The War on Drugs or the War on Drug Users? Supervised Consumption Site in the United States as a Harm Reduction Strategy to Fight the Opioid Epidemic

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THE WAR ON DRUGS OR THE WAR ON DRUG USERS? SUPERVISED CONSUMPTION SITES IN THE UNITED STATES AS A HARM REDUCTION STRATEGY TO FIGHT THE OPIOID EPIDEMIC

By: Mary Crevello*

ABSTRACT

Exploring the U.S. response to the opioid crisis, this study critically examines supervised consumption sites (SCSs) as a pragmatic approach. The historical framework of the "war on drugs" is scrutinized, highlighting its limitations and the necessity to shift from punitive measures towards more effective harm reduction strategies. Due to escalating opioid-related fatalities and inadequate harm reduction methods, the potential of SCSs is evaluated for short-term intervention. The Department of Justice's (DOJ) role in facilitating temporary measures to enable SCS operations is assessed, underscoring the urgency for a stable legislative framework to comprehensively address the crisis.

This research advocates for embracing supervised consumption sites within a legal structure as a transformative response to the opioid crisis. By offering an alternative paradigm to the current drug policy, SCSs hold promise in reducing opioid-related deaths and reshaping the trajectory of substance abuse interventions.
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INTRODUCTION

President Ronald Regan once said, “[d]rug use is too costly for us not to do everything in our power, not just to fight it but to subdue it and conquer it.”1 The war on drugs was enacted by President Richard Nixon, fifteen years prior to Ronald Regan’s speech in 1971 to combat illegal drug activities.2 Nixon pledged to enhance federal funding that was devoted to the “prevention of new addicts” and the “rehabilitation of those who are addicted.”3 While the war on drugs resulted in significant funding for drug control policies and the creation of several federal agencies, such as the Drug Enforcement Administration (DEA), the war on drugs also led to the incarceration of millions of Americans.4 Nearly thirty-seven years and over a trillion dollars later, America is still fighting the war on drugs.5 But perhaps a more appropriate name for the “war on drugs” is the “war on drug users,” as nearly 1.6 million Americans are arrested on drug-related charges annually, yet the U.S. government’s response to the opioid crisis remains incarceration rather than offering an effective solution.6 The question of primary authority regarding substance abuse has never been answered, with some possible answers being the criminal justice system, the healthcare system, religious institutions, or the recovery community.7 Historically the criminal justice system has taken the primary authority regarding substance

2 Drug War History, DRUG POLICY ALLIANCE (last visited Jan. 10, 2023).
5 Juhun Lee, America Has Spent Over a Trillion Dollars Fighting the War on Drugs. 50 Years Later, Drug Use in the U.S. is Climbing Again, CONSUMER NEWS & BUS. CHANNEL (June 17, 2021), https://www.cnbc.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html [https://perma.cc/6URB-HTFS].
abuse\textsuperscript{8}, but the past fifty-one years should have made it clear to Americans and lawmakers that incarceration of drug users is not an effective solution for addressing drug addiction. Imprisoning drug users only leads to a higher risk of drug overdose upon release.\textsuperscript{9}

The stigma around substance abuse often means drug users are dehumanized or overlooked by society and lawmakers, which often drives treatment or harm reduction strategies out of reach.\textsuperscript{10} Despite being available, the current harm reduction strategies that are within reach have proven ineffective in addressing the opioid epidemic, as an estimated 130 Americans die every day due to an opioid overdose.\textsuperscript{11} In 2021 alone, the total opioid-related deaths was over 75,000.\textsuperscript{12} Due to the yearly rise in opioid-related deaths, it is apparent that the current harm reduction strategies offered by our government are inadequate.\textsuperscript{13} The United States has the highest number of opioid-related deaths among wealthy nations,\textsuperscript{14} possibly due to the legal uncertainty surrounding supervised consumption sites (SCSs), a proven effective harm reduction strategy in other countries.\textsuperscript{15} SCSs, while controversial, offer asylum, among many other resources, to drug users to conceal public drug use, prevent overdose, and encourage drug treatment.\textsuperscript{16} The future of SCSs in the U.S. is uncertain as some states successfully operate SCSs, while other states have faced federal prosecution for their operation.\textsuperscript{17}

