpose is drug use because it operates so that opioid addicts can inject drugs under medical supervision. *Id.* Though Safehouse's motive is altruistic, drug use is a key factor in its operation. *Id.*

[273] *Id.* at 237–38.

[274] *Compare* United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 611–14 (E.D. Pa. 2019) (holding that (a)(2) requires a significant purpose to facilitate drug activity), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021), *with Safehouse II*, 985 F.3d at 237 (holding that (a)(2) requires a significant purpose of drug activity but not addressing whether the provision also requires some additional predatory motive).

[275] *See Safehouse II*, 985 F.3d at 237 (holding that "purpose" in (a)(2) refers to the drug users' purpose).

[276] *See id.*

As the district court noted, the legislative history and the statute's general purpose indicate that facilitating drug use may be implied in § 856.[277] Though this interpretation is convincing, it is not invulnerable.[278] One issue is that the government has used § 856(a)(2) to prosecute people who merely knew about but were not directly involved in the drug operation.[279] This application of (a)(2) would suggest that the district court is incorrect because these defendants did not intend to facilitate drug use.[280] Still, that case law is not determinative of how courts would handle SIFs because no court to date has applied (a)(2) to cases involving drug use in the absence of drug manufacture or sale.[281] Given this context, it is possible that the district court's holding, that the statute requires a purpose to facilitate drug activity, is limited to cases involving drug use alone.[282]

In view of the baffling state of § 856(a)(2) jurisprudence, courts should engage in extensive statutory interpretation to discern the meaning of the

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[277] *Safehouse I*, 408 F. Supp. 3d at 611–13 (citing 149 CONG. REC. 1848–49, 9383–84 (2003)).

[278] *See infra* notes 279–281 and accompanying text (explaining how the district court's interpretation of the Crack House Statute is inconsistent with the way in which the government has prosecuted the statute).

[279] *See* United States v. Tebeau, 713 F.3d 955, 958, 960–61 (8th Cir. 2013) (convicting a defendant under § 856(a)(2) for allowing certain drug sales to occur on his farm during music festivals he hosted there); United States v. Wilson, 503 F.3d 195, 196–97, 197–98 (2d Cir. 2007) (applying (a)(2) to a woman, who lived with a drug dealer, for allowing people to use her residence for drug activity); United States v. Ramsey, 406 F.3d 426, 431–33 (7th Cir. 2005) (holding that excluding the word "intentionally" from jury instructions regarding (a)(2) was a harmless error in a case in which the defendant knew his son sold drugs in the defendant's rented trailer); United States v. Chen, 913 F.2d 183, 185, 190 (5th Cir. 1990) (finding that the district court appropriately gave the jury a willful ignorance instruction for (a)(2) in sentencing the defendant who knew about the widespread drug sales occurring at his motel); *cf.* United States v. Banks, 987 F.2d 463, 466 (7th Cir. 1993) (applying (a)(1) to the owner of the crack house who opened his property to drug distribution and use); United States v. Tamez, 941 F.2d 770, 772, 774 (9th Cir. 1991) (applying (a)(2) to the owner of a car dealership who used profits from the drug ring operating at his business to buy more cars).

[280] *See supra* note 279 and accompanying text (overviewing cases in which the government prosecuted defendants who were aware of, but not engaged in, drug operation under the Crack House Statute).

[281] *See generally* Belfiore, *supra* note 104 (collecting cases that apply § 856(a)(2) and finding no cases concerning drug use in the absence of manufacturing or distribution). This selective application, however, may not be imputed onto the statute's scope because it is the government's enforcement priorities that prevent (a)(2) charges for drug use alone. *See* Adler, *supra* note 116 (explaining that federal drug enforcement concentrates on more expansive criminal drug enterprises). It is rare, outside of drug trafficking operations, for the scale of drug use to be worthy of federal prosecution. *See Safehouse I*, 408 F. Supp. 3d at 585–86 (bringing § 856(a)(2) charges for drug use in the absence of manufacturing or sales for the first time). The statute's original purpose to target crack houses and raves typically encompasses drug use in addition to drug sales or manufacturing. 149 CONG. REC. 9383 (statement of Sen. Biden).

