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YOU CAN'T SAVE DEAD PEOPLE: THE EMERGING BATTLES OVER SUPERVISED CONSUMPTION SITES

James Satterberg*

Abstract: The United States is experiencing a drug overdose epidemic of historic proportions. As fatal overdose rates continue to increase, some jurisdictions have sought evidence-based solutions to this public health issue. This Comment concerns one proposed remedy in particular: supervised consumption sites. In a supervised consumption site, drug users are encouraged to consume their own drugs at the facility. Facility staff give drug users clean equipment, teach safe injection techniques, and, most importantly, monitor drug users for symptoms of overdose. If a staff member witnesses an overdose, they act to prevent the overdose from becoming fatal.

Research conducted on supervised consumption sites outside the United States has generally concluded that the sites are effective at saving lives, preventing the spread of disease, and eventually leading drug users towards treatment. As of this writing, no supervised consumption sites operate legally in the United States. U.S. jurisdictions that have considered establishing supervised consumption sites face a number of legal hurdles, including the threat of federal prosecution. However, these jurisdictions can take steps to put their proposed supervised consumption sites, and those who will utilize and staff them, in the best possible legal position under their own laws.

This Comment focuses on the emerging issue of supervised consumption sites by examining research on supervised consumption sites and its implications for the sites as a public health measure. Specifically, this Comment looks at King County, Washington, which, jointly with the City of Seattle and other entities and organizations, created a detailed plan to establish supervised consumption sites that has faced legal and political challenges. This Comment contrasts King County's legal hurdles with those faced by San Francisco, California, which also seeks to implement the sites. This Comment makes three recommendations to any jurisdiction seeking to implement the sites: (1) empower public health boards to make decisions in the public interest that are protected from direct referendum, (2) allow public health boards to make decisions in the name of public health unconstrained by criminal law, and (3) if necessary, enact legislation at the state level to exempt supervised consumption sites from state drug laws. Finally, this Comment calls for a change in federal law to allow jurisdictions to legally establish supervised consumption sites.

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INTRODUCTION

In 2016, 63,632 people died from a drug overdose in the United States.¹ It marked the eighth consecutive year in which the rate of recorded fatal overdoses increased, and it also marked the largest single-year increase in overdose deaths since records were kept.² Prior to 2016, the largest year-to-year increase in overdose deaths was in 2015.³ Due to this massive rise in fatal overdoses, the average life expectancy for a person born in the United States dropped in consecutive years for the first time since 1962-1963.⁴

Substance use disorder is first and foremost a public health issue in the United States. Decades of punitive drug policies, strict prohibition, and public stigma did not prevent drug addiction and drug overdose from becoming a public health crisis of epidemic proportions. In order to reverse this trend, it is necessary for U.S. jurisdictions to determine which approaches can reduce the body count. As with any public health problem, the advice of experts and medical professionals should help drive the policy discussion.

One approach to combat overdoses that has been implemented successfully in Canada, Australia, and some European countries is supervised consumption sites (“SCSs”). In a supervised consumption site, drug users consume their own drugs—without regard to the legal status of that drug—in a safe, indoor environment monitored by staff members, often medical professionals equipped with anti-overdose drugs, oxygen, and other equipment. SCS staff monitor drug users for signs of overdose, standing ready to intervene should the user begin to show symptoms. In 2017, the American Medical Association endorsed establishing SCSs on a pilot basis to curb fatal overdoses.⁵

In response to the escalating drug overdose crisis, public officials in several U.S. municipalities have discussed or made plans to establish

1. Ctrs. for Disease Control & Prev., *Underlying Cause of Death, 1999-2016 Results*, CDC WONDER, <https://wonder.cdc.gov/> (last visited Nov. 18, 2018) (follow “Detailed Mortality” hyperlink; then group results by “Year” and “Drug Induced Causes”; then follow “Send” hyperlink).

2. *Id.*

3. *Id.*

4. Lenny Bernstein & Christopher Ingraham, *Fueled by Drug Crisis, U.S. Life Expectancy Declines for a Second Straight Year*, WASH. POST (Dec. 21, 2017), https://www.washingtonpost.com/national/health-science/fueled-by-drug-crisis-us-life-expectancy-declines-for-a-second-straight-year/2017/12/20/2e3f8dea-e596-11e7-ab50-621fe0588340_story.html?utm_term=.bae51b06223f [<https://perma.cc/H42G-MS76>].

5. *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-injectable-drugs> [<https://perma.cc/CD4N-3H2S>].

SCSs, including large metropolitan cities such as New York City,⁶ San Francisco,⁷ Seattle,⁸ and Philadelphia,⁹ and smaller jurisdictions such as Chittenden County, Vermont,¹⁰ and Ithaca, New York.¹¹ However, there are significant legal hurdles for any jurisdiction seeking to adopt this strategy. Primarily, federal law may effectively prohibit the establishment of SCSs. State laws may also not be adequately prepared to provide a legal basis for the operation of SCSs. Finally, officials who establish SCSs may see their decision face political challenges.

The political and legal battles over SCSs in King County, Washington, and San Francisco, California, demonstrate the challenges involved in establishing SCSs. In response to a growing local drug epidemic, King County convened an official task force to find solutions to drug overdose deaths. Among the task force's recommendations was a proposal to create SCSs.¹² This recommendation was approved by the King County Board of Health, and funding was provided by the City of Seattle for its implementation.¹³ The plan was met with political opposition and a proposed ballot initiative to ban the sites, culminating in a King County Superior Court decision that struck the initiative from the ballot.¹⁴ The

6. William Neuman, *de Blasio's Plan for Safe Injection Sites Faces Many Hurdles*, N.Y. TIMES (May 4, 2018), <https://www.nytimes.com/2018/05/04/nyregion/nyc-safe-injection-sites-opioids.html> (last visited Oct. 16, 2018).

7. Rachel Swan, *San Francisco Moving Toward Opening Nation's 1st Safe Injection Clinic*, S.F. CHRON. (Sept. 22, 2017) www.sfchronicle.com/politics/amp/San-Francisco-moving-toward-opening-nation-s-12219347.php (last visited Nov. 18, 2018).

8. King Cty. Bd. of Health, Resolution No 17-01.1 (Jan. 19, 2017), http://aqua.kingcounty.gov/Council/agendas/Board_of_Health/20170119-BOH-packet.pdf [<https://perma.cc/VK87-HHQ9>].

9. Bobby Allyn, *'Safe-injection Site' More Likely for Philly, but Big Hurdles to Clear*, WHYY (Jan. 4, 2018), <https://whyy.org/segments/safe-injection-site-likely-philly-big-hurdles-clear/> [<https://perma.cc/8HXJ-6HQ3>].

10. Tyler Dumont, *Chittenden County State's Attorney, Health Officials Push for Supervised Injection Sites*, WCAX (Nov. 29, 2017), www.wcax.com/content/news/Prosecutor-health-officials-push-for-supervised-injection-facilities-460792603.html [<https://perma.cc/GV8D-WS8H>].

11. Angus Chen, *Ithaca's Plan to Open a Safe Site for Heroin Users Faces Legal Hurdles*, NPR (Feb. 24, 2016), <https://www.npr.org/sections/health-shots/2016/02/24/467958912/ithacas-plan-to-open-a-safe-site-for-heroin-users-faces-legal-hurdles> [<https://perma.cc/9E8J-T58S>].

12. HEROIN & PRESCRIPTION OPIATE ADDICTION TASK FORCE, FINAL REPORT AND RECOMMENDATIONS, 26–29 (2016), http://www.kingcounty.gov/~media/depts/community-human-services/behavioral-health/documents/herointf/Final-Heroin-Opiate-Addiction-Task_Force-Report.ashx?la=en, [<https://perma.cc/7BXF-TJK4>] [hereinafter KC Report].

13. Susan Kelleher, *Seattle Council Approves \$5.6B Budget that Boosts Spending on Homelessness, Opioid Crisis*, SEATTLE TIMES (Nov. 20, 2017), <https://www.seattletimes.com/seattle-news/politics/seattle-council-approves-5-6b-budget-that-boosts-spending-on-homelessness-opioid-crisis> (last visited Nov. 19, 2018).

14. See Order Granting Plaintiff's Motion for Declaratory Judgment and Injunctive Relief, Protect

court held that under Washington State law, a decision made by a public health authority was not subject to an initiative.¹⁵ The decision was successfully appealed to the Washington Supreme Court.¹⁶ The court heard oral arguments on the case on September 18, 2018, and a decision is forthcoming.¹⁷

In San Francisco, a local task force also recommended the establishment of SCSs, and a plan was put in place to establish them.¹⁸ San Francisco officials and California legislators pushed to pass a state law that would legalize and provide regulations for SCSs, allowing San Francisco to move forward with its plan.¹⁹ The bill, Assembly Bill 186, ultimately passed the California State Legislature in 2018 but was vetoed by the Governor of California.²⁰

Part I of this Comment provides a brief overview of the opioid epidemic in the United States and introduces harm reduction as an alternative to strict prohibition and punitive drug policies. Part II introduces the concept of SCSs in more detail; analyzes the research that has been conducted so far about SCSs; examines one particular SCS, Vancouver's Insite Supervised Injection Facility ("Insite"), which has been the focus of much of this research, and discusses unsanctioned SCSs currently operating outside the law. Part III examines 21 U.S.C. § 856, which may prohibit an SCS from operating legally under federal law. Part IV examines King County and San Francisco's plans to establish SCSs and the ensuing political and legal challenges they have faced. Part V

Pub. Health v. Freed, No. 17-2-21919-3 (Wash. Sup. Ct. Oct. 16, 2017).

15. *Id.* at 5–6.

16. Josh Kelety, *Safe Drug Site Challenge Heads to State Supreme Court*, SEATTLE WKLY. (May 4, 2018), <https://www.seattleweekly.com/news/safe-drug-site-challenge-heads-to-state-supreme-court> [https://perma.cc/F4V9-FKZ6].

17. *Supreme Court Calendar: September 18, 2018*, WASH. COURTS, http://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/?fa=atc_supreme_calendar.display&year=2018&file=20180918 [https://perma.cc/V4UH-RF64]; see also Oral Argument, Protect Pub. Health v. Freed, No. 17-2-21919-3 (Wash. Sup. Ct. Sept. 18, 2018), <https://mediaplayer.inventusmedia.com?clientID=9375922947&eventID=2018091031&autoStartStream=true> (last visited Nov. 19, 2018).

18. S.F. SAFE INJECTION SERVS. TASK FORCE, S.F. DEP'T OF PUB. HEALTH, FINAL REPORT 6 (2017) [hereinafter SF Task Force Report], <https://www.sfdph.org/dph/files/SISTaskforce/SIS-Task-Force-Final-Report-2017.pdf> [https://perma.cc/7ESJ-XUH7].

19. See Chloe Veltman, *S.F. Safe Injection Site Supporters Urge Gov. Brown to Sign Bill*, KQED (Sept. 4, 2018), <https://www.kqed.org/news/11690409/s-f-safe-injection-site-supporters-urge-gov-brown-to-sign-bill> [https://perma.cc/N29P-JMET].

20. *AB-186 Controlled Substances: Overdose Prevention Program*, CAL. LEGISLATIVE INFO., https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB186 [https://perma.cc/Y77F-YPPW] (noting vetoed status of AB-186 and documenting the text of Governor Brown's veto letter).

makes recommendations for jurisdictions that wish to open SCSs in order to put these programs in the best possible legal position.