\textsuperscript{8} Id.
\textsuperscript{9} Nora Volkow, Addiction Should Be Treated, Not Penalized, HEALTH AFFAIRS (Apr. 27, 2021), https://www.healthaffairs.org/content/forefront/addiction-should-treated-not-penalized
\textsuperscript{11} See generally Christen Linke Young & Abigail Durak, How Do We Tackle the Opioid Crisis?, BROOKINGS (Oct. 18, 2019), https://www.brookings.edu/policy2020/votervital/how-do-we-tackle-the-opioid-crisis
\textsuperscript{12} Drug Overdose Deaths in the U.S. Top 100,000 Annually, CTR. DISEASE CONTROL (Nov. 17, 2021), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm
\textsuperscript{13} Id.
\textsuperscript{16}AMA Wants New Approaches to Combat Synthetic and Injectable Drugs, AM. MED. ASS’N (June 12, 2017), https://www.ama-assn.org/ama-wants-new-approaches-combat-synthetic-and-injectabledrugs
\textsuperscript{17}Brian Mann & Caroline Lewis, New York City Allows the Nation’s 1st Supervised Consumption Sites for Illegal Drugs, NAT’L PUB. RADIO (Nov. 30, 2021),
With the national opioid epidemic rapidly increasing and current public health initiatives failing, the need for a viable solution is prevalent. A comprehensive solution to the opioid crisis will require time, but SCSs offer a viable interim solution. With the DOJ’s support SCSs could operate under federal regulations, allowing for an exception to 21 U.S. Code § 856, creating a similar situation to the DOJ’s Cole Memo.  

Part I of this Comment delves into the gravity of the opioid crisis and critiques the government’s current harm reduction strategies. It then goes on to highlight the advantages of supervised drug consumption sites. Part II of this Comment evaluates a recent court ruling determined in Safehouse, analyzes the meaning and intent behind 21 U.S. Code § 856, and explores the obstacles the statute creates for SCS. Finally, Part III of this comment discusses the Department of Justice’s discretion in choosing which circumstances to federally prosecute, referencing the Cole memo, and illustrates how the legal complexities surrounding these sites can attract the attention of the DOJ.

I. THE OPIOID EPIDEMIC AND SUPERVISED DRUG CONSUMPTION SITES

One could make a valid assessment regarding the severity of the opioid epidemic by walking down Kensington Avenue, also known as Philadelphia’s “skid row” near Somerset and Allegheny Avenue. It would not take long to recognize how Kensington coined the title “the largest open air drug market on the east coast” as hundreds gather on skid row to sell and use drugs amid an atmosphere that resembles a post-apocalyptic world. What could be even more disturbing than drug users resembling a post-apocalyptic world? Philadelphia’s Skid Row and similar areas around the country continue to flourish due to the government’s lack of urgency regarding the nation’s opioid endemic. The opioid crisis has been a

https://www.npr.org/2021/11/30/1054921116/illegal-drug-injection-sites-nyc


prevailing issue in our society since the early 1990s, and public health initiatives to curb the use of opioids and opioid-related deaths have fallen short of uncovering viable solutions. Opioid users need resources, and legislators are unwilling to deal with the problems caused by the national opioid crisis at the local and nationwide levels.

At the nation-wide level, the government’s current harm reduction strategies are blanket statements that offer no real solutions, such as the “stop overdose campaign” or grants to prevent prescription drug and opioid-related deaths which train EMTs how to administer Narcan. While these strategies can be helpful, they are not all-encompassing or valuable to all opioid users. For example, individuals who are homeless with no access to telephones do not have a realistic option to call an EMT for help. Other solutions for reducing the opioid crisis involve criminalizing the use of illicit drugs forcing users into withdrawal and increasing the chances of an overdose when they return to the streets. While there does seem to be a shift in approach by Congress from serving criminal justice to offering more health-oriented solutions to the opioid crisis, current efforts to curtail opioid overdose in the U.S. continue to fall short.

One successful harm reduction strategy introduced as an effort to reduce the opioid crisis and spread of HIV is the Syringe Exchange program “SEP.” These programs provide sterile syringes to drug users and gather used syringes to reduce the spread of diseases that accompany sharing syringes, such as Hepatitis or HIV. There are currently over 43 states which provide support services for SEPs; however, the rationales by which these services are authorized vary between these states. Harm reduction strategies such as SEPs must tread lightly as they attempt to aid those who use illicit substances without violating any federal laws. For example, some states such as

\[\text{References}\]


26 Id.

Wisconsin and Minnesota have an agreement with law enforcement that allows the programs to operate without prosecution, while other states such as New York and Florida have explicit syringe exchange laws. The SEPs effectively reduce the risk of HIV and Hepatitis in opioid users, but they do not prevent overdoses for opioid users. However, supervised consumption sites “SCSs” have proven to prevent opioid overdoses world-wide.