[282] *See Safehouse I*, 408 F. Supp. 3d at 616 (holding that a violation of § 856(a)(2) requires a significant purpose to facilitate drug use); *supra* notes 279–281 and accompanying text (detailing the government's use of the Crack House Statute to prosecute different actors and the enforcement priorities of federal law enforcement).

law.[283] Too many courts have relied on one decision that illogically construed the statute and did not consider the 2003 amendment, leaving an impressive volume of precedent lacking textual analysis.[284] So far, only the District Court for the Eastern District of Pennsylvania has completed the level of analysis required for this opaque provision.[285] With only one court weighing in on the question, it remains unclear whether the operators need only a significant purpose of drug use or a significant purpose to facilitate drug use.[286] SIFs' legality could hinge on this issue if a court adopts this Note's and the district court's interpretation that "purpose" modifies the operator.[287] Therefore, future courts discerning whether SIFs violate the provision should independently analyze the text rather than merely citing to previous cases.[288] These future judicial findings could pave a path to SIF legalization.[289]

B. Recommendations for Opioid Harm Reduction Measures Going Forward

The Third Circuit's holding creates an obstacle to SIFs, but even the district court's interpretation of the Crack House Statute leaves harm reduction

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[283] *See Safehouse I*, 408 F. Supp. 3d at 603 (noting the absence of statutory analysis in previous opinions applying the statute).

[284] *See id.* at 603–04 (outlining the cases that misused interpretive canons to discern the statute's meaning and the cases decided after the 2003 amendment which relied on precedent analyzing the 1986 language); *see also Tebeau*, 713 F.3d at 960–61 (avoiding completing statutory analysis by citing to case precedent, including cases decided before the 2003 amendment); *Wilson*, 503 F.3d at 197–98 (citing only to cases decided before the 2003 amendment and not engaging in its own independent interpretation); *Ramsey*, 406 F.3d at 431 (same); *Tamez*, 941 F.2d at 774 (citing to *Chen* and not engaging in its own analysis); *Chen*, 913 F.2d at 190 (holding that "purpose" in § 856(a)(2) refers to the purpose of third-party drug users).

[285] *See Safehouse I*, 408 F. Supp. 3d at 603 (analyzing the statute's text in detail); Oral Arg., *supra* note 73, at 21–22 (highlighting the Crack House Statute's ambiguities, including the level of purpose required and who must harbor that purpose).

[286] *See Safehouse I*, 408 F. Supp. 3d at 603 (being the only court to analyze § 856(a)(2)'s text since the 2003 amendment); *supra* note 284 and accompanying text (outlining courts that decided cases without engaging in statutory analysis of (a)(2)).

[287] *See supra* notes 252–259 and accompanying text (arguing that "purpose" in (a)(2) refers to the site operator); *see also Safehouse I*, 408 F. Supp. 3d at 595–603 (interpreting the word "purpose" in (a)(2) to refer to the site operator and holding that SIFs do not violate the Crack House Statute).

[288] *See supra* notes 283–286 and accompanying text (arguing that incorrect precedent limits current judicial interpretation of the Crack House Statute); *see also Safehouse I*, 408 F. Supp. 3d at 603 (deriding other courts for merely citing to precedent rather than independently analyzing the statute). Independent analysis could also steer courts away from concluding that "purpose" in (a)(2) refers to the drug users. *See Safehouse I*, 408 F. Supp. 3d at 603 (observing that every previous case that held that (a)(2) required drug users to have the purpose of drug use ignored relevant legislative history and cited to one case, *Chen*, with flawed logic and inconsistent application of interpretive canons).