I. THE WAR ON DRUGS AND THE DEVELOPMENT OF HARM REDUCTION

In 1970, Congress passed the Controlled Substances Act (CSA),²¹ forming a comprehensive federal law scheme regarding the use, possession, sale, manufacture, and importation of certain substances.²² Under the CSA, substances are classified into a series of five schedules, based on a substance's perceived potential for abuse, medicinal value, and potential for harm.²³ A substance's classification determines its regulation, including whether it may be legally prescribed.²⁴ The CSA also establishes criminal penalties for the unlawful manufacture, possession, and distribution of any substance classified as a controlled substance and criminalizes a broad range of activities related to the use, manufacture, distribution, and possession of controlled substances.²⁵ These criminal penalties, along with other federal, state, and local drug policies, embody the "War on Drugs" approach, which attempts to curb addiction through the regulation and prohibition of drugs combined with the incarceration of drug users and dealers.²⁶

The War on Drugs has been criticized for a wide variety of reasons, including its failure to prevent substance abuse or mitigate its harmful effects on users.²⁷ Due to broad enforcement of the CSA's criminal penalties for drug related offenses, 46.1% of federal inmates are incarcerated for drug offenses, more than twice the percentage for any other type of crime.²⁸ Approximately 15.2% of prisoners in state correctional facilities, or approximately 197,200 prisoners, are incarcerated primarily for drug offenses, including more than 44,000 incarcerated for drug possession.²⁹ Mass incarceration has failed to inhibit

21. Controlled Substances Act of 1970, 21 U.S.C. § 801 (2012).

22. *See id.* § 811.

23. *Id.* § 812(b).

24. *Id.* §§ 812(b), 829.

25. *See id.* §§ 841–865.

26. *See* George P. Shultz & Pedro Aspe, *The Failed War on Drugs*, N.Y. TIMES (Dec. 31, 2017), <https://www.nytimes.com/2017/12/31/opinion/failed-war-on-drugs.html> (last visited Oct. 16, 2018)

27. *Id.*

28. *Inmate Statistics — Offenses*, FED. BUREAU OF PRISONS (Oct. 27, 2018), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Aug. 27, 2018) (data as of September 2018).

29. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 18–19 (2018),

the drug market: Since the 1980s, average street prices for cocaine and heroin have fallen sharply, while the average purity of those drugs has increased.³⁰ Further, War on Drugs criminal policies have been disproportionately enforced against racial minorities.³¹

Notwithstanding vigorous enforcement of the CSA and the mass incarceration of drug offenders, drug abuse remains a major health epidemic in the United States, and its public health consequences have reached epidemic proportions. Between 2001 and 2015, the rate of fatal drug overdoses in the United States more than doubled.³² The 63,632 fatal drug overdoses recorded by the Centers for Disease Control and Prevention (“CDC”) in 2016 exceeds the number of recorded deaths in 2016 from homicides (19,362) and traffic accidents (40,327) combined.³³ Out of all the fatal drug overdoses in 2015, 37.9% (19,884) were caused by controlled opioids such as heroin and fentanyl; in 2001, overdoses from these drugs constituted only 14% of total deaths.³⁴ 2015 also marks the first year since data became available that more people died from heroin overdoses than from gun homicides.³⁵ In 2016, drug overdose deaths increased again by 21%, causing the U.S. average life expectancy to drop for the second straight year.³⁶ In addition to the loss of life, the worsening drug epidemic has created a tremendous financial burden; costs from hospitalizations due to opioid abuse and dependence increased from

<https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/PK3H-7FJZ>].

30. See INST. FOR DEF. ANALYSIS, THE PRICE AND PURITY OF ILLICIT DRUGS 1981–2007 (2008), https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/bullet_1.pdf (last visited Jan. 24, 2017).

31. See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 95–136 (2010) (arguing that cognitive biases in American society and law enforcement combined with aggressive enforcement of the War on Drugs led to police disproportionately targeting African Americans for drug crimes and longer incarceration sentences for African American drug offenders).

32. Ctrs. for Disease Control & Prev., *Underlying Cause of Death, 1999–2016 Results*, CDC WONDER <https://wonder.cdc.gov/> (last visited Nov. 18, 2018) (follow “Detailed Mortality” hyperlink; then group results by “Year” and “Drug/Alcohol Induced Causes”; then follow “Send” hyperlink).

33. *Id.* (follow “Detailed Mortality” hyperlink; then group results by “ICD-10 113 Cause List”; then select year/month “+ 2016 (2016)”; then follow “Send” hyperlink).

34. NAT’L INST. ON DRUG ABUSE, NATIONAL OVERDOSE DEATHS FROM SELECT PRESCRIPTION AND ILLICIT DRUGS (2018), <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates> [<https://perma.cc/6TFG-PQSQ>].

35. Christopher Ingraham, *Heroin Deaths Surpass Gun Homicides for the First Time*, *CDC Data Shows*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/12/08/heroin-deaths-surpass-gun-homicides-for-the-first-time-cdc-data-show/?utm_term=.d64b579fa90b (last visited Oct. 16, 2018).

36. Bernstein, *supra* note 4.

\$4.57 billion in 2002 to \$14.85 billion in 2012.³⁷ Because patients hospitalized with opioid dependence are less likely to have private insurance and more likely to be uninsured, these costs are often shifted onto government agencies, patients, and hospitals.³⁸

Evidence suggests that incarcerating drug users is less effective at curtailing drug use and drug-related crimes than other solutions. A RAND Corporation analysis showed that drug treatment would be more than ten times as effective at preventing drug-associated crimes than conventional enforcement, including seizure of drugs and incarceration of dealers and users.³⁹ That study also found that \$1 million spent on treatment would reduce cocaine consumption by over 103 kilograms; in comparison, \$1 million spent on longer sentences for drug offenders leads to only a 12.6 kilogram reduction.⁴⁰ Certain identifiable factors create limitations in the effect that incarceration of drug users has on preventing drug use. For example, drug selling is subject to a “replacement effect.”⁴¹ While other types of crime are more easily reduced by putting offenders “off the streets” and into jails and prisons, incarcerated drug dealers are quickly replaced by new entrants into the drug market.⁴²

One alternative to the punitive War on Drugs approach is harm reduction. Harm reduction philosophy is defined by its focus on preventing the occurrence of harmful consequences from drug use instead of focusing on preventing drug use itself.⁴³ Central to harm reduction is the importance of meeting drug users “where they are” rather than mandating abstinence from drug use or pressuring them to seek drug treatment against their will.⁴⁴ Harm reduction advocates call for the recognition of the human rights of drug users and for a non-judgmental,

37. Matthew V. Ronan & Shoshana J. Herzig, *Hospitalizations Related to Opioid Abuse/Dependence and Associated Serious Infections Increased Sharply, 2002–12*, 35 HEALTH AFF. 5, 834 (2016).

38. *Id.* at 837.

39. Jonathan P. Caulkins et al., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?*, 64 RAND 36, 64–65 (1997).

40. *Id.* at 33 (modeled over a fifteen-year period). Note that the dollar value in the dollar-to-cocaine reduction estimate is expressed in 1992 dollars. *Id.* at 31.

41. RYAN S. KING ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 6 (2005).

42. *Id.* at 1.

43. *What is Harm Reduction?*, HARM REDUCTION INT'L (2018), <https://www.hri.global/what-is-harm-reduction> [<https://perma.cc WRZ5-CJZY>].

44. HUMAN RIGHTS WATCH, WE KNOW WHAT TO DO: HARM REDUCTION AND HUMAN RIGHTS IN NORTH CAROLINA 3 (2011), https://www.hrw.org/sites/default/files/related_material/us0911brochurewebwcover_0.pdf [<https://perma.cc/5XZ6-EYE6>].

non-coercive model of assisting at-risk users.⁴⁵ This model thus necessarily relies on outreach to drug users, especially the most marginalized users, and allows users to make their own choices regarding their drug use, including when and whether to seek treatment.⁴⁶ Harm reduction philosophy has its roots in an activist-led response to the HIV/AIDS panic of the 1980s⁴⁷ and developed with the active support of drug users.⁴⁸ Notwithstanding its countercultural origins, harm reduction has since achieved recognition in mainstream public health circles worldwide.⁴⁹

States and municipalities in the United States have explored, discussed, and implemented a handful of harm reduction-related measures directly targeted towards reducing harm caused by substance abuse, state-sponsored rebates for naloxone purchases,⁵⁰ fentanyl test distribution,⁵¹ and Good Samaritan laws preventing prosecution of persons seeking medical care for overdose victims.⁵² These policies do not require abstinence from illegal drugs as a prerequisite for participation, but focus on mitigating the potential for negative effects such as overdoses and the

45. *Principles of Harm Reduction*, HARM REDUCTION COALITION, harmreduction.org/about-us/principles-of-harm-reduction [<https://perma.cc/PP2N-GE5C>].

46. S. Einstein, *Harm and Risk Reduction: History, Theories, Issues, and Implications*, 42 *SUBSTANCE USE & MISUSE* 257, 258 (2007).

47. See Allan Clear, *Harm Reduction in the United States: Whose History? (Part 2)*, HUFFPOST (June 5, 2010), https://www.huffingtonpost.com/allan-clear/harm-reduction-in-the-uni_b_525429.html [<https://perma.cc/5EMV-HE8C>]; Frank G. Runyeon, *Harm Reduction: Lessons Learned from the AIDS Crisis*, N.Y. NONPROFIT MEDIA (June 18, 2015), <https://nynmedia.com/news/harm-reduction-lessons-learned-from-the-aids-crisis> [<https://perma.cc/C3GH-N7MZ>].

48. See *About Us*, HARM REDUCTION COALITION, harmreduction.org/about-us [<https://perma.cc/56BZ-BN4G>]. (“Harm Reduction Coalition was founded in 1993 . . . by a working group of needle exchange providers, advocates and drug users.”). See also INT’L NETWORK OF PEOPLE WHO USE DRUGS, *DRUG USER PEACE INITIATIVE: EXECUTIVE SUMMARY AND FORWARD 2* (2015), www.druguserpeaceinitiative.org/dupidocuments/DUPI-Executive_Summary_and_Foreword.pdf [<https://perma.cc/GP5G-7RT2>].

49. Alex Wodak, *Harm Reduction Is Now the Mainstream Global Drug Policy*, 104 *ADDICTION* 343, 344 (2009).

50. James Q. Lynch, *Iowa Attorney General Reaches Rebate Agreement for Opioid Overdose Antidote*, WATERLOO-CEDAR FALLS COURIER (Oct. 5, 2017), https://wfcourier.com/news/local/govt-and-politics/iowa-attorney-general-reaches-rebate-agreement-for-opioid-overdose-antidote/article_cbd232b8-d57e-526c-9017-608ac9ea6050.html [<https://perma.cc/2SHW-UY4M>].

51. Soumya Karlamangla, *California Is Now Paying for People to Test Their Drugs for Fentanyl*, L.A. TIMES (May 31, 2018), <http://www.latimes.com/health/la-me-ln-fentanyl-test-strips-20180531-story.html> [<https://perma.cc/652W-9J6Q>].

52. Garry Rayno, *Hassan Signs Good Samaritan Bill into Law*, N.H. UNION LEADER (July 8, 2015), <http://www.unionleader.com/apps/pbcs.dll/article?AID=/20150709/NEWS06/150709234/0/img> [<https://perma.cc/8GJ8-SVSX>].

transmission of blood-borne diseases such as HIV and hepatitis C.⁵³ Needle exchanges are one harm reduction strategy that has been successfully implemented in many places across the United States to allow intravenous drug users to acquire sterile injection equipment to prevent unsafe practices, such as sharing needles, which increase the risk of spreading blood-borne disease.⁵⁴

Another harm reduction method that has yet to be implemented in the United States in a fully legal manner is SCSs. SCSs go one step further than needle exchanges by allowing drug users to inject or otherwise consume drugs on site in an environment monitored by health professionals.⁵⁵ The establishment of these sites, proposed and debated by many American municipalities, is likely to create political controversy and could conflict with the CSA.⁵⁶

II. SUPERVISED CONSUMPTION SITES: AN OVERVIEW

SCSs⁵⁷ are a harm reduction strategy that aims to decrease the social costs of drug use without stigmatizing or penalizing drug use itself. While there is no single established model for SCSs, they can be generally defined as health care facilities providing hygienic spaces and equipment for drug users to consume drugs, regardless of the drugs' potential danger or legal status, under the supervision of staff trained and equipped to respond to emergencies such as an overdose.⁵⁸ SCSs do not provide drugs but rather give drug users the capability to inject their own drugs more safely than would likely be possible otherwise.⁵⁹ Typically, access is restricted to registered users, who must meet conditions such as residency

53. INST. OF MED., HEPATITIS AND LIVER CANCER: OPPORTUNITIES FOR REDUCING HARM 1–2 (2010), <http://nationalacademies.org/hmd/~media/Files/Report%20Files/2010/Hepatitis-and-Liver-Cancer-A-National-Strategy-for-Prevention-and-Control-of-Hepatitis-B-and-C/Hepatitis%20and%20Liver%20Cancer%202010%20%20Report%20Brief%20for%20Providers.pdf> [https://perma.cc/8SE2-RAU6].