Several countries’ efforts to combat opioid overdoses have been successful in part due to SCSs, which are harm-reduction strategies that privatize drug use without punishing users. There is no single model for SCSs; however, typically, they are facilities operated by nonprofit organizations that provide sanitary equipment and a safe space for drug addicts to consume drugs. SCSs do not provide or administer illicit drugs; instead, they permit drug use under the supervision of licensed professionals who are readily available in case of an overdose. It might be easy to understand the rationale for opposing the legality of SCSs due to the controversy that accompanies them. However, the purpose of SCSs is to counteract overdoses, encourage treatment, and prevent diseases.

Additionally, the concept of SCSs is not novel as several countries, such as Canada, Denmark, and Australia, began implementing them as early as 1986. Since their execution, SCS has reduced overdose, death, and public nuisance crimes. While SCSs presents ethical quandaries and raises valid concerns, such as promoting illicit drug use and increased criminal activity in the areas surrounding SCSs, there is little to no evidence to support them. If anything, allowing drug users a safe space to use drugs eliminates the public nuisance many drug users bring to the streets, in fact, one study in Vancouver saw a 26% reduction in overdose deaths in surrounding areas of an SCS.

While several countries have experienced immense success since implementing SCSs, the United States lags in codifying laws allowing them to operate. As a result of the growing battle between state and federal law, only a handful of SCSs tentatively operate in the United States including multiple in New York. Although there

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29 Finke & Chan, supra note 15, at 454.
31 Finke & Chan, supra note 15, at 454.
32 Id.
34 Finke & Chan, supra note 15, at 454.
35 Id.
36 Id.
37 Id.
38 Mays & Newman, supra note 23.
are few SCSs in the United States, there are studies that prove SCSs can contribute to a promising viable solution to the opioid crisis.  

For example, in New York, a study found a connection between the drug treatment a SCS provided and a decrease in crime rates in neighbors and surrounding areas near the SCS. If SCSs are proven to prevent opioid overdose, death, and reduce public nuisance crimes, why has the U.S. delayed in uniformly adopting this harm reduction strategy? Several public health care initiatives that intend to offer a solution to the opioid epidemic all have one barrier in common, 21 U.S. Code § 856, colloquially known as the "crack house statute."

II. The Crack House Statute, Safehouse and Implications of Supervised Consumption Sites

21 U.S. Code § 856, or the "crack house statute," is a federal statute that prohibits the use of any building or premises for the purpose of using, storing, manufacturing, or selling controlled substances. As a part of Congress' Anti-Drug Act, the crack house statute was enacted to outlaw 'crack houses' – buildings or homes that allowed for the congregation of drug users to use illicit drugs during a time when crack houses posed a dangerous and prevalent threat to society. The passage of this statute during a time when crack houses were prevalent suggests that Congress enacted it to combat drug trafficking by targeting areas used to store, distribute, and sell illegal drugs. The legislative intent surrounding the crack house statute is highly controversial. Proponents of SCSs argue that legislators intended the statute to restrict the creation of drug houses, not medical facilities. However, some circuits have held that the statute should be interpreted broadly, prohibiting any building that knowingly permits the use of illicit drugs. This dispute is contingent on the statutory interpretation of the phrase "purpose of" in 21 U.S.C. § 856(a)(2). A copious amount of case law exemplifies various circuit court’s analysis regarding the implications of the crack house statute on manufacturing and distributing drugs. However, the primary objective of SCSs is to regulate consumption and there is limited analysis solely from a purely consumption point

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39 Id.
40 Id.
44 See infra note 45 (the Second, Fifth, Seventh, Eighth, and Ninth Circuit Courts have ruled that 21 U.S. Code § 856 should be interpreted broadly).
46 Rayfield, supra note 42, at 1816.
of view. The Third Circuit recently considered SCSs from a purely consumption point of view in United States v. Safehouse. However, case law remains limited.