[289] *See Safehouse I*, 408 F. Supp. 3d at 606–14 (relying on canons of statutory interpretation, the statute's text, and legislative history to determine that SIFs do not violate the Crack House Statute because the statute requires the property operator to have a significant purpose to facilitate drug use).

approaches vulnerable.[290] At this juncture, the federal government can better address the opioid epidemic not by creatively interpreting existing federal drug laws, but by amending them to protect and incentivize harm reduction strategies to addiction.[291]

Under the existing legislation, some legal harm reduction programs remain available.[292] For example, facilities can distribute clean syringes and fentanyl testing strips.[293] Facilities like SPOT in Boston provide medical supervision to people who inject opioids before arriving at the clinic.[294] These alternative programs are legal but lack SIFs' efficacy in preventing overdose deaths because they do not provide services at the point of injection, when most overdoses occur.[295] The safest harm reduction strategy for current opioid users is SIFs, so proponents should continue to fight for their implementation in the United States.[296]

One potential path to SIF implementation is reform at the state level.[297] The United States' federalist system enables states to legalize drugs in spite of federal laws criminalizing them.[298] Focusing on state reform also helps expunge relics of the drug war from lower levels of government that have long-lasting community impact.[299] Nevertheless, a state's laws do not protect its

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[290] *See* United States v. Safehouse (*Safehouse II*), 985 F.3d 225, 229 (3d Cir.) (holding that SIFs are illegal under the Crack House Statute), *cert. denied*, 142 S. Ct. 345 (2021).

[291] *See infra* notes 314–318 and accompanying text (arguing that, because federal drug laws create so many obstacles to harm reduction strategies and SIFs specifically, a sweeping reform would be more effective in addressing the opioid epidemic than adopting the district court's interpretation of the Crack House Statute).

[292] *See* Longnecker, *supra* note 3, at 1154 (detailing syringe exchange programs); Gaeta, *supra* note 74 (describing medical monitoring during a drug user's high); *SPOT*, *supra* note 72 (same).

[293] Goldman et al., *supra* note 68, at 2 (describing clinical use of fentanyl testing); Longnecker, *supra* note 3, at 1154 (detailing syringe exchange programs).

[294] Gaeta, *supra* note 74; *SPOT*, *supra* note 72.

[295] *See* Gaeta, *supra* note 74 (noting that the SPOT program does not stop overdoses that occur at the time of injection or prior to patients arriving at the facility). Clean syringes do not prevent overdoses. Longnecker, *supra* note 3, at 1155. Fentanyl testing, though incredibly helpful, does not prevent overdose from pure heroin. *See* Goldman et al., *supra* note 68, at 2 (explaining that fentanyl test strips identify synthetic opioids in drugs but do not prevent overdose from prescription drugs or heroin).

[296] *See* Kral & Davidson, *supra* note 6, at 919 (reviewing different countries' SIF models and research showing reduced overdoses, safer injection environments, and expanded access to health care); Knopf, *supra* note 6 (same).

[297] *See* Chemerinsky et al., *supra* note 109, at 103 (explaining how the federalist system allows for a state to decriminalize an activity that the federal government proscribes).

[298] *See* Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the federal government could not force state police officers to enforce federal law). *See generally* U.S. CONST. amend. X (reserving powers not expressly bestowed on the federal government to the states).

[299] *See* Shapiro, *supra* note 118, at 116 (noting that state drug policy is more impactful than national drug policy because the federal government only carries out 1% of marijuana arrests per year). Only after local governments normalize SIFs and demonstrate reduced overdose deaths will the federal government consider following their lead. *Cf.* Tom Head, *Interracial Marriage Laws History and Timeline*, THOUGHTCO, https://www.thoughtco.com/interracial-marriage-laws-721611 [https://perma.cc/KP7T-KVBL] (June 11, 2021) (highlighting the state trend in allowing for interracial marriages

constituents from the reach of the federal government, which may use its own law enforcement resources to prosecute violations of federal drug law.[300] At present, only the federal government's drug enforcement priorities and resource allocation, perhaps in addition to fear of political fallout, protect people who use drugs pursuant to state law from federal prosecution.[301]