54. M. Mofizul Islam, *Needle Syringe Program-Based Primary Health Care Centers: Advantages and Disadvantages*, J. PRIMARY CARE & COMMUNITY HEALTH 103 (2010).

55. Leo Beletsky et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 AM. J. PUB. HEALTH 231, 231–37, (2008).

56. *See infra* Part III.

57. There are a number of different terms used more or less synonymously with SCSs in the literature and in media reports. These include safe injection site, drug consumption room, and heroin injection site. This Comment uses the term “supervised consumption site” to refer to these sites, unless in reference to a specific site. This term is used in order to include SCSs of all sizes, to avoid the implication that these sites are exclusively intended for heroin use, and to include SCSs that allow for consumption of drugs by means other than injection.

58. *See* Beletsky, *supra* note 55, at 231.

59. *Id.* at 231.

and age requirements to utilize the facility.⁶⁰ Although some facilities cater to injecting drug users exclusively, increasingly SCSs are allowing drug inhalation or smoking within their facilities.⁶¹

As of 2009, more than ninety official SCSs had been established worldwide,⁶² a number which has certainly increased in subsequent years. None of these are located in the United States.⁶³ To be able to function legally and publicly, SCSs essentially require that the public health and criminal justice interests of their surrounding communities are aligned with at least tolerance of their presence.⁶⁴ In addition to these legally operating SCSs, there are an unknown number of groups in the United States and elsewhere operating what are essentially underground SCSs, without official government cooperation or oversight.⁶⁵ These kinds of sites are likely illegal under 21 U.S.C. § 856⁶⁶ as well as local and state statutes, and rely on secrecy or police and prosecutorial discretion to continue operating. One proposed means of establishing an SCS in the United States is simply to allow one of these groups to operate openly with some level of local government recognition but without public funding or substantial government oversight.⁶⁷

The first and longest-operating SCS in the Western Hemisphere is Insite, located in Vancouver, British Columbia, Canada.⁶⁸ For years, Insite was the only legally operating SCS in North America, and during this time it was the center of political and legal controversy. This Part begins by

60. *Drug Consumption Rooms: An Overview of Provision and Evidence (Perspectives on Drugs)*, EUROPEAN MONITORING CTR. FOR DRUGS & DRUG ADDICTION 3, http://www.emcdda.europa.eu/topics/pods/drug-consumption-rooms_en [<https://perma.cc/AT8F-U4V2>].

61. *Id.* at 4.

62. DAGMAR HEDRICH ET AL., DRUG CONSUMPTION FACILITIES IN EUROPE AND BEYOND *in* EMCDDA MONOGRAPHS, HARM REDUCTION: EVIDENCE, IMPACTS AND CHALLENGES ch. 11, at 306–31 (Tim Rhodes & Dagmar Hedrich eds., 2010), http://www.emcdda.europa.eu/system/files/publications/555/EMCDDA-monograph10-harm_reduction_final_205049.pdf [<https://perma.cc/H37R-YLHV>].

63. See EUROPEAN MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, *supra* note 60, at 2.

64. See HEDRICH, *supra* note 62, at 307.

65. 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. PREVENTATIVE MED. 919 (2017).

66. 21 U.S.C. § 856(a)(2) (2012) (making it a crime for a person or entity to “knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of . . . using a controlled substance”).

67. See KC Report, *supra* note 12, at 28.

68. *Insite Supervised Injection Facility*, PHS CMTY. SERVS. SOC'Y, <https://www.phs.ca/index.php/project/insite-supervised-injection-facility> [<https://perma.cc/55A6-T3RC>].

profiling Insite in order to contextualize the discussion of SCSs and to see what can be learned from the legal challenges to its operation.

A. *Insite*

The first legally operating SCS in North America was Vancouver's Insite Supervised Injection Facility.⁶⁹ Launched in 2003, Insite is funded by the provincial health authority Vancouver Coastal Health, and operates in conjunction with the private group PHS Community Services Society.⁷⁰ The facility has an annual budget of approximately \$3 million (CAD).⁷¹ Insite also operates a withdrawal management facility at the same location called Onsite.⁷² A disproportionately large amount of the research that has been conducted on SCSs so far is focused on Insite⁷³ due to a lack of other long-established and legal SCSs in the Western Hemisphere available for study.

Insite operates legally under section 56 of Canada's Controlled Drugs and Substances Act, which allows the Canadian Minister of Health to exempt any person, class of people, or substance from any or all applications of the Act, so long as the Minister determines that the exemption "is necessary for a medical or scientific purpose or is otherwise in the public interest."⁷⁴ The Canadian Minister of Health granted this exemption to Insite in 2003 on condition that the effects of the facility be the subject of scientific research.⁷⁵ Since then, dozens of peer-reviewed scientific studies have been published about Insite and its effects.⁷⁶ A 2008 report from Health Canada, the Canadian governmental agency in

69. *Id.*

70. *Id.*

71. CAN. MINISTRY OF HEALTH EXPERT ADVISORY COMM., VANCOUVER'S INSITE SERVICE AND OTHER SUPERVISED INJECTION SITES: WHAT HAS BEEN LEARNED FROM RESEARCH? FINAL REPORT OF THE EXPERT ADVISORY COMMITTEE ON SUPERVISED INJECTION SITE RESEARCH (2008) [hereinafter CMH Report], http://www.hc-sc.gc.ca/ahc-asc/pubs/_sites-lieux/insite/index-eng.php#ex [https://perma.cc/VWD6-TFDT].

72. *Insite – Supervised Consumption Site*, VANCOUVER COASTAL HEALTH, www.vch.ca/Locations-Services/result?res_id=964 [https://perma.cc/AB8Z-PLSU].

73. Chloé Potier et al., *Supervised Injection Services: What Has Been Demonstrated? A Systematic Literature Review*, 145 DRUG & ALCOHOL DEPENDENCE 48, 50 (2014) (finding that at the time of publication 68% of studies of SCSs focused on InSite).

74. Controlled Drugs and Substances Act, R.S.C. 1996, c. 19, § 56 (Can.).

75. B.C. CTR. FOR EXCELLENCE IN HIV/AIDS, FINDINGS FROM THE EVALUATION OF VANCOUVER'S PILOT MEDICALLY SUPERVISED SAFER INJECTING FACILITY – INSITE 5 (2009), http://uhri.cfenet.ubc.ca/wp-content/uploads/images/Documents/insite_report-eng.pdf [https://perma.cc/4ME2-65UE].

76. *Id.*

charge of public health, summarized this research and concluded that Insite increased access to health care among its clients, including addiction treatment, successfully intervened to halt overdoses, did not lead to an increase in drug use or drug-related crime in its neighborhood, and was cost-effective.⁷⁷ In 2015, the majority of Insite users reported consuming heroin at the site, though others reported using methamphetamine and cocaine.⁷⁸ To date, there has not been a single fatal overdose at the Insite facility despite over 6,400 overdose incidents at the site, with 2,151 occurring in 2017 alone.⁷⁹ Despite positive research findings to that point, in 2008, former Minister of Health Tony Clement indicated that he intended to deny Insite's application to extend its exemption, an exemption that was originally supposed to last three years but had been extended in 2006 and 2007.⁸⁰

PHS Community Services Society filed suit to prevent the Minister from allowing its exemption to expire and received a remedial order from the trial judge allowing the facility to remain open during litigation.⁸¹ The case was appealed to the Supreme Court of Canada, which unanimously reversed the Minister's decision not to renew Insite's exemption.⁸² The court held that the decision not to renew the exemption was "arbitrary," that its effects were a "grossly disproportionate" response to the government's interests in promoting public health, and that the decision was "not in accordance with the principles of fundamental justice."⁸³ The court's holding rested on the lower court's conclusion that Insite was effective in reducing risks associated with illegal drug use and that it had no negative impact on the legitimate criminal law objectives of the Canadian government.⁸⁴

The Supreme Court of Canada ordered the Minister of Health to grant Insite another exemption, allowing it to continue to operate.⁸⁵ Insite's exemption has not been similarly threatened since, and in 2016 it was extended for another four years.⁸⁶ The political winds in Canada appear to

77. See CMH Report, *supra* note 71.

78. *Insite User Statistics*, VANCOUVER COASTAL HEALTH, <http://www.vch.ca/public-health/harm-reduction/supervised-consumption-sites/insite-user-statistics> [<https://perma.cc/J3S7-KW96>].

79. *Id.*

80. *Canada (Attorney General) v. PHS Cmty. Servs. Soc'y*, [2011] 3 S.C.R. 134, 136 (Can.).

81. *Id.* at 126.

82. *Id.* at 137.

83. *Id.* at 138–39.

84. *Id.* at 139.

85. *Id.* at 137.

86. *Health Canada Grants Exemption to Continue to Run Insite*, VANCOUVER COASTAL HEALTH (Mar. 17, 2016), <http://www.vch.ca/about-us/news/health-canada-grants-exemption-to-continue-to>

be shifting in favor of SCSs. In 2017, the Canadian Parliament passed Bill C-37, which streamlines the process of applying for and renewing exemptions for SCSs.⁸⁷ Health Canada has approved a number of additional exemptions for SCSs across the country since the passage of Bill C-37, including two sites in Surrey,⁸⁸ three sites in Montreal,⁸⁹ three sites in Toronto,⁹⁰ and one site in Canada's capital of Ottawa.⁹¹

While this certainly reflects a greater receptiveness to SCSs from Canadian lawmakers, it is also a consequence of the worsening opioid crisis. There are simply far more people using drugs than there is space at SCSs—Insite operates at capacity with long lines for entry in a neighborhood where fatal drug overdoses remain a major public health issue.⁹² Due largely to the increasing presence of fentanyl in the drug supply,⁹³ overdose deaths in the province of British Columbia nearly quadrupled from 368 in 2014 to 1,452 in 2017.⁹⁴

In 2016, British Columbia officially declared overdose deaths a public health emergency.⁹⁵ Pursuant to this emergency declaration,⁹⁶ the British

run-insite [<https://perma.cc/HLK3-8P4L>].

87. *Royal Assent of Bill C-37 - An Act to Amend the Controlled Drugs and Substances Act and to Make Related Amendments to Other Acts*, GOV'T CAN. (May 18, 2017), https://www.canada.ca/en/health-canada/news/2017/05/royal_assent_of_bill-c-37anacttoamendthecontrolleddrugsandsubstan.html [<https://perma.cc/24XV-TUJS>].

88. Karin Larsen, *2 Supervised Injection Sites Approved for Surrey*, CBC NEWS (May 26, 2017, 4:37 PM), www.cbc.ca/news/canada/british-columbia/2-supervised-injection-sites-approved-for-surrey-1.4133646 [<https://perma.cc/L3FR-NDFB>].

89. Andrea Woo & Les Perreux, *Health Canada Approves Three Supervised Consumption Sites for Montreal*, GLOBE & MAIL (Feb. 6, 2017), <https://www.theglobeandmail.com/news/politics/federal-government-approves-three-supervised-injection-sites-in-montreal/article33914459/> [<https://perma.cc/7LQ8-7CPX>].

90. Peter Cameron, *3 Safe Injection Sites Approved for Toronto*, GLOBAL NEWS (via CANADIAN PRESS) (June 2, 2017), <https://globalnews.ca/news/3499088/health-canada-approves-three-safe-injection-sites-in-toronto> [<https://perma.cc/R5DM-L5CP>].