SCSs and their legal implications surrounding the federal crack house statute had not been addressed by federal courts until United States v. Safehouse was decided in 2021. As the deaths from the opioid crisis continue to reach historical numbers and no real solution on the horizon from our legislators, leaders of nonprofit organizations around the nation have taken matters into their own hands. Safehouse, a nonprofit organization, proposed to open Philadelphia’s first SCS in 2019. The SCS was to “offer a variety of services, including medication-assisted treatment, medical care, referrals to a variety of other services, and use of medically supervised consumption and observation rooms.” The SCS also proposed to offer a variety of resources to opioid users, such as certified peer counselors, recovery specialists, social workers, and case managers who would have been available to offer services and encourage treatment.

The government prosecuted Safehouse arguing that the consumption rooms proposed by Safehouse would violate the crack house statute, and the district court was left to interpret the statutory construction of the crack house statute. The government failed to provide legislative evidence that SCSs were ever considered by Congress when the crack house statute was enacted. The government also conceded that offering harm reduction services similar to those of an SCS in a mobile van or in public on the streets would be lawful, as it does not involve the use of real property. Moreover, Congress’ silence on whether moral condemnation or criminal punishment should extend to the medical pursuit of advancing drug treatment resulted in a victory for Safehouse.

The district court concluded that for Safehouse to violate the crack house statute, the purpose of the SCS would be for others to distribute, manufacture, or use illegal drugs on the premises. The district court held that while Safehouse is aware and to some extent intends that some illicit drug use will occur on its premises, it does not signify that “the organization will knowingly and intentionally make the place available for the purpose of unlawful drug activity.”

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47 Safehouse, 985 F.3d at 236.
48 See generally Id.
50 Id. at 586.
51 Id.
52 Id. at 592.
53 Id. at 616.
54 Id. at 614.
55 Id. at 617.
56 Id. at 595.
57 Id. at 606.
the purpose of Safehouse is to facilitate drug treatment. Therefore, Safehouse was permitted to continue its plans of opening the nation's first SCS.

However, in 2020, just one year following the district court’s decision granting Safehouse permission to continue its plans to open a SCS, the government appealed the district court’s decision and the Third Circuit Court of Appeals ultimately decided the case in 2021. On appeal, the primary issue was the statutory interpretation of § 856(a)(1) when read in conjunction with § 856(a)(2).

When read together, the statutes state:

It shall be unlawful to--knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

To violate § 856(a)(2), “a defendant must “knowingly and intentionally ... make [his property] available for use” by a third party for that person's illegal drug use.” In their decision, the Third Circuit considered § 856(a)(2)'s last phrase: "for the purpose of ...." Safehouse and the district court contend that in order for Safehouse to violate §856(a)(2), Safehouse themselves must have the purpose for its visitors to use drugs while utilizing any services provided at Safehouse. The government contends that § 856(a)(2) is violated even if Safehouse’s visitors intend to use drugs, regardless of Safehouse’s purpose. The Third Circuit came to its conclusion by analyzing § 856(a)(2) and determined that the statute considers at least two actors, the defendant, and a third party, whereas § 856(a)(1) considers only one party, the defendant. The Third Circuit considered § 856(a)(2) and established that a defendant must meet three elements to violate the statute. To violate § 856(a)(2), first, the defendant must know that others are or will be storing, manufacturing, distributing, or using drugs on their property.

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59 Id. at 230.
61 Safehouse, 985 F.3d at 232.
62 Id.
63 Id. at 236.
64 Id. at 234.
65 Id. at 232-33.
uses illicit drugs on his premises; he does not need to realize that others are breaking the law.\textsuperscript{66} Lastly, the defendant must intentionally make the premises available to others.\textsuperscript{67}

Through these three elements of § 856(a)(2), the defendant manages and controls the premises to rent, lease, or profit from, and by doing so, the defendant makes the premises readily available to others.\textsuperscript{68} The third party is either storing, selling, distributing, or using the controlled substances.\textsuperscript{69} According to Safehouse’s interpretation of the statute, § 856(a)(1) encompasses crack house operators, while § 856(a)(2) covers distant landlords.\textsuperscript{70} However, it would be redundant for Safehouse to interpret § 856(a)(2) in conjunction with § 856(a)(1) since the distant landlord would fall under either if only one must possess the intent to participate in drug activities.\textsuperscript{71} Therefore, Safehouse’s interpretation of § 856(a)(2) does not stand.