For states that have decriminalized hard drugs, the federal government's priorities and limited resources will likely prevent it from targeting individual heroin users.[302] SIFs, on the other hand, present a larger problem.[303] Prosecuting SIFs expends fewer resources than prosecuting individual drug possession cases and has a broader impact.[304] The *Safehouse* cases demonstrate that the federal government assumes that the benefit of preventing SIF implementation justifies the cost of litigation.[305] Though President Joe Biden's support for harm reduction measures could prevent SIF prosecution during his tenure, keeping the Crack House Statute in place leaves SIFs in a vulnerable position when another President takes office.[306] It is therefore vital that Congress repeal the Crack House Statute and other codified barriers to treatment, like the larger CSA.[307]

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before the Supreme Court followed suit in 1967 *Loving v. Virginia*); *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, GEORGETOWN L. LIBR., https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201 [https://perma.cc/8DNW-4AWZ] (underscoring that the Supreme Court only held that same-sex marriage was legal after many states had sanctioned it). Similarly, states played vital roles in the federal legalization of same-sex and interracial marriage and could be instrumental in the implementation of SIFs at the federal level. Head, *supra*; *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, *supra*; *see* Adler, *supra* note 110, at 6 (explaining the states' role in social policy experiments).

[300] *See* U.S. CONST. art. VI, cl. 2 (stipulating federal supremacy over contradictory state law).

[301] Adler, *supra* note 116 (reporting that the federal government does not have the resources to prosecute minor drug infractions); *Marijuana*, *supra* note 123 (hypothesizing that the federal government avoids charging drug users for marijuana use because decriminalization has become increasingly popular). An appropriations rider temporarily precludes the government from spending its resources to charge marijuana users in states that have decriminalized the drug. Shapiro, *supra* note 118, at 116. Attempts to prolong the protection failed, leaving the marijuana industry in a precarious position. Shapiro & Larosiere, *supra* note 118, at 349, 356.

[302] *See* Adler, *supra* note 116 (reporting that the federal government does not have the resources to prosecute individual drug possession cases and instead concentrates on more substantial criminal enterprises).

[303] *See* United States v. Safehouse (*Safehouse II*), 985 F.3d 225, 241 (3d Cir.) (holding in favor of the federal government in its prosecution of the first SIF in the United States), *cert. denied*, 142 S. Ct. 345 (2021).

[304] *See Safehouse II*, 985 F.3d at 241 (ruling on the government's attempted prosecution of a SIF); Adler, *supra* note 116 (explaining that scarce funding affects the federal government's prosecutorial behavior).

[305] *See Safehouse II*, 985 F.3d at 241 (ruling in favor of the government's prosecution of a SIF); United States v. Safehouse (*Safehouse I*), 408 F. Supp. 3d 583, 585 (E.D. Pa. 2019) (ruling in favor of the SIF), *rev'd*, 985 F.3d 225 (3d. Cir.), *cert. denied*, 142 S. Ct. 345 (2021).

[306] *See* Sessi Kuwabara Blanchard, *Biden Quietly Announces Harm Reduction Among His Drug Priorities*, FILTER (Feb. 4, 2021), https://filtermag.org/ondcp-biden-priorities/ [https://perma.cc/WL34-2W9N] (reporting that President Biden supports harm reduction but not clarifying whether that support extends to SIFs); *The Biden Plan to End the Opioid Crisis*, BIDEN HARRIS, https://joebiden.