91. Judy Trinh, *Health Canada Approves Supervised Injection Trailer at Ottawa Shelter*, CBC NEWS (Nov. 6, 2017, 6:30 PM), www.cbc.ca/news/canada/ottawa/sanctioned-supervised-injection-site-trailer-shepherds-of-good-hope-overdose-1.4389413 [<https://perma.cc/87U4-KR4Q>].

92. TRAVIS LUPICK, *FIGHTING FOR SPACE: HOW A GROUP OF DRUG USERS TRANSFORMED ONE CITY'S STRUGGLE WITH ADDICTION* 379–80 (Arsenal Pulp Press 2017) (1985).

93. *Increase in Overdose Deaths Prompts B.C. to Declare Public Health Emergency*, CBC NEWS (Apr. 14, 2016, 12:20 PM), <https://www.cbc.ca/news/canada/british-columbia/bc-public-health-emergency-overdose-drugs-1.3535910> [<https://perma.cc/H82D-5MU4>].

94. B.C. CORONER'S SERV., *ILLICIT DRUG OVERDOSE DEATHS IN BC JANUARY 1, 2008 – AUGUST 31, 2018*, at 5 (Sept. 27, 2018).

95. Erin Ellis & Bethany Lindsay, *B.C. Declares Public Health Emergency After Fentanyl Overdoses*, VANCOUVER SUN (Apr. 14, 2016), <https://vancouversun.com/news/local-news/b-c-declares-public-health-emergency-after-fentanyl-overdoses> [<https://perma.cc/UV6S-65RP>].

96. Press Release, B.C. Gov't, *Ministerial Order Supports Urgent Overdose Response Action* (Dec.

Columbia Minister of Health announced that the provincial health authority would open more than fifteen “overdose prevention sites,” which provide the same essential overdose prevention services as Insite but forgo complementary services and registration of users.⁹⁷ The Minister of Health acknowledged that these sites were likely illegal under Canadian federal law, but stated that he believed that so many people were dying that the province could not afford to wait for the law to change to address the crisis.⁹⁸ By September 2018, Vancouver’s health authority was funding eight overdose prevention sites in the city,⁹⁹ including one site that had previously operated unsanctioned.¹⁰⁰ A study of the formerly unsanctioned site found that despite over 100,000 visits and 255 overdoses in under ten months, no deaths occurred at the overdose prevention site.¹⁰¹ Local health officials also concluded that the overdose prevention sites saved lives in the midst of a developing fentanyl crisis.¹⁰² Insite could not singlehandedly stop fentanyl from killing drug users across the province, but the legal battle over Insite’s existence laid the groundwork for the British Columbia provincial government to respond more quickly to fentanyl’s arrival and to save people who may have otherwise died of an overdose.

Given that the U.S. Controlled Substances Act does not contain an analogous exemption provision to Canada’s version, Insite’s legal basis is not directly replicable under the CSA in its current form. However, the political and legal controversy surrounding Insite illustrates the challenges of operating such a site, even if it leads to improved health outcomes. Nonetheless, Insite’s legal victory and its ability to serve as a test subject for SCSs have led to a better understanding of the effects of SCSs. The positive results from Insite create a strong evidential basis for making a case in favor of establishing SCSs elsewhere.

12, 2016), <https://news.gov.bc.ca/releases/2016HLTH0094-002737> [<https://perma.cc/K2PJ-ZHW4>].

97. LUPICK, *supra* note 92, at 381.

98. *Id.* at 381–82.

99. *Overdose Response: Overdose Prevention Sites*, VANCOUVER COASTAL HEALTH—DOWNTOWN EASTSIDE (Sept. 8, 2018), <http://dtes.vch.ca/overdose-response> [<https://perma.cc/HC36-TGQE>].

100. Nick Eagland, *Vancouver Overdose Prevention Site Records 108,800 Visits, 255 Overdoses and 0 Deaths*, VANCOUVER SUN (Dec. 14, 2017), <https://vancouversun.com/news/local-news/vancouver-overdose-prevention-site-records-108800-visits-255-overdoses-and-0-deaths> [<https://perma.cc/4GJA-3Q2P>].

101. *Id.*

102. Cheryl Chan, *Prevention Sites Help Reduce Number of Overdose Deaths, Says Vancouver Coastal Health*, VANCOUVER SUN (July 26, 2017), <https://vancouversun.com/news/local-news/prevention-sites-helping-to-reduce-number-of-overdose-deaths-says-vancouver-coastal-health> [<https://perma.cc/WYT3-S3PT>].

B. *The Case for Supervised Consumption Sites*

The studies conducted to determine the effectiveness of SCSs have shown that SCSs are an effective harm reduction tool.¹⁰³ This section discusses the implications of this research, which suggest that SCSs can both prevent harm to drug users and the greater communities in which they live.

1. *SCSs Reduce Harms to the Public*

A collateral effect of SCSs attracting populations of marginalized drug users is that by bringing drug use into the facility, SCSs can reduce public drug use and its consequences, benefiting the community as a whole. Though skeptics of SCSs have claimed that their presence can lead to crime,¹⁰⁴ much of the research has found no impact on crime levels, including drug-related crimes.¹⁰⁵ An early study of Insite found that as Insite was established and its use rate increased, there were measurable declines in public injection, publicly discarded syringes, and syringe-related litter in the surrounding ten blocks.¹⁰⁶ A five-year survey of residents near another SCS in Australia found that the number of residents who reported witnessing public drug use and publicly discarded syringes declined over the course of the study, with no increase in reports of public drug dealing.¹⁰⁷

Publicly funded SCSs have also been shown to be cost effective, with the costs of operating a facility more than offset by reduced costs resulting from improved health outcomes of drug users. One study estimated that

103. See Potier, *supra* note 73, at 50.

104. See, e.g., Jason Rantz, *Rantz: I Visited Vancouver's Devastating, Dangerous Safe-injection Neighborhood*, 770 KTHH (Oct. 31, 2017, 7:29 AM), <http://mynorthwest.com/799135/visiting-insite-safe-injection/> [<https://perma.cc/4WPA-Q7A2>] (“The blocks around Insite felt dangerous. . . . [SCSs would] be a blight on any . . . neighborhood.”).

105. E.g., JACQUELINE FITZGERALD ET AL., NSW BUREAU OF CRIME STATISTICS & RESEARCH, TRENDS IN PROPERTY AND ILLICIT DRUG CRIME AROUND THE MEDICALLY SUPERVISED INJECTING CENTRE IN KINGS CROSS: AN UPDATE 51 (2010) (finding no evidence of an increase in robberies, property crime, or drug offenses near an SCS in Sydney, Australia). *But see* Jo Kimber et al., *Survey of Drug Consumption Rooms: Service Delivery and Perceived Public Health and Amenity Impact*, 24 DRUG & ALCOHOL REV. 21, 22–23 (2005) (finding that six of thirteen European SCSs surveyed reported increases in drug dealing nearby, and three reported increases in petty crime and local resentment).

106. Evan Wood et al., *Changes in Public Order After the Opening of a Medically Supervised Safer Injecting Facility for Illicit Injection Drug Users*, 171 CANADIAN MED. ASS'N J. 731, 732 (2004)

107. Allison M. Salmon et al., *Five Years On: What Are the Community Perceptions of Drug-related Public Amenity Following the Establishment of the Sydney Medically Supervised Injecting Centre?*, 18 INT'L J. DRUG POL'Y 46 (2007).

over ten years, Insite would likely save approximately \$11.18 million USD and 920 cumulative years of prolonged lives.¹⁰⁸ Another study estimated that three proposed SCSs in Montreal would each save about \$1.21 for every dollar spent due solely to preventions of HIV and hepatitis C.¹⁰⁹ SCSs also prevent a significant number of ambulance trips by preventing overdoses; in Sydney, Australia, there was a 68% decrease in ambulance responses in the vicinity of an SCS during its business hours compared to before the SCS began operating, a significantly larger decrease than that observed in the region as a whole.¹¹⁰ Just as SCSs improve health outcomes of drug users by preventing overdose and the spread of disease, they can simultaneously reduce the medical costs associated with responding to and treating drug-related harms. By decreasing these costs to the public, SCSs may be capable of offsetting their funding costs. Of course, while these financial and incidental public benefits are important, they pale in comparison to the direct impact an SCS can have on the lives of the people they serve.

2. *SCSs Prevent Harms to Drug Users*

The primary function and purpose of SCSs is to prevent death by overdose.¹¹¹ Opioid overdoses are identifiable from their symptoms, including decreased pupil size, unconsciousness, and depressed respiratory function, which can cause breathing to slow to dangerous levels or stop entirely.¹¹² In order to prevent fatal opioid overdoses, nurses and supervisors staffing SCSs are equipped with the drug naloxone.¹¹³ Naloxone is an opioid antagonist that quickly reverses overdoses by binding to opioid receptors in the brain and blocking the effects of the opioid.¹¹⁴ It can be administered through injection or a nasal spray and can

108. Ahmed M. Bayoumi & Gregory S. Zaric, *The Cost-effectiveness of Vancouver's Supervised Injection Facility*, 179 CANADIAN MED. ASS'N J. 1143, 1143 (2008).

109. Ehsan Jozaghi et al., *A Cost-Benefit/Cost-Effectiveness Analysis of Proposed Supervised Injection Facilities in Montreal, Canada*, SUBSTANCE ABUSE TREATMENT, PREVENTION, & POL'Y (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3710233/> [<https://perma.cc/4QTN-6NGS>].

110. Allison M. Salmon et al., *The Impact of a Supervised Injecting Facility on Ambulance Call-outs in Sydney, Australia*, 105 ADDICTION 676, 678 (2010).

111. Mary Clare Kennedy & Thomas Kerr, *Overdose Prevention in the United States: A Call for Supervised Injection Sites*, 107 AM. J. PUB. HEALTH 42 (2017).

112. *Management of Substance Abuse: Information Sheet on Opioid Overdose*, WHO (Aug. 2018), http://www.who.int/substance_abuse/information-sheet/en [<https://perma.cc/R4DZ-FEB3>].

113. See Kennedy, *supra* note 111, at 42.

114. *Opioid Overdose Reversal with Naloxone (Narcan, Evzio)*, NAT'L INST. ON DRUG ABUSE (Apr. 2018), <https://www.drugabuse.gov/related-topics/opioid-overdose-reversal-naloxone-narcan-evzio> [<https://perma.cc/4S8Q-UKC3>].

restore breathing and consciousness in an overdose victim within two to five minutes.¹¹⁵ In addition to naloxone administration, staff and nurses can prevent fatal overdoses though administering oxygen, inserting an airway, or calling emergency services for additional assistance.¹¹⁶

Research suggests that SCSs are very effective at preventing fatal overdoses on site. A 2011 study conducted on Insite found that the fatal overdose rate in the 500 meter radius around Insite fell 35% in two years, compared to a 9.3% reduction in fatal overdoses in the rest of Vancouver during that time period.¹¹⁷ Another study of Insite found that the site likely prevented between two and twelve overdose deaths per year, while a similar study of an SCS in Sydney concluded that between four and nine deaths were prevented by that site annually.¹¹⁸ At Insite, overdoses occurred in roughly 1.3 out of every one thousand injections.¹¹⁹ Of these, 60% were successfully managed by site staff, while the remaining 40% required an ambulance call; naloxone was administered in 30% of cases, and no overdose resulted in death.¹²⁰ In Sydney, overdoses occurred in 7.2 out of every one thousand injections (9.5 for every thousand heroin injections), about a quarter of overdoses required naloxone, and no fatal incidents occurred on site.¹²¹ In fact, in all the literature on SCSs worldwide there has only been one recorded death at an SCS—in 2002, when a drug user in an SCS in Germany died from anaphylactic shock.¹²² Because the medical staff at SCSs are able to detect overdoses early and respond to them in a controlled environment, they can prevent deaths that

115. Learn about Naloxone, CTR. FOR OPIOID SAFETY EDUC. <http://stopoverdose.org/section/learn-about-naloxone/#laws> [https://perma.cc/E2JA-JVMK].