Furthermore, considering the three elements, it is evident that Safehouse satisfies the first two, as they manage the SCS and make their consumption rooms readily available for drug users.\textsuperscript{72} However, because Safehouse offers a plethora of resources in addition to the consumption room, it must be carefully determined whether the visitor’s use of the consumption room will satisfy the third element; the actor must utilize the SCS for a significant purpose of using drugs.\textsuperscript{73} The court recognizes that people often have more than one purpose; the actor’s purpose must fall between “incidental” and a “sole purpose” to satisfy the third element of significant purpose.\textsuperscript{74} If an actor has multiple significant purposes, but one significant purpose is to use drugs, § 856(a)(2) is violated, even if the actor has other significant purposes.\textsuperscript{75} Therefore, as a result, the Third Circuit found that Safehouse violated §856(a)(2) because Safehouse would make the supervised consumption room readily available to users, and only the visitors needed to have a significant purpose for using drugs on the defendant’s premises.\textsuperscript{76}

The Third Circuit’s reasoning then raises the argument following the “incidental” and “sole purpose” logic of parents who knowingly house children who use drugs on their premises, are the parents now criminally liable under § 856(a)(2)?\textsuperscript{77} The Third Circuit asserted that

\textsuperscript{66} Id. at 233.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 234.
\textsuperscript{69} Id. at 235.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 237.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 237.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 237-38.
\textsuperscript{77} Id. at 238.
using drugs on premises where one eats, sleeps, and bathes becomes "incidental" rather than a significant purpose.\textsuperscript{78} The rationale of this argument appears to create a gray area where the court draws the line between allowing drug users to use in their parents' homes since they also eat, sleep, and bathe there versus a group of drug users living together doing the same thing. It seems the latter would be deemed a "crack house," which is what § 856(a)(2) intended to prevent, but under the Third Circuit's line of reasoning, it would be permitted since drug use would only be "incidental" to living there.

The Third Circuit's analysis of § 856(a)(2) to include both the defendant and a third party is sound. The interpretation of § 856(a)(1) and (2) offered by Safehouse would require the defendant landlord, in each case, to have the purpose of using, storing, manufacturing, or distributing illicit drugs, not any third party.\textsuperscript{79} Under this line of reasoning, nothing is differentiating § 856(a)(1) and (2) from each other. Although § 856(a)(2) requires the defendant to act knowingly and willfully, it requires someone other than the defendant to have a purpose.\textsuperscript{80} This interpretation of § 856(a)(2) to extend to a third party rather than the defendant avoids redundancy, as § 856(a)(1) operates to prohibit a landlord from operating a place for his own use of illicit drug activities.\textsuperscript{81} Whereas § 856(a)(2) functions to prohibit the defendant from knowingly making his premises available to a third party, who then uses, stores, distributes, or manufactures illicit drugs.\textsuperscript{82} Both § 856(a)(1) and (2) encompass various scenarios involving illicit drug activities and "maintaining a drug-involved premise."\textsuperscript{83} Six other circuits have also taken the same approach as the Third Circuit in interpreting § 856(a)(1) and (2).\textsuperscript{84} However, it is important to note that no other circuit has addressed the topic of SCSs.\textsuperscript{85}

Not only has no other circuit addressed the topic of SCSs, but there is reason to believe congress has not addressed or even considered SCSs. Safehouse contends that § 856(a)(2) should not be interpreted to include SCSs as legislators could not have contemplated SCSs when the statute was created.\textsuperscript{86} While Safehouse's argument was correct in stating that Congress never intended § 856(a)(1) or (2) to encompass SCSs but rather to prohibit crack houses, it is immaterial to the Third Circuit's reasoning.\textsuperscript{87} Upon analyzing § 856(a)(1) and (2), the court is not required to contemplate

\textsuperscript{78} Id.
\textsuperscript{79} Id. at 235.
\textsuperscript{80} Id. at 233.
\textsuperscript{81} Id. at 233-34.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 235.
\textsuperscript{84} Id. at 236.
\textsuperscript{85} Id.
\textsuperscript{86} See id. at 238.
\textsuperscript{87} Id.
what legislators meant but rather what the statute means.\textsuperscript{88} The Third Circuit stated that the statute’s plain meaning was to include SCS.\textsuperscript{89} It is evident after analyzing § 856(a)(1) and (2) that legislators intended to prohibit any means of maintaining a premise for any drug activity.\textsuperscript{90} Because Safehouse intends to offer a consumption room, they violate the crack house statute.