com/opioidcrisis/ [https://perma.cc/W747-ZMKN] (outlining the Biden Administration's plan to combat the opioid epidemic). *But see* Tim Craig, *Biden, Once a Warrior in the 'War on Drugs,' May Slowly Retreat*, WASH. POST (Jan. 11, 2021), https://www.washingtonpost.com/politics/2021/01/11/biden-war-on-drugs/ [https://perma.cc/TE9L-42SM] (noting that although President Biden now supports marijuana decriminalization, his commitment to prevention and treatment does not necessarily extend to legalizing SIFs). *Compare* Memorandum from James M. Cole, *supra* note 126, at 3 (stating that the federal government did not intend to pursue drug possession or sales that complied with state law during the Obama Administration), *with* Memorandum from Jefferson B. Sessions, III, *supra* note 119 (rescinding the Cole Memo under the Trump Administration). President Biden hopes to make MAT more widely available, shooting for treatment for all by 2025. *The Biden Plan to End the Opioid Crisis*, *supra*. He also intends to improve overdose response training for first responders, implement community education programs, and end incarceration for drug use. *Id.* For the last of those goals, he claims that he will compel federal courts to redirect defendants charged with drug possession to drug courts and encourage states to do the same. *Id.* Many are skeptical that President Biden will follow through on these promises given his authorship of numerous drug control bills that continue to destroy communities of color. *See* Abraham Gutman, Opinion, *Joe Biden and the Kinder, Gentler War on Drugs*, NEWSDAY, https://www.newsday.com/opinion/commentary/joe-biden-war-on-drugs-hunter-biden-addiction-program-opioids-1.50044352 [https://perma.cc/YX3Y-GRUB] (Oct. 22, 2020) (noting that President Biden's expressed compassion for those suffering from addiction is ironic given his role in introducing the Crack House Statute); Kastalia Medrano, *The Biden Administration and Drug Policy: Expectation Versus Reality*, FILTER (Jan. 20, 2021), https://filtermag.org/biden-administration-drug-policy-reform/ [https://perma.cc/3G7M-K2GN] (expressing skepticism in President Biden's willingness to end the War on Drugs, in part because he drafted the Crack House Statute). Drug courts may not necessarily be preferable to federal courts because judges in drug courts mandate treatment and punish noncompliance with a prison term, surging the chance of fatal overdoses at discharge. Gutman, *supra*.

[307] *See* SARAH HERMAN PECK, CONG. RSCH. SERV., R44967, CONGRESS'S POWER OVER COURTS: JURISDICTION STRIPPING AND THE RULE OF *KLEIN* 1–2 (Aug. 9, 2018), https://fas.org/sgp/crs/misc/R44967.pdf [https://perma.cc/R759-LJZ3] (explaining that Congress checks the Judiciary's power by repealing and revising laws when Congress believes the court misinterpreted their scope). Repealing the Crack House Statute would be a small step toward racial justice because racism motivated the government's enforcement of crack cocaine charges. *See* Sanders, *supra* note 63, at 422–23 (detailing how the federal government shaped American drug policy to target specific ethnic and racial groups); Des Jarlais, *supra* note 16, at 2 (linking American drug policy to systemic racism). In fact, the government may be responsible for the prevalence of crack in Black communities. *See* Sanders, *supra* note 63, at 427 n.3 (citing GARY WEBB, DARK ALLIANCE: THE CIA, THE CONTRAS, AND THE CRACK COCAINE EXPLOSION (1999)). The CIA, during the Reagan Administration, directed capital to a political group in Nicaragua, a leader in cocaine export, and helped funnel Nicaraguan cocaine to predominantly Black, urban neighborhoods. *Id.* Crack is a cheaper form of cocaine diluted with baking soda, allowing people of all social strata to access it. *Id.* at 423. Crack deals surged, and the profits were directed to the Nicaraguan political group that provided the cocaine. *Id.* at 427 n.3. Gangs then materialized to "control the market," resulting in an increasingly Black prison population and rising deaths of young Black men in gang-related violence. *Id.* at 423.