116. M-J. S. Milloy et al., *Estimated Drug Overdose Deaths Averted by North America's First Medically-Supervised Safer Injection Facility*, PLOS ONE (2008), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0003351> [https://perma.cc/A8UR-KQUT].

117. Brandon DL Marshall et al., *Reduction in Overdose Mortality After the Opening of North America's First Medically Supervised Safer Injecting Facility: A Retrospective Population-based Study*, 377 LANCET 1429, 1433 (2011).

118. See Milloy, *supra* note 116, at 2.

119. Evan Wood et al., *Summary of Findings from the Evaluation of a Pilot Medically Supervised Safer Injecting Facility*, 175 CANADIAN MED. ASS'N J. 1399, 1402–03 (2006).

120. *Id.*

121. MSIC EVALUATION COMM., FINAL REPORT OF THE EVALUATION OF THE SYDNEY MEDICALLY SUPERVISED INJECTING CENTRE 24 (2003), https://www.drugsandalcohol.ie/5706/1/MSIC_final_evaluation_report.pdf [https://perma.cc/VP2G-XDYH].

122. DAGMAR HEDRICH, EUROPEAN MONITORING CTR. FOR DRUGS & DRUG ADDICTION, EUROPEAN REPORT ON DRUG CONSUMPTION ROOMS 45 (2004), http://www.emcdda.europa.eu/attachements.cfm/att_2944_EN_consumption_rooms_report.pdf [https://perma.cc/7VFFH-Z772].

may have otherwise occurred had the user consumed the same drugs elsewhere.

In addition to greatly reducing the risk of fatal overdose, SCSs can prevent other kinds of harms drug users may experience. Research has shown a correlation between consistent use of an SCS facility and positive changes in injecting practices that reduce the risk of transmitting disease, including not reusing or sharing needles, using clean water for dissolution of drugs and cleaning injection areas,¹²³ not rushing the injection process, and disposing of needles safely.¹²⁴ Drug users will sometimes go to SCSs for the purpose of receiving care for injection-related infections,¹²⁵ and SCSs also refer users in need of more intensive care to other services, helping increase access to health care for drug users.¹²⁶ SCSs have also provided HIV education services for their users,¹²⁷ and one study found that self-reported condom use increased in SCS users over a two-year period.¹²⁸

SCSs may also provide is free drug inspection or testing to ensure the substance the user intends to consume does not contain unwanted or especially dangerous substances.¹²⁹ This is a necessary service for drug users because one of the big drivers of the recent increase in opioid deaths is the growing presence of extremely potent substances such as fentanyl.¹³⁰ Once a relatively uncommon cause of overdose deaths, annual

123. See HARM REDUCTION COAL., GETTING OFF RIGHT: A SAFETY MANUAL FOR INJECTION DRUG USERS 16–17, <https://harmreduction.org/wp-content/uploads/2011/12/getting-off-right.pdf> [<https://perma.cc/SWD9-JD6W>] (stating that use of sterile or clean water for dissolution of drugs and cleaning injection areas is an important part of safer injection practice).

124. Jo-Anne Stoltz et al., *Changes in Injecting Practices Associated with the Use of a Medically Supervised Safer Injection Facility*, 29 J. PUB. HEALTH 35, 37 (2007) (finding that consistent use of SCSs correlated with decreases in needle sharing and rushed injections, and increased use of sterile water, cleaning of injection sites, and cooking/filtering of drugs).

125. Will Small et al., *Assessing Care for Injection-related Infections Through a Medically Supervised Injection Facility: A Qualitative Study*, 98 DRUG & ALCOHOL DEPENDENCE 159, 159 (2008).

126. *Id.*

127. See generally Evan Wood et al., *Safer Injecting Education for HIV Prevention Within a Medically Supervised Safer Injecting Facility*, 16 INT'L J. DRUG POL'Y 281 (2005).

128. See generally Brandon DL Marshall et al., *Condom Use Among Injection Drug Users Accessing a Supervised Injecting Facility*, 85 SEXUALLY TRANSMITTED INFECTIONS 121 (2009).

129. See, e.g., *Drug Checking at Insite Shows Potential for Preventing Fentanyl-related Overdoses*, VANCOUVER COASTAL HEALTH (May 15, 2017), www.vch.ca/about-us/news/news-releases/drug-checking-at-insite-shows-potential-for-preventing-fentanyl-related-overdoses [<https://perma.cc/SSNP-WAET>] (discussing the results of drug inspections performed at InSite in 2016–2017 and the possible implications of the inspections for overdose prevention).

130. John Katz, *The First Count of Fentanyl Deaths in 2016: Up 540% in Three Years*, N.Y. TIMES (Sept. 2, 2017), <https://www.nytimes.com/interactive/2017/09/02/upshot/fentanyl-drug-overdose->

reported overdose deaths in the United States due to fentanyl or fentanyl analogues increased nearly fivefold from 5,776 in 2014 to 28,586 in 2017.¹³¹ Fentanyl has now surpassed heroin as the leading cause of fatal overdose.¹³² A synthetic opioid that can be up to one hundred times more potent than morphine,¹³³ fentanyl is sometimes mixed by drug sellers and distributors with heroin or other substances and sold as heroin, resulting in users unknowingly taking the drug in belief that they are consuming another substance.¹³⁴ Moreover, the fentanyl may not be distributed evenly throughout the mixture, meaning that two doses of fentanyl-spiked heroin from the same source may contain differing amounts of fentanyl, leading a user to overdose from a drug they may have consumed previously in the same quantity from the same source without issue.¹³⁵ A study of drugs tested at Insite between July 2016 and March 2017 found that 83% of heroin samples contained fentanyl, along with 82% of methamphetamine samples and 40% of cocaine samples.¹³⁶ Carfentanil, another synthetic opioid that has been found present in street heroin, is used like fentanyl but is 100 times more potent and thus even more deadly.¹³⁷ By testing drugs before they are consumed, SCSs may help deter overdoses by informing the user of the presence of fentanyl and other high-potency substances in their drugs.

SCSs also create an environment where some of the most hardened and marginalized drug users may find access to drug treatment and other social services to improve their overall condition. For example, Insite was found to be effective at bringing in drug users who were at particularly

deaths.html (last visited Aug. 28, 2018).

131. NAT'L CTR. FOR HEALTH STATISTICS, CTR. FOR DISEASE CONTROL & PREV., VITAL STATISTICS RAPID RELEASE: PROVISIONAL DRUG OVERDOSE DEATH COUNTS (2018), <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.html> [<https://perma.cc/U4XL-STDF>].

132. See Katz, *supra* note 130.

133. *Fentanyl*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drugs-abuse/fentanyl> [<https://perma.cc/MS9D-NTC9>].

134. E.g., Fred Bever, *Illicit Version of Painkiller Fentanyl Makes Heroin Deadlier*, NPR (Aug. 26, 2015), <https://www.npr.org/sections/health-shots/2015/08/26/434618809/illicit-version-of-painkiller-fentanyl-makes-heroin-deadlier?sc=tw> (last visited Aug. 27, 2018) (describing the story of a heroin user who accidentally overdosed on a substance he likely believed to be heroin, but was likely fentanyl).

135. LUPICK, *supra* note 92, at 374.

136. *Drug Checking at Insite Shows Potential for Preventing Fentanyl-related Overdoses*, VANCOUVER COASTAL HEALTH (May 15, 2017), www.vch.ca/about-us/news/news-releases/drug-checking-at-insite-shows-potential-for-preventing-fentanyl-related-overdoses [<https://perma.cc/63V3-V5UG>].

137. *DEA Issues Carfentanil Warning to Police and Public*, DRUG ENFORCEMENT ADMIN. (Sept. 22, 2016), <https://www.dea.gov/press-releases/2016/09/22/dea-issues-carfentanil-warning-police-and-public> [<https://perma.cc/QKV4-UGXQ>].

high risk of blood-borne diseases or who would otherwise have consumed drugs in public.¹³⁸ SCS advocates claim that SCSs can play a role in linking drug users to treatment that they may otherwise not seek or have access to.¹³⁹ During a one-year period, Insite staff made 812 patients referrals to addiction counseling and a significant number of referrals to other services including detoxification, housing, and methadone treatment.¹⁴⁰ Further, one study found that regular SCS users who had more contact with SCS staff were more likely to cease injecting drugs for a period of at least six months during the thirty-month period of the study.¹⁴¹ It may appear counterintuitive at first, but using drugs at an SCS instead of an alley, park, or public restroom and forming relationships with the SCS staff could be the first step for a person with substance use disorder towards successful treatment and a healthier, more stable life. Ultimately, the most important function of an SCS is to prevent drug users from dying; for a person to be able to overcome their addiction, that person must still be alive.

Considering the demonstrated positive impact SCSs have on the health and safety of drug users and the continuing drug overdose epidemic, it should come as no surprise that many harm reduction activists are frustrated at the lack of progress made towards establishing legal SCSs—a common social media hashtag used by activists is #TheyTalkWeDie.¹⁴² Due to this sense of urgency, some activists have taken the step of opening underground, unsanctioned SCSs. These sites are inherently difficult to study, but their existence merits discussion.

138. Evan Wood et al., *Do Supervised Injecting Facilities Attract Higher-Risk Injection Drug Users?*, 29 AM. J. PREVENTATIVE MED. 126 (2005) (analyzing a 2003–2004 survey of Vancouver drug users who reported having injected at a safe injection facility). At the time of the survey, Insite was the only legal SCS in Vancouver. *See id.*

139. *See, e.g.*, Ingrid Walker, *Guest Editorial: Safe Consumption Sites Will Save Lives, Money, and Improve Public Health*, STRANGER SLOG (Sept. 21, 2017, 2:50 PM), <https://www.thestranger.com/slog/2017/09/21/25427949/guest-editorial-safe-consumption-sites-will-save-lives-money-and-improve-public-health> [<https://perma.cc/B4C6-D376>] (arguing that SCSs are “effective at reaching long-term drug users who have not been in the social service system”).

140. Mark W. Tyndall et al., *Attendance, Drug Use Patterns, and Referrals Made from North America’s First Supervised Injection Facility*, 83 DRUG & ALCOHOL DEPENDENCE 193, 196 (2006).

141. Kora DeBeck et al., *Injection Drug Use Cessation and Use of North America’s First Medically Supervised Safer Injecting Facility*, 113 DRUG & ALCOHOL DEPENDENCE 172, 174–75 (2011).

142. *E.g.*, Insightful Vancouver (@InsiteVan), TWITTER (Oct. 2, 2018, 9:38 PM), <https://twitter.com/InsiteVan/status/1047360233385820160> [<https://perma.cc/28RM-68C2>].

C. *Unsanctioned SCSs*

There are an unknown number of SCSs operating in the United States without legal recognition or approval. These sites, like legally sanctioned sites elsewhere in the world, are intended to prevent drug overdoses and other harms resulting from drug use.¹⁴³ They may also reduce the public inconvenience and costs caused by open drug use.¹⁴⁴ Due to the illegality of the drugs consumed at these sites and the likelihood that the sites themselves violate federal law, unsanctioned SCSs typically operate outside the public eye and are difficult to study.

One recent multi-year case study of an unsanctioned SCS in the United States found that the site was open between four and six hours a day, five days a week, and limited its services to under sixty total individuals by invitation only.¹⁴⁵ Of the people the site served, 80.5% reported being currently homeless and over 90% reported that if they did not inject drugs at the site, then they would likely have injected drugs at a public restroom, street, park, or parking lot.¹⁴⁶ Most users at the site reported injecting heroin, though some members reported using methamphetamine and cocaine.¹⁴⁷ In the first two years of the site's operation, there were two recorded overdoses out of a total of 2,574 injections, both of which were successfully reversed through naloxone administered by site staff.¹⁴⁸

It is impossible to know how typical this site may be because so little research has been conducted on unsanctioned SCSs. However, one inference that may be drawn is that while an unsanctioned SCS may succeed in preventing overdoses and other external harms from drug use, a legally permitted SCS could do so far more effectively by operating for longer hours, serving larger and more diverse populations, and linking drug users to treatment, medication, and other social services.¹⁴⁹ A legal SCS could also operate with greater public exposure, which would likely increase opportunities for funding and education. Finally, legalizing SCSs would create a better environment for further study of the effectiveness of the SCS model. The existence of these unsanctioned sites is also evidence

143. Alex H. Kral & Peter J. Davidson, *Addressing the Nation's Opioid Epidemic: Lessons from an Unsanctioned Supervised Injection Site in the U.S.*, 53 AM. J. PREVENTATIVE MED. 919, 919 (2017).