State and federal governments and the crack house statute, stand in the way of the legalization of SCSs. Safehouse argued that the federal government lacked the power to criminalize their SCS as their SCS was local and non-commercial.\textsuperscript{91} The commerce clause allows Congress to regulate non-commercial and economic activities that have the potential to affect the national market; because Congress possesses this power, they can criminalize Safehouse for their consumption room, regardless if Safehouse receives compensation for these services.\textsuperscript{92} Furthermore, the Supreme Court has previously held that “making properties available for drug use is an economic activity.”\textsuperscript{93} Therefore, if someone uses illicit drugs at an SCS, the activity affects the national market, granting Congress the authority to act.\textsuperscript{94} As long as SCSs remain federally illegal, Congress can utilize the commerce clause to criminalize SCSs, if they choose to.\textsuperscript{95}

For example, an SCS currently operates in New York City, and while the city sanctions it, the nonenforcement by federal officials is responsible for allowing the SCS to operate.\textsuperscript{96} As a result of this irregular treatment concerning the legality of SCSs, there is a gray area regarding where some SCSs can operate, as location and political jurisdictions appear to be indicators of an SCSs’ survival. Some geographic areas have limited resources, while others, such as New York City, may not prioritize enforcement against SCS.\textsuperscript{97} The Third Circuit’s decision in \textit{Safehouse} outlawing a SCS had nationwide implications as Safehouse was testing the waters of the legality of SCS. Potential developers of SCSs are now cautioned about the legal consequences that may result from opening a SCS.

Proponents of SCSs view the failure to open Safehouse as a setback, but there is still hope that SCSs can legally operate state-wide despite being federally illegal currently. Several states
throughout the nation have legalized marijuana while it remains illegal federally, creating a similar situation.98

III. THE DEPARTMENT OF JUSTICE AND ITS ABILITY TO RESOLVE THE FEDERAL AND STATE BATTLE OVER THE LEGALIZATION OF SUPERVISED CONSUMPTION SITES

Addressing the legalization of a particular issue at the federal and state levels is not incipient to the Department of Justice (DOJ). In 2013, the DOJ released the Cole Memo in response to the ongoing debates regarding the legalization of marijuana at the state and national levels.99 While this memo did seek to provide clarity and guidance to states that had legalized marijuana, the memo did not change the legal status of marijuana.100 When the Cole Memo was issued, marijuana was still illegal under federal law.101 However, because several states have legalized marijuana for recreational or medicinal purposes, it led to a complex legal landscape surrounding its use.102 The memo issued guidance to federal prosecutors for prioritizing the enforcement of marijuana under the Controlled Substance Act (CSA).103 The Cole Memo clearly stated the DOJ’s priorities, which included preventing the distribution of marijuana to minors, preventing revenue from the sale of marijuana from going to criminal organizations, and preventing the use of state-authorized marijuana as a cover for transporting marijuana to where it was outlawed.104 In addition, the memo also created factors that federal prosecutors should contemplate in deciding whether or not to enforce legal action against marijuana-related businesses operating in compliance with state law.105 By issuing this memo, the DOJ had assured states that had legalized marijuana that they would not be federally prosecuted as long as they followed the guidelines outlined in the Cole Memo.106

The legal complexities surrounding the ongoing debate on the legality of cannabis use at the federal and state levels are allusive to those surrounding state-sanctioned supervised consumption sites. While both cannabinoids and SCSS are permitted by individual states, they remain illegal under federal law. There are no laws at the state level regarding the legality of SCSSs, but because some states

98 Kilmer, supra note 18.
100 Id.
101 Id.
102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
permit SCs to operate and others do not, there is a similar need for the DOJ to issue guidance just as they did with the Cole memo.\footnote{Beau Kilmer & Bryce Pardo, \textit{Addressing Federal Conflicts Over Supervised Drug Consumption Sites}, \textit{RAND CORP. \ (March 14, 2019)}, \url{https://www.rand.org/blog/2019/03/addressing-federal-conflicts-over-supervised-drug-consumption.html} [https://perma.cc/MG8F-XK44].} For a SC to be utilized as a harm reduction strategy, it would be effective for the DOJ to release a memo stating their decision not to prosecute those who operate SCs and outlining guidelines for these operations.