Though some are skeptical of this history, the racially motivated discrepancies in punishments for crack and cocaine infractions are undeniable. *See id.* at 423 (noting that federal laws punish possession of crack, prevalent in Black communities, one hundred times more severely than cocaine, prevalent in white communities); *see also* 146 CONG. REC. H8206-06 (daily ed. Sept. 27, 2000) (statement of Rep. Scott) (denouncing an amendment to the Crack House Statute that would exempt ecstasy possession, primarily occurring in white middle-class communities, from mandatory minimums while upholding mandatory minimums for infractions related to crack, prevalent in Black communities, and methamphetamine, prevalent in Latinx communities). Legislative history indicates that Congress either bought into national panic that the prevalence of crack would destroy the American family or capitalized on that fear to pass the racist statute. *See* 132 CONG. REC. H9455-05 (daily ed. Oct. 8,

Though a complete overhaul of American drug policy is a chimeric dream, some drug reform is on the horizon.[308] Modern substance use research should inform Congress's forthcoming policy decisions.[309] Research has revealed new insights into addiction since the 1980s, and the public's awareness of the disease has deepened with the spotlight on today's opioid crisis.[310] For example, at the time Congress passed the CSA, law enforcement understood harm reduction as a disguised form of legalization.[311] Today, a large volume of scientific evidence backs the importance of harm reduction, treatment, and prevention alongside enforcement.[312] The law should reflect an updated under-

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1986) (statement of Rep. Florio) (proclaiming that eight-year-olds are using crack); 132 CONG. REC. S14270-01 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (stating that "children as young as nine . . . are already crack users"); 132 CONG. REC. H6679-02 (daily ed. Sept. 11, 1986) (statement of Rep. Wright) (stating that crack is "available at elementary schools throughout our Nation"); 132 CONG. REC. H6716-03 (daily ed. Sept. 11, 1986) (statement of Rep. LaFalce) (expressing a similar sentiment that crack is accessible "on school yards across the land"); 132 CONG. REC. H6519-01 (daily ed. Sept. 10, 1986) (statement of Rep. Wirth) (asserting that crack is destroying the American family). Members of Congress did not explicitly link crack use to Black communities, instead focusing on the accessibility of the drug in even the poorest neighborhoods. *See* 132 CONG. REC. S14270-01 (including statements by multiple Senators worrying about the availability of crack in under-resourced communities). One Member of Congress did, however, relate the issue to immigration. 132 CONG. REC. H6679-02 (statement of Rep. McCollum) (noting the necessity of deporting "those illegals dealing in crack and cocaine . . . as fast as we can possibly get them out under the deportation laws as they now exist").

[308] *See supra* note 306 and accompanying text (summarizing President Biden's plan to address the opioid epidemic and also his role in criminalizing drug use and creating racial disparities in cocaine sentencing).

[309] *See infra* notes 310–312 and accompanying text (detailing breakthroughs in research and public perception of addition since the 1980s).

[310] *See* Des Jarlais, *supra* note 16, at 2 (discussing how the public has historically considered substance use disorder (SUD) an ethical shortcoming, whereas the academic community considers it a disease); Kristof, *supra* note 87 (reporting Oregon's decriminalization of narcotics and stating that both Republicans and Democrats recognize the need for a new approach to drug use). *Compare Timeline: America's War on Drugs*, NPR (Apr. 2, 2007), https://www.npr.org/templates/story/story.php?storyId=9252490 [https://perma.cc/7M82-YJX4] (reporting that President Nixon declared drugs as "public enemy No. 1" in 1971), *and The History of the War on Drugs: Reagan Era and Beyond*, LANDMARK RECOVERY (Feb. 13, 2019), https://landmarkrecovery.com/history-of-the-war-on-drugs-reagan-beyond/ [https://perma.cc/G869-QKTD] (discussing President Reagan's "tough on crime" tactic regarding drug use, including punishing it with prison time), *with* Ehley, *supra* note 32 (reporting that President Trump declared the opioid epidemic a public health crisis), *and* Connery, *supra* note 51, at 63 (conceptualizing addiction as a medical rather than moral illness), *and Opioid Use Disorder*, *supra* note 51 (same).

[311] Caulkins & Reuter, *supra* note 7, at 117. Even harm reduction proponents are divided into two camps: (1) those who champion the paradigm for public health, and (2) those who use it to promote more comprehensive systemic change. Gordon Roe, *Harm Reduction as Paradigm: Is Better Than Bad Good Enough? The Origins of Harm Reduction*, 15 CRITICAL PUB. HEALTH 243, 244 (2005).