144. *Id.*

145. *Id.* at 920.

146. *Id.* at 921.

147. *Id.*

148. *Id.* at 920.

149. *Id.*

that if allowed to do so, private groups could and likely would organize to further the public health goal of curbing the drug overdose crisis.

III. THE FEDERAL BARRIER TO LEGAL SAFE CONSUMPTION SITES

While illegal drugs are not made or distributed at SCSs, the fact that drugs are consumed there could expose the owners and operators of the site to criminal liability under a textual reading of federal statutes. 21 U.S.C. § 856,¹⁵⁰ passed as part of the Anti-Drug Abuse Act of 1986,¹⁵¹ may effectively, if not explicitly, proscribe the operation of SCSs in the United States.¹⁵² Section 856(a)(1) prohibits anyone from knowingly opening, leasing, renting, using, or maintaining any place for the purpose of manufacturing, distributing, or using controlled substances.¹⁵³ Section 856(a)(2) criminalizes a broad range of activity with respect to the same.¹⁵⁴ The maximum criminal penalty for violating this statute is twenty years imprisonment and a fine of up to \$500,000, or an institutional fine of \$2 million.¹⁵⁵ Courts have treated these two subsections as targeting different kinds of conduct: § 856(a)(1) applies when a defendant makes the place available with the purpose of personally using the place to manufacture, distribute, or use drugs, while § 856(a)(2) merely requires that the defendant knowingly allowed others to use the place for these purposes.¹⁵⁶ A person or entity operating an SCS would therefore be more likely to face charges under subsection (a)(2).

The underlying purpose of § 856(a) was not to prohibit SCSs. Rather, as the legislative history makes clear, the statute's purpose was to prohibit "crack houses" from producing and distributing cocaine.¹⁵⁷ In fact, the statute itself is sometimes colloquially referred to as the "crackhouse

150. 21 U.S.C. § 856(a)(2) (2012).

151. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C.).

152. 21 U.S.C. § 856(a).

153. *Id.* § 856(a)(1).

154. *Id.* § 856(a)(2).

155. *Id.* § 856(b).

156. *See, e.g.,* United States v. Chen, 913 F.2d 183, 190 (5th Cir. 1990) (articulating this distinction).

157. 132 CONG. REC. S26473, S26474 (1986) ("[This bill] outlaws operation of houses or buildings, so-called 'crack houses', [sic] where 'crack', cocaine and other drugs are manufactured and used."); *see also* 132 CONG. REC. S27180, S27180 (1986) ("The bill also recognizes crack's insidious impacts on neighborhoods by outlawing crack houses . . .").

statute.”¹⁵⁸ Further, it is unlikely that Congress was even aware of the concept of SCSs—the first legally operating SCS worldwide was established in Bern, Switzerland, in 1986, the same year the Act was passed.¹⁵⁹ However, the plain text encompasses a broader range of conduct than running or leasing a “crack house,” and multiple circuit courts have interpreted the scope of the statute to apply to places other than where drugs are sold or used, even when the primary purpose of the place is not drug-related.¹⁶⁰ However, federal courts have yet to decide the question of whether operating an SCS violates the statute.

If a court determines that operating an SCS violates § 856(a)(2), then the process of operating an SCS likely violates other federal criminal statutes: it is a crime to attempt or conspire to violate the CSA,¹⁶¹ as is aiding and abetting the commission of a federal crime.¹⁶² Therefore, unless 21 U.S.C. is amended to explicitly allow SCSs, the question is whether a state or municipality could operate SCSs, or allow them to be operated, while insulating state actors and private individuals involved in the sites’ operation from criminal liability.

The Department of Justice (DOJ) contends that operating an SCS would violate federal law and that it would consider prosecuting those who do so. This statement came after an announcement from the Chittenden County State Attorney, who said, after participating in a commission on the matter, that she would support legislation to establish SCSs in Vermont.¹⁶³ In direct response, the U.S. Attorney’s Office in the District of Vermont issued a public statement, warning:

[T]he proposed [SCSs] would violate several federal criminal laws, including those prohibiting use of narcotics and maintaining a premises for the purpose of narcotics use. It is a crime, not only to use illicit narcotics, but to manage and maintain sites on which

158. See, e.g., *United States v. Church*, 970 F.2d 401, 405 (7th Cir. 1992) (referring to 21 U.S.C. § 856(a) (2018) as the crackhouse statute).

159. See HEDRICH et al., *supra* note 62, at 307.

160. See *United States v. Tebeau*, 713 F.3d 955, 960 (8th Cir. 2013) (affirming conviction under 21 U.S.C. § 856(a)(2) of an owner of land used for music festivals found to have had knowledge of open drug sales and use on his land during festivals); *United States v. Tamez*, 941 F.2d 770, 773 (9th Cir. 1991) (“There is no reason to believe that [21 U.S.C. § 856(a)(2)] was intended to apply only to storage facilities and crack houses.”).

161. 21 U.S.C. § 846.

162. 18 U.S.C. § 2(a) (2012).

163. Elizabeth Murray, *Top Officials at Odds over Need for Safe Injection Site in Vermont*, BURLINGTON FREE PRESS (Nov. 29, 2017), www.burlingtonfreepress.com/story/news/local/2017/11/29/safe-injection-sites-needed-vermont-says-study-group/902666001 [<https://perma.cc/89JW-J46D>].

such drugs are used and distributed. Thus, exposure to criminal charges would arise for users and [SCS] workers and overseers. The properties that host [SCSs] would also be subject to federal forfeiture.¹⁶⁴

The U.S. Attorney's Office's statement additionally declared the Office's opinion that "[SCSs] are counterproductive and dangerous as a matter of policy"¹⁶⁵ because "the proposed government-sanctioned sites would encourage and normalize heroin use, thereby increasing demand for opiates and, by extension, risk of overdose and overdose deaths."¹⁶⁶ The Drug Enforcement Administration, which is operated by the DOJ, has also indicated that they could take enforcement action against SCSs.¹⁶⁷

In an August 2018 New York Times op-ed, Deputy U.S. Attorney General Rod Rosenstein reiterated the DOJ's policy of enforcing federal drug laws against operators of SCSs, writing that "[b]ecause federal law clearly prohibits injection sites, cities and counties should expect the Department of Justice to meet the opening of any injection site with swift and aggressive action."¹⁶⁸

Given this kind of open hostility from the Department of Justice toward SCSs, and the Department's stated intention to prosecute SCS operators, it is apparent that the U.S. Government presents a substantial hurdle to the establishment of SCSs. However, in some jurisdictions, such as King County, plans for SCSs are moving forward despite federal disapproval.

IV. POLITICAL AND LEGAL CHALLENGES TO KING COUNTY CHEL SITES

A. *King County Addiction Task Force Plan*

In September 2016, the King County Heroin and Prescription Opiate Addiction Task Force recommended the establishment of two SCSs in the

164. Press Release, U.S. Attorney's Office District of Vermont, Statement of the U.S. Attorney's Office Concerning Proposed Injection Sites (Dec. 13, 2017), <https://www.justice.gov/usao-vt/pr/statement-us-attorney-s-office-concerning-proposed-injection-sites> [<https://perma.cc/S3EM-VM5C>].

165. *Id.*

166. *Id.*

167. Dominic Holden, *The Trump Administration Says Proposed Heroin Injection Sites Could Face "Legal Action"*, BUZZFEED NEWS (Feb. 14, 2018), https://www.buzzfeed.com/dominicholden/the-trump-administration-says-proposed-heroin-injection?utm_term=.fyklLymbDx#.ulJP2ZzAn1 [<https://perma.cc/X37X-S32A>].

168. Rod J. Rosenstein, Opinion, *Fight Drug Abuse, Don't Subsidize It*, N.Y. TIMES (Aug. 27 2018), <https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html> (last visited Oct. 25, 2018).

county as part of a broad series of recommendations to address heroin addiction in the region.¹⁶⁹ The King County Board of Health subsequently approved the Task Force's recommendations in a unanimous 12–0 vote on January 19, 2017.¹⁷⁰ The Task Force consisted of a large coalition of groups, including King County organizations (including the King County Sheriff's Office, Prosecutor's Office, and Public Defender Association), local government organizations (including the Seattle Mayor's Office, Seattle Fire Department, and the Police Departments of Seattle, Renton, and Auburn), and non-governmental organizations (including the American Civil Liberties Union, area hospitals and local non-profit groups).¹⁷¹

The proposed King County SCSs, referred to in the report as Community Health Engagement Locations or CHEL sites, are intended to provide an array of social services in addition to a safe place to consume drugs.¹⁷² The stated goals of the CHEL sites are to (1) reduce drug related health risks, including “overdose death, transmission of HIV and hepatitis B and C viruses”¹⁷³; to (2) “[p]rovide access to substance use disorder treatment and related health and social services, provide a safe and trusting environment where people who use drugs can engage with services to improve their health and reduce criminal justice system involvement and reduce emergency medical services utilization”¹⁷⁴; and to (3) “improve public safety and the community environment by reducing public drug use and discarding of drug using equipment.”¹⁷⁵

In addition to the standard services SCSs generally provide, such as injection supplies, naloxone, and a hygienic space to inject drugs, the King County proposal indicates that CHEL sites will provide access to a variety of social services.¹⁷⁶ These include sexual health resources, basic medical treatment, peer support, health education, and connections to a variety of addiction treatments.¹⁷⁷ Though the Task Force was convened specifically in response to the heroin and opiate epidemic in King County, the proposed CHEL sites do not restrict the kind of drugs that may be brought and consumed at the site, other than to prohibit smoking tobacco and

169. See KC Report, *supra* note 12, at 2.

170. King Cty. Bd. of Health, *supra* note 8.

171. KC Report, *supra* note 12, at 8–9.

172. *Id.* at 26.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 28–29.

177. *Id.*

marijuana.¹⁷⁸ CHEL sites will also provide a space for users to consume drugs via sublimation or inhalation rather than injection.¹⁷⁹ The proposal also aims for the sites to provide on-site medication treatment for opiate dependency, basic medical treatment and screening services, and access to legal services.¹⁸⁰

Exactly where and how these sites will operate is still unsettled. King County's original plan was to locate one site within Seattle and another site outside the city.¹⁸¹ This plan morphed into a plan for a "fixed mobile site," essentially a mobile home converted into an SCS and parked daily at the same location.¹⁸² At this point, King County has not committed to whether its SCSs will be operated exclusively by public health organizations, operated in a public-private partnership in a model similar to Insite, or whether it will give oversight to a private community service provider group to operate an SCS independently.¹⁸³ However, the City of Seattle's 2018 budget includes \$1.3 million allocated for the establishment of a CHEL site.¹⁸⁴ There are important legal and economic ramifications to this decision, including whether and how the site and its employees will be insured and whether operating the facility would violate state law in addition to federal law.¹⁸⁵ In a summary written by ACLU of Washington policy director Mark Cooke and attached to the Task Force Report, Cooke argued that the broad grant of authority given to local health boards by article XI, section 11 of the Washington State Constitution provides a strong legal basis for a county-sponsored SCS under Washington State law, just as it provides the legal basis for needle exchange programs.¹⁸⁶

178. *Id.* at 29.

179. *Id.*

180. *Id.*

181. *Id.* at 28.