The DOJ’s stance on whether to prosecute those who operate a SC has merit because of the Cole Memo. When the legality of state-sanctioned cannabis use was uncertain, the DOJ released the Cole Memo to provide guidance and protection for such operations.\footnote{Id.} Similarly, in the current legal climate of uncertainty surrounding SC, the DOJ may issue a similar memo to provide nationwide protection for SCs’ operations and allow them to operate without fear of breaking the law. The idea of potentially legalizing SCs is not unfamiliar to the DOJ; in February of 2022, the Associated Press questioned the DOJ regarding the possibility of legalizing SCs to which the DOJ responded that they are “evaluating” such facilities and talking to regulators about “appropriate guardrails.”\footnote{Jennifer Peltz & Michael Balsamo, \textit{Justice Dept. Signals It May Allow Safe Injection Sites}, \textit{U.S. NEWS & WORLD REP. \ (Feb. 7, 2022)}, \url{https://www.usnews.com/news/health-news/articles/2022-02-07/justice-dept-signals-it-may-allow-safe-injection-sites} [https://perma.cc/9CYZ-APVB].} However, the DOJ has yet to give any further indications of moving forward with the legalization of SC,\footnote{See id.} but this does not mean the legalization of SCs is out of the realm of possibilities.

The DOJ, more specifically, the Attorney General, can take a stance on SCs that can ultimately allow states to operate SCs under the Attorney General’s guidelines.\footnote{Kilmer, supra note 107.} In fact, in April of 2021, Mayor De Blasio of New York and several other mayors urged U.S. Attorney General Merrick Garland to release a statement on behalf of the DOJ stating that federal prosecution against SCs would not be a priority.\footnote{Mann, supra note 17.} Although the U.S. Attorney General Garland nor the DOJ have issued such a statement, the SC located in New York continues to operate.\footnote{See generally id.; see generally Peltz & Balsamo, supra note 109.} Nevertheless, the SC operating in New York City with little difficulties is uncommon; \textit{Safehouse} is a prime example of legal obstacles operators of SCs have to navigate when attempting to open a SC. The release of a memo by the DOJ outlining its priorities would greatly benefit those seeking to establish a SC nation-wide; however, a memo issued by the DOJ must keep Congress’ original intent when they enacted the CSA.
The release of a memo by the DOJ outlining their stance not to prosecute operators of SCSs would not minimize the main priorities of the CSA, which was to target the drug crisis at a local level allowing for safer neighbors.\textsuperscript{114} It is commonly agreed within various circuit courts that the intent of § 856 was never to criminalize or imprison the “casual” drug user but to impose the CSA onto drug sellers, handlers, and buyers that extended beyond the casual user.\textsuperscript{115} Furthermore, Congress even stated that § 856 was enacted to “outlaw[] operation of houses or buildings, so-called ‘crack houses,’ where ‘crack,’ cocaine and other drugs are manufactured and used.”\textsuperscript{116} It is conspicuous that § 856, a component of the CSA, was enacted to target illicit drug activities performed by the front of illegitimate businesses, not to target the single drug user maintaining their premises for their own illicit drug use.\textsuperscript{117}

The Cole memo was permissible because federal priorities aligned with the original intentions of legislators when they outlawed marijuana use. Similarly, if the DOJ were to release a memo stating its priorities for the prosecution of SCSs, it must not contradict the intent of the CSA as established by Congress.\textsuperscript{118} It may seem counterintuitive at first blush, but the objectives of the CSA and those of SCSs are surprisingly closely aligned. Both were designed to promote society’s overall well-being: the CSA through tackling dangerous drug operations and SCS by promoting access to treatment and safer drug use practices.

Allowing SCS to operate nationwide does not contradict the legislative intent outlined in the CSA but could further the goals the CSA was intended to accomplish. As previously mentioned, one of the objectives of the CSA was to prohibit landlords from allowing their properties to be used for drug-related activities such as sales, use, storage, or manufacturing, to prevent the existence of "crack houses."\textsuperscript{119} This is the reason why 21 U.S. Code § 856 is commonly referred to as "the crack house statute." The CSA was enacted when crack houses were a prevalent danger to society,\textsuperscript{120} however, this is no longer the case.

The DOJ’s permission allowing SCS to operate without legal repercussions would not permit the use of manufacturing, storing, disturbing, selling, or using illicit substances on any premise nationwide, activities that contribute to the growth of crack houses. Instead, it would permit drug users to utilize a harm reduction strategy

\textsuperscript{114} Reagan, \textit{supra} note 1.
\textsuperscript{116} 132 CONG. REC. 26474 (1986).
\textsuperscript{117} Fitzsimmons, \textit{supra} note 115, at 193.
\textsuperscript{118} Kilmer, \textit{supra} note 18.
\textsuperscript{119} See United States v. Chen, 913 F.2d 183, 188 (5th Cir. 1990).
\textsuperscript{120} See \textit{id}. 
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proven to be successful within other countries in curbing opioid-related deaths.\textsuperscript{121} The DOJ’s memo would still authorize the DOJ to prioritize and prosecute landlords or business owners for maintaining any premises other than treatment facilities that permit illicit drug use, manufacturing, distributing, selling, or storing, preserving the original intent of the CSA. The CSA’s original intent was not to criminalize the “casual user,” but rather to target and prevent large-scale drug operations that posed a threat to society. Therefore, permitting SCS to operate without legal repercussions would not be at odds with legislator’s objectives for the CSA as SCSs operate to prevent the local drug user from overdose and encourage treatment.

Given that the legislative intent behind the CSA was to eliminate crack houses, improve neighborhood safety, and enhance society’s overall well-being, it stands to reason that allowing the nationwide operation of SCSs would accomplish those very objectives. The DOJ’s memo stating that SCSs would not be a priority on enforcement could eliminate the need for crack houses as drug users can consume illicit drugs without fear of overdose or arrest. It follows that permitting the operations of SCSs would not only potentially eradicate crack houses but also improve neighborhood safety as public nuisance crimes could be reduced due to the use of SCSs and enhance the overall well-being of society as SCSs have proven to save lives.\textsuperscript{122} Safehouse even establishes that Congress never contemplated SCSs during the enactment of the CSA; it seems illogical to prohibit a harm reduction strategy proven effective in other countries under the pretense of respecting Congressional intent when Congress may not have intended to prohibit SCS under the CSA in the first place.

In its memo, the DOJ should establish guidelines outlining the legal mechanics of SCSs to remain within the parameters of the CSA. These guidelines should include provisions prohibiting any sale of illicit substances on their premises and first-time drug users and minors from accessing SCSs’ facilities. Additionally, these guidelines should prohibit drug users from congregating on their premises. To prevent public nuisance crimes in surrounding areas of SCSs, all drug users wishing to utilize resources from a SCS must enter the premises before consuming the illicit drugs. To eliminate the concern of confidentiality and to maximize use and encourage opioid users to utilize its services, all SCS should refrain from entering drug users’ personal information into a database. This purpose allows those seeking to utilize resources offered by SCS without jeopardizing their employment or similar consequences. In addition, all SCSs must be equipped with resources regarding addiction treatment, rehabilitation services, mental health counseling, drug addicts’

\textsuperscript{121} Finke & Chan, supra note 15, at 454.
\textsuperscript{122} Id.
anonymous information, and medical personnel to encourage users to seek treatment. Furthermore, all SCs should have the authority to deny service to any users with a history of violence or endangering others, especially if they threaten the sobriety or access to treatment of other users. It is the goal that drug users who have a SCS easily accessible will be more inclined to consume their illicit substances inside the premises of a SCS rather than in a “crack house” or the public streets.

CONCLUSION

While the DOJ issuing a memo allowing SCS to operate without legal repercussions may provide a temporary solution to the opioid epidemic, it is not a long-term solution. The DOJ has the authority to rescind any decision set forth in the memo, this was demonstrated in the Cole memo. Amending the CSA to allow for SCS to operate legally nation-wide is a long-term solution to the growing opioid epidemic. A long-term solution to opioid endemic perhaps requires society and lawmakers to consider with greater depth the question of why current harm reduction strategies continue to fall short of preventing opioid overdoses. While a long-term solution may seem currently unattainable, its feasibility can be improved within the near future through congress’ examination of the failure of current harm reduction strategies and subsequent action. The opioid epidemic is pressing which is why it currently requires a fast-acting solution, a memo issued by the DOJ offers a promising and immediate remedy. The war on drugs will last an eternity if legislators continue the same route, they have taken for the past fifty years, criminalizing drug users as opposed to offering viable solutions to encourage treatment or prevent overdose. While an amendment to § 856 by Congress would be the best long-term solution to offering beneficial harm reduction strategies to opioid users, it has not come into fruition. The DOJ issuing a memo regarding their priorities on enforcing § 856 with regards to SCS is an efficient and short-term solution to the opioid epidemic.