[312] *See* Caulkins & Reuter, *supra* note 7, at 117 (explaining public health's four pillars of combatting addiction); Des Jarlais, *supra* note 16, at 4 (noting that by 1998, the research supporting syringe exchange programs, a form of harm reduction, was so robust that the Secretary of Health and Human Services sanctioned them); Stanton Peele, *A Brief History of Disease Theory and Harm Reduction Treatment in the US*, AM. ADDICTION CTRS., https://www.rehabs.com/pro-talk/a-brief-history-of-

standing of addiction and the ways in which previous enforcement methods failed to control drug use.[313]

Furthermore, Congress should recognize that focusing on enforcement stigmatizes addiction.[314] Enforcement is an impediment to treatment because the drug user's physician could report their drug use to authorities, which can result in prosecution and loss of parental rights, among other harms.[315] The fear of legal repercussions coupled with the astronomical cost of treatment have caused a huge treatment gap.[316] Unfortunately, prisons are the predominant and most affordable vehicle for substance use treatment.[317] Further, both inside and outside of prison, treatment, harm reduction, and prevention pro-

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disease-and-harm-reduction-treatment-in-the-united-states/ [https://perma.cc/YY76-37HX] (Nov. 4, 2019) (discussing that when the American Psychiatric Association published the DSM-IV in 1994, it did not measure substance abuse recovery by abstinence).

[313] *See* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE. L. REV. 1011, 1151–52 (2007) (arguing that when legal legitimacy and sociological legitimacy do not align, the public may not credit a court's decision); Radley Balko, Opinion, *How Do We Reconcile Law and Science?*, WASH. POST (Aug. 6, 2019), https://www.washingtonpost.com/opinions/2019/08/06/how-do-we-reconcile-law-science/ [https://perma.cc/4RDC-EUJ5] (discussing the tension between law, which seeks stability and definitiveness, and science, which is perpetually evolving).

[314] *See* Longnecker, *supra* note 3, at 1154 (discussing drug users' fear of social ostracization).

[315] Angelotta et al., *supra* note 139, at 586. This problem is underlined by the experience of pregnant opioid users, who can be charged with criminal child abuse or neglect for their prenatal use. *Id.* The fear of law enforcement coupled with the public ostracizing drug users leads them to use in concealed, often dirty, places. Longnecker, *supra* note 3, at 1154. Injecting in these conditions heightens the risk of infection and overdose. *Id.*

[316] *See* Longnecker, *supra* note 3, at 1154 (explaining opioid users' fear of law enforcement); Leah Miller, *How Much Does Drug & Alcohol Rehab Cost?*, AM. ADDICTION CTRS., https://www.rehabs.com/addiction/how-much-does-rehab-cost/ [https://perma.cc/B7KL-4U7S] (Dec. 7, 2021) (detailing the high cost of drug rehabilitation programs); *Addiction Statistics*, *supra* note 1 (discussing the addiction treatment gap); Jeffrey Juergens, *Cost of Drug and Alcohol Rehab*, ADDICTION CTR., https://www.addictioncenter.com/rehab-questions/cost-of-drug-and-alcohol-treatment/ [https://perma.cc/QH7E-G3R5] (Jan. 27, 2022) (itemizing the exorbitant cost of drug treatment).