182. Deedee Sun, *Seattle Moving Forward with 'Fixed Mobile' Safe Injection Site*, KIRO 7 (June 7, 2018), <https://www.kiro7.com/news/local/seattle-moving-forward-with-fixed-mobile-safe-injection-site/765093230> [<https://perma.cc/7JEF-PAT7>].

183. KC Report, *supra* note 12, at 28.

184. Susan Kelleher, *Seattle Council Approves \$5.6B Budget that Boosts Spending on Homelessness, Opioid Crisis*, SEATTLE TIMES (Nov. 20, 2017, 8:03 PM), <https://www.seattletimes.com/seattle-news/politics/seattle-council-approves-5-6b-budget-that-boosts-spending-on-homelessness-opioid-crisis> (last visited Oct. 28, 2018).

185. KC Report, *supra* note 12, at 84–94.

186. *Id.* at 88–90.

B. Initiative 27

Despite the evidence supporting SCSs as an effective tool to combat the negative health impacts of opioid addiction, King County's proposal caused a significant political backlash from within the county. This opposition was most visible in the suburbs of Seattle. The nearby cities of Bellevue,¹⁸⁷ Kent,¹⁸⁸ Renton,¹⁸⁹ Federal Way,¹⁹⁰ and Auburn¹⁹¹ passed ordinances or resolutions against SCSs following the announcement of the King County plan. Neighboring Snohomish County passed a similar ban.¹⁹² A bill was also introduced in the Washington State Senate that would have effectively killed the proposed sites by withholding state funding to any institution that made "any expenditure . . . related to safe injection sites."¹⁹³ One consequence of this backlash was that King County abandoned, at least temporarily, their plan to place a CHEL site in suburban King County.¹⁹⁴ This political opposition to SCSs also resulted in the creation of Proposed King County Initiative 27 ("I-27").¹⁹⁵

King County's Charter provides for an initiative process that permits a proposed ordinance to appear on the electoral ballot if supporters file a petition containing enough signatures of registered voters,¹⁹⁶ and if the King County Council does not enact the proposed measure within ninety days.¹⁹⁷ The King County Council may instead reject the measure and approve an alternative measure "concerning the same subject matter"; in that event, both proposed measures appear on the ballot, and voters may choose to vote for either or reject both.¹⁹⁸

187. Bellevue, Wash., Ordinance 6376 (Oct. 17, 2017).

188. Kent, Wash., Ordinance 4250 (Aug. 15, 2017) (prohibiting CHEL sites for six months).

189. Renton, Wash., Resolution 4317 (Aug. 14, 2017).

190. Federal Way, Wash., Resolution 17-724 (Aug. 8, 2017).

191. Auburn, Wash., Resolution 5306 (July 18, 2017).

192. Hanna Scott, *Snohomish County Preemptively Bans Safe Injection Sites*, MYNORTHWEST (Sept. 26, 2017), <http://mynorthwest.com/764514/snohomish-county-preemptively-bans-safe-injection-sites/> [https://perma.cc/67W9-AVED].

193. S.B. 5223, 65th Leg., Reg. Sess. (Wash. 2017).

194. Josh Kelety, *County Plans for Second Safe Drug Site Now on Hold*, SEATTLE WKLY. (Apr. 20, 2018), www.seattleweekly.com/news/county-plans-for-second-safe-drug-site-put-on-hold [https://perma.cc/MR6M-5RJS].

195. *Initiative 27, SAFE KING CTY.* (2017), <https://safekingcounty.org/initiative> [https://perma.cc/ETL9-DL2Z].

196. The number of signatures required is "not less than ten percent of the votes cast in the county for the office of county executive at the last preceding election . . ." KING CTY., WASH. CHARTER § 230.50 (2018).

197. *Id.*

198. *Id.*

In May 2017, opponents of SCSs, led by Bothell City Councilmember Joshua Freed, announced their intention to put an initiative on the ballot that would ban SCSs in King County.¹⁹⁹ By August 2017, SCS opponents collected enough valid signatures to confirm their petition and put I-27 on the King County electoral ballot.²⁰⁰ The King County Council scheduled the proposed initiative for a February 2018 vote.²⁰¹ The King County Council also approved an alternative ballot measure that would implement the Heroin and Prescription Opiate Addiction Task Force's recommendations, including the two proposed SCSs.²⁰²

I-27 began with a statement of facts, which acknowledged that “[h]eroin and prescription opioid use constitutes a public health crisis in King County” and that “[h]eroin overtook prescription opioids in 2013 as the primary cause of opioid overdose deaths.”²⁰³ The initiative then stated that “[t]he use of supervised drug consumption sites is inconsistent with the county’s goal of preventing substance use disorder and overdoses across King County.”²⁰⁴ I-27 proposed to change King County law in three ways: (1) it stipulated that “[n]o public funds may be spent on the registration, licensing, construction, acquisition, transfer, authorization, use, or operation of a supervised drug consumption site”²⁰⁵; (2) it would have made it a misdemeanor for any person or entity to operate an SCS, “whether public or private and whether for profit or not for profit,”²⁰⁶ and (3) it would have created a civil cause of action against King County if they spent public funds on SCSs, as well as against any person or entity who operated an SCS.²⁰⁷

199. Aaron Kunkler, *Group Launches Campaign to Bar Government-funded Drug Injection Sites in King County*, KIRKLAND REPORTER (May 17, 2017), <https://www.kirklandreporter.com/news/group-launches-campaign-to-bar-government-funded-drug-injection-sites-in-king-county/#civil-comments> [<https://perma.cc/J2T3-DK5L>].

200. Jim Brunner, *Initiative to Ban Heroin Safe-injection Sites in King County Qualifies for Ballot*, SEATTLE TIMES (Aug. 18, 2017), <https://www.seattletimes.com/seattle-news/politics/initiative-to-ban-heroin-safe-injection-sites-in-king-county-qualifies-for-ballot> (last visited Nov. 9, 2018).

201. Jon Humbert, *King County Council Pushes Public Vote over Injection Sites to February*, Q13 FOX (Aug. 22, 2017), <https://q13fox.com/2017/08/21/king-county-council-pushes-public-vote-over-injection-sites-to-february> [<https://perma.cc/LQ5W-74M5>].

202. *Voters Sent Alternative on I-27 Measure*, KING COUNTY (Oct. 16, 2017), <https://kingcounty.gov/council/news/2017/October/I27-Alternate.aspx> (last visited Nov. 9, 2018).

203. SAFE KING CTY., *supra* note 195.

204. *Id.*

205. *Id.* at section 1.

206. *Id.* at section 2.

207. *Id.*

C. Protect Public Health v. Freed

On August 21, 2017, the group Protect Public Health filed suit in King County Superior Court seeking both a judicial declaration invalidating I-27 and an injunction to prevent the measure from reaching the ballot.²⁰⁸ Protect Public Health is directed by Robert Wood, M.D., a Clinical Professor of Medicine at the University of Washington whose professional background is in HIV/AIDS prevention.²⁰⁹ Councilmember Joshua Freed and Safe King County were among the named defendants.²¹⁰ The City of Seattle intervened in the case a month later and filed a separate complaint seeking to invalidate I-27.²¹¹ On October 16, 2017, Judge Veronica Alicea Galván of King County Superior Court ruled in favor of Protect Public Health and the City of Seattle, declaring I-27 invalid and removing it from the electoral ballot.²¹² Councilmember Freed announced shortly thereafter that he would appeal the decision.²¹³ On May 2, 2018, the Washington State Supreme Court agreed to hear the case in an upcoming term.²¹⁴ Oral arguments were heard on September 18, 2018.²¹⁵

The primary argument made by both the City of Seattle²¹⁶ and Protect

208. Complaint, Protect Pub. Health v. Freed, No. 17-2-21919-3 (Wash. Sup. Ct. Aug. 21, 2017). On December 6, 2018, the Washington State Supreme Court affirmed the decision of the King County Superior Court. Protect Pub. Health v. Freed, No. 95134-9, slip op. at 12–13 (Wash. Dec. 6, 2018). *See infra* Addendum.

209. Declaration of Robert Wood in Support of Plaintiff's Motion for Declaratory Judgment and Injunctive Relief at 1, Protect Pub. Health v. Freed, No. 17-2-21919-3 (Wash. Sup. Ct. Sept. 15, 2017).

210. Complaint, Protect Pub. Health v. Freed, No. 17-2-21919-3 (Wash. Sup. Ct. Aug. 21, 2017).

211. City of Seattle's Motion to Intervene, Protect Pub. Health v. Freed, No. 17-2-21919-3 (Wash. Sup. Ct. Sept. 22, 2017); City of Seattle's Complaint, Protect Pub. Health v. Freed, No. 17-2-21919-3 (Wash. Sup. Ct. Sept. 22, 2017).

212. Order Granting Plaintiff's Motion for Declaratory Judgment and Injunctive Relief, Protect Pub. Health v. Freed, No. 17-2-21919-3 (Wash. Sup. Ct. Oct. 16, 2017).

213. *I-27 Barred from the Ballot After Being Shut Down in Court*, MYNORTHWEST (Oct. 16, 2017), <http://mynorthwest.com/784949/i-27-loses-in-court/> [https://perma.cc/CQ8S-ZL87].

214. Josh Kelety, *Safe Drug Site Challenge Heads to State Supreme Court*, SEATTLE WKLY (May 4, 2018), <https://www.seattleweekly.com/news/safe-drug-site-challenge-heads-to-state-supreme-court> (last visited Nov. 9, 2018).

215. *Supreme Court Calendar: September 18, 2018*, WASH. COURTS, http://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/?fa=atc_supreme_calendar.display&year=2018&file=20180918 [https://perma.cc/V4UH-RF64]; *see also* Oral Argument, Protect Pub. Health v. Freed, No. 17-2-21919-3 (Wash. Sup. Ct. Sept. 18, 2018), <https://mediaplayer.inventusmedia.com?clientID=9375922947&eventID=2018091031&autoStartStream=true> (last visited Nov. 19, 2018).

216. City of Seattle's Complaint at 6, Protect Pub. Health v. Freed, No. 17-2-21919-3 (Wash. Sup. Ct. Sept. 22, 2017).

Public Health,²¹⁷ which essentially formed the basis for the court's decision, was that I-27 exceeded the scope of what can be lawfully addressed through a local ballot initiative in the State of Washington. In Washington, an initiative may not infringe on powers expressly bestowed by statute onto the governing bodies of its municipalities, as opposed to powers granted to the municipality as a whole.²¹⁸ In other words, if Washington law delegates a power specifically to the legislative bodies of its cities, that power belongs to Washington city councils and mayors; if a proposed initiative attempts to invoke that power, the initiative is void under state law because it attempts to give a power that belongs to the legislative body to the electorate.²¹⁹

In this instance, I-27 was invalidated because it attempted to claim two powers that under Washington law belonged solely to the governmental bodies of King County and Seattle: (1) the power of the legislatures to fix and determine their budgets by prohibiting funding of CHEL sites; and (2) the power of the King County Board of Health to make decisions regarding public health.²²⁰ The former of these reasons is relatively straightforward: Washington statute provides that “the *county legislative authority shall* fix and determine each item of the budget separately and shall by resolution adopt the budget”²²¹ Likewise, Washington statute provides that in cities with at least 300,000 residents, “there *shall be enacted annually by the legislative authority* a budget covering all functions or programs of such city.”²²² Thus by stipulating that “[n]o public funds may be spent on . . . a supervised drug consumption site,”²²³ I-27 interfered with the legislative authority of King County and the City of Seattle to determine generally what items each may include and appropriate funds to in their municipal budgets.

More importantly for the purposes of this Comment, the court held that

217. Complaint at 12–17, *Protect Pub. Health v. Freed*, No. 17-2-21919-3 (Wash. Sup. Ct. Aug. 21, 2017).

218. *City of Sequim v. Malkasian*, 157 Wash. 2d 251, 265, 132 P.3d 943, 951, (2006) (finding it “well-settled” that power granted to the governing body of a municipality belongs “exclusively [to] the mayor and city council and not the electorate” and cannot be reached by initiative); *State ex rel. Guthrie v. City of Richland*, 80 Wash. 2d 382, 494 P.2d 990 (1972) (holding that when the legislature expressly intends for a governing body of a municipality to exercise a power, the power may not be reached by referendum).

219. *See Malkasian*, 157 Wash. 2d at 265, 132 P.3d at 951; *State ex rel. Guthrie v. City of Richland*, 80 Wash. 2d 382, 494 P.2d 990.

220. Order Granting Plaintiff’s Motion for Declaratory Judgment and Injunctive Relief at 6, *Protect Pub. Health v. Freed*, No. 17-2-21919-3 (Wash. Sup. Ct. Oct. 16, 2017).

221. WASH. REV. CODE § 36.40.080 (2018) (emphasis added).

222. *Id.* § 35.32A.010 (emphasis added).

223. SAFE KING CTY., *supra* note 195.

I-27 interfered with King County and Seattle's powers to make decisions regarding public health.²²⁴ Washington statute provides that "Each *county legislative authority shall* annually budget and appropriate a sum for public health work."²²⁵ Washington statute also provides that in counties such as King County, "*the county legislative authority shall* establish a local board of health . . ."²²⁶ Each local board of health "shall have supervision over all matters pertaining to the preservation of the life and health of the people within its jurisdiction,"²²⁷ including the power to "[s]upervise the maintenance of all health and sanitary measures for the protection of the public health within its jurisdiction,"²²⁸ to "[p]rovide for the control and prevention of any dangerous, contagious or infectious disease within the jurisdiction,"²²⁹ and to "[p]rovide for the prevention, control and abatement of nuisances detrimental to the public health."²³⁰ Additionally, Washington statute delegates these same powers to "[t]he local health officer, acting under the direction of the local board of health,"²³¹ who additionally is empowered by the statute to "[t]ake such measures as he or she deems necessary in order to promote the public health."²³²

The King County Board of Health is jointly operated by King County and the City of Seattle; of its ten voting members, three are King County councilmembers, three are Seattle City Council members, two are selected from suburban King County cities, and two are health professionals selected by the other board members.²³³ The King County Board of Health unanimously approved the policy recommendations of the King County Heroin and Prescription Opiate Addiction Task Force, which included the establishment of the CHEL sites.²³⁴

The court thus found that the decision to establish SCSs in King County, made by the Board of Health pursuant to their powers delegated

224. See Order Granting Plaintiff's Motion for Declaratory Judgment and Injunctive Relief, *Protect Pub. Health v. Freed*, No. 17-2-21919-3 (Wash. Sup. Ct. Oct. 16, 2017).

225. WASH. REV. CODE § 70.12.025 (2018) (emphasis added).

226. *Id.* § 70.05.035 (emphasis added).

227. *Id.* § 70.05.060.

228. *Id.* § 70.05.060(2).

229. *Id.* § 70.05.060(4).

230. *Id.* § 70.05.060(5).

231. *Id.* § 70.05.070.

232. *Id.* § 70.05.070(9).

233. KING CTY. CODE § 2.35.021 (2018).

234. King Cty. Bd. of Health, *supra* note 8.

by Washington State, could not be reached by an initiative.²³⁵ In addition, the court noted that through I-27's provisions seeking to make county officials civilly and criminally liable for funding an SCS, I-27 sought to "interfere[] with the duties and obligations of the Board and County Council . . . if they attempt to fulfill the mandates which have been placed upon them by statute. In this way, I-27 is in direct conflict with RCW Chapter 70."²³⁶ Finally, the court referenced a section of the King County Charter which stipulates that neither an appropriation ordinance nor "an ordinance necessary for the immediate preservation of the public peace, health, or safety" are subject to referendum.²³⁷

D. The Precedent of Spokane County Health District v. Brockett

Due to the precedent set by the Washington Supreme Court in *Spokane County Health District v. Brockett*,²³⁸ Washington's criminal statutes prohibiting possession of controlled substances²³⁹ did not factor into the court's decision.²⁴⁰ *Spokane County* concerned the harm reduction policy that preceded SCSs in the public consciousness—needle exchanges.²⁴¹ In 1990, the Spokane County Health Board approved the establishment of a needle exchange program in order to combat the growing spread of HIV/AIDS in the region.²⁴² This drew the disapproval of the Spokane County Prosecuting Attorney, Spokane County Sheriff, and Spokane County Attorney General, who sought to prevent the establishment of the program through criminal enforcement.²⁴³ The Spokane County Health District brought suit to seek preemptive legal resolution of the issue.²⁴⁴ Defendants argued that the needle exchanges were illegal under state law because the program necessarily entailed the distribution of drug paraphernalia, a crime in Washington State, and that a county program that conflicts with state criminal law must be unconstitutional.²⁴⁵

The Washington Supreme Court took a different approach to the issue.

235. Order Granting Plaintiff's Motion for Declaratory Judgment and Injunctive Relief, *Protect Pub. Health v. Freed*, No. 17-2-21919-3 (Wash. Sup. Ct. Oct. 16, 2017).

236. *Id.* at 5.

237. KING CTY., WASH. CHARTER § 230.40 (2018).

238. 120 Wash. 2d 140, 839 P.2d 324 (1992).

239. WASH. REV. CODE § 69.50.4013(1) (2018).

240. *Spokane Cty.*, 120 Wash. 2d 140, 839 P.2d 324.

241. *Id.* at 142, 839 P.2d at 325.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 146–48, 839 P.2d at 327–28.

The court examined the broad public powers granted by the Washington State Legislature to local boards of health.²⁴⁶ One of the statute provisions the court examined states that local boards of health “shall . . . [p]rovide for the control and prevention of any dangerous, contagious or infectious disease within the jurisdiction of the local health department . . . [.]”²⁴⁷ The court found that this reflected the legislature’s broad grant of authority to local health boards due to the importance of protecting public health, stating:

Because protecting and preserving the health of its citizens from disease is an important governmental function, public health statutes and the actions of local health boards implementing those statutes are liberally construed. The legislatively delegated power to cities and health boards to control contagious diseases gives them extraordinary power which might be unreasonable in another context.²⁴⁸

The court’s key holding in *Spokane County* was that when enacting a public health measure, a local health board in Washington is not restricted by state criminal laws, but rather need only adhere to its grant of authority from the Washington legislature.²⁴⁹

[P]laintiffs here are not relying on the general powers granted local officials under the state constitution. Rather, they are acting pursuant to *public health* statutes, namely RCW 70.05, which defines the powers and duties of local health officials, and RCW 70.24, the AIDS act. It is those (public health) statutes—not the criminal statute in which the drug paraphernalia act appears—with which the needle exchange program must not “conflict” to retain its constitutional imprimatur.²⁵⁰

The court had previously recognized that “the subject matter and expediency of public health disease prevention measures are ‘beyond judicial control, except as they may violate some constitutional right guaranteed to [plaintiffs].’”²⁵¹ Because the *Spokane County* defendants could not claim that they personally would suffer any constitutional violations as a result of the needle exchange, the needle exchange program

246. WASH. REV. CODE § 70.05.060 (2018).

247. *Spokane Cty.*, 120 Wash. 2d at 149, 839 P.2d at 328 (quoting WASH. REV. CODE § 70.05.060(4) (1992)).

248. *Id.* at 149, 839 P.2d at 330 (citations omitted).

249. *Id.* at 148, 839 P.2d at 329.

250. *Id.*

251. *Id.* at 149–50, 839 P.2d at 329 (quoting *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 621, 277 P.2d 352, 355 (1954)).

did not violate the Washington State Constitution.²⁵² The precedent set in *Spokane County* was of great importance in *Protect Public Health*, not only for its direct holding that violation of Washington criminal laws does not in itself defeat an otherwise valid public health measure, but also for its support for judicial deference to the decisions of public health boards. Judge Galván’s opinion cited *Spokane County* in support of the Washington State Supreme Court’s recognition of “the broad authority public health authorities have in protecting public health and addressing responses to public health crisis.”²⁵³ The prospect that a legitimate health authority’s duty to protect the public from contagious diseases gives them “extraordinary power which might be unreasonable in another context”²⁵⁴ is an idea that could have important, life-saving consequences for the future of SCSs and harm reduction generally.

Spokane County’s precedent affirms that Washington State public health boards have authority from the legislature to contradict general laws in the interest of public health.²⁵⁵ However, not every state grants this level of authority to local public health boards, and in some states the public health authority is centralized at the state government level.²⁵⁶ Therefore, in some states it will be necessary to change state law to permit SCSs—local public health officials may simply not have the authority to create programs as they can in Washington State.

E. California Assembly Bill 186: An Uphill Climb

In California, proponents of SCSs in the state legislature have attempted to give local officials that authority. In January 2017, California State Assembly member Susan Eggman introduced Assembly Bill 186, which as introduced would have empowered any city or county to establish an SCS, subject to certain requirements.²⁵⁷ The scope of the bill was ultimately narrowed to seven counties.²⁵⁸ The bill passed in the

252. *Id.*

253. Order Granting Plaintiff’s Motion for Declaratory Judgment and Injunctive Relief, *Protect Pub. Health v. Freed*, No. 17-2-21919-3 (Wash. Sup. Ct. Oct. 16, 2017).

254. *Spokane Cty.*, 120 Wash. 2d at 149, 839 P.2d at 329.

255. *Id.* at 148–49, 839 P.2d at 328.

256. See ASS’N OF STATE & TERRITORIAL HEALTH OFFICIALS, STATE PUBLIC HEALTH AGENCY CLASSIFICATION: UNDERSTANDING THE RELATIONSHIP BETWEEN STATE AND LOCAL PUBLIC HEALTH (2012), <http://www.norc.org/PDFs/Projects/Classification%20of%20State%20Health%20Agencies/ASTHO%20NORC%20Governance%20Classification%20Report.pdf> [https://perma.cc/ES8J-7PFS].

257. Assemb. 186, 2017-2018 Reg. Sess. (Cal. 2017) (as introduced).

258. Assemb. 186, 2017-2018 Reg. Sess. (Cal. 2017) (as amended).

California State Assembly that year, but failed to pass in the state senate by two votes.²⁵⁹

In the City and County of San Francisco, local officials launched a task force to evaluate the need for SCSs and the feasibility of establishing them.²⁶⁰ The task force recommended establishing multiple sites of varying sizes, but also found that doing so would violate California law.²⁶¹ The Task Force recommended that San Francisco advocate for the passage of Assembly Bill 186.²⁶² Assembly Bill 186 was re-amended to permit only San Francisco to open SCSs.²⁶³

San Francisco officials and SCS proponents were ultimately disappointed. The re-amended Assembly Bill 186 passed in the California State Senate,²⁶⁴ and then six days later it passed again in the California Assembly.²⁶⁵ Following the bill's passage, San Francisco attempted to gather support and enthusiasm for the program, opening up a "mock" SCS to demonstrate to supporters, critics, and media what the site would look like and what services it would offer.²⁶⁶ However, on September 30, 2018, California Governor Edmund "Jerry" Brown vetoed Assembly Bill 186.²⁶⁷ In his veto statement, Governor Brown expressed concern that operating the SCS might expose local officials to federal prosecution.²⁶⁸ In addition, Governor Brown's statement expressed personal doubts about the effectiveness of SCSs as a whole, stating that "[f]undamentally, I do not believe that enabling illegal drug use in government sponsored injection

259. Joshua Sabatini, *Bill to Allow Safe Injection Sites for Drug Users Fails in California Senate*, S.F. EXAMINER (Sept. 15, 2017, 10:43 PM), <http://www.sfexaminer.com/bill-allow-safe-injection-sites-drug-users-fails-california-senate> [<https://perma.cc/ACN5-JLXQ>].

260. SF Task Force Report, *supra* note 18, at 6.

261. *Id.* at 9.

262. *Id.*

263. Assemb. 186, 2017-2018 Reg. Sess. (Cal. 2018) (as reconsidered and amended) (vetoed).

264. Nuala Sawyer, *California Senate Passes Landmark Safe Consumption Site Bill*, S.F. WKLY. (Aug. 21, 2018), <http