[317] *See* Matt Ford, *America's Largest Mental Hospital Is a Jail*, THE ATLANTIC (June 8, 2015), https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/ [https://perma.cc/6R27-VR3L] (discussing how more than 30% of incarcerated persons at Cook County Jail in Illinois have mental disorders and that some perpetrated crimes in order to access treatment); Tanya St. John, *Why America's Largest Mental Health Institutions Are Prisons and Jails*, ARUNDEL LODGE (Aug. 8, 2016), https://www.arundellodge.org/why-americas-largest-mental-health-institutions-are-prisons-and-jails/ [https://web.archive.org/web/20201112003538/https://www.arundellodge.org/why-americas-largest-mental-health-institutions-are-prisons-and-jails/] (reporting that the largest establishments housing people with a SUD are prisons and jails and that, in 2010, 65% of the prison population acutely suffered and 20% historically suffered from SUD); Christine Vestal, *This State Has Figured Out How to Treat Drug-Addicted Inmates*, PEW (Feb. 26, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/02/26/this-state-has-figured-out-how-to-treat-drug-addicted-inmates [https://perma.cc/5X5N-DZ39] (reporting that "120 jails . . . and prison systems . . . offer evidence-based treatment for opioid addiction"); *see also* Ford, *supra* (explaining that the Supreme Court, in 1976, declared that prisons must offer healthcare to prisoners, making prisoners the only U.S. residents who have a right to healthcare); Peele, *supra* note 312 (noting the lack of non-abstinence-based treatment programs in the United States).

grams are limited or ineffective.[318] Congress must address each of these issues so it can better fight, and eventually end, the opioid epidemic.[319]

CONCLUSION

When courts finally addressed whether SIFs violate the Crack House Statute, the U.S. Court of Appeals for the Third Circuit, in 2021, in *United States v. Safehouse* (*Safehouse II*), concluded that they did, whereas the U.S. District Court for the Eastern District of Pennsylvania, in 2019, in *United States v. Safehouse* (*Safehouse I*) held that they did not. The issue turned on the meaning of the word "purpose" in 21 U.S.C. § 856(a)(2). The courts agreed that the statute requires a significant purpose of drug activity but diverged in who they believed must hold that purpose. The district court held that "purpose" referred to the SIF operator. Conversely, the Third Circuit determined that the statute focused on the drug user's purpose.

Though the Third Circuit opinion carries more weight than the district court opinion, future courts deciding the matter should heed the district court's point that the precedential circuit court cases did not properly analyze the statute. In 1990, in *United States v. Chen*, the U.S. Court of Appeals for the Fifth Circuit illogically construed an imagined redundancy between statutory provisions, and every subsequent circuit merely cited to that opinion without independently analyzing the statute, even after its language changed in 2003. The district court was the first to analyze the statute's text since the 2003 amendment, supporting its conclusion that "purpose" refers to the site operator with a wealth of interpretive canons and legislative history. Despite the Goliathan effort against five circuit cases, there is an irrefutable logic to the district court opinion. SIFs' legality hinges on whether future courts adopt and find support for the district court's reading that the statute requires a purpose to facilitate drug use, an issue the Third Circuit did not address.

In the meantime, the opioid epidemic is yielding higher death counts every year. The Crack House Statute specifically and the CSA generally prohibit harm reduction measures like SIFs from combatting the drug crisis. American drug policy envisions a fictional world in which criminalizing drug use causes

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[318] *See* Longnecker, *supra* note 3, at 1154–55 (noting that the legal forms of harm reduction do not directly prevent overdose deaths); Peele, *supra* note 312 (detailing the lack of non-abstinence-based treatment programs in the United States); *Why the DARE Program Failed*, *supra* note 87 (discussing why DARE disappointed in efforts to decrease drug use); *see also* Siegel, *supra* note 90 (describing one state report that re-entering persons fatally overdose from opioids 12,000% more than the typical American).

[319] *See* Caulkins & Reuter, *supra* note 7, at 117 (explicating that harm reduction, along with enforcement, treatment, and prevention must work in tandem for drug control to be successful); *supra* notes 315–318 and accompanying text (arguing that the focus on drug enforcement stigmatized addiction and prevented the implementation of adequate treatment facilities and harm reduction measures).

it to disappear. In reality, the United States' laws and anti-drug programs have only succeeded in criminalizing addiction. Congress must reconsider its approach so that the country can embrace harm reduction, treatment, and prevention services rather than face endless legal barriers to slowing the death toll.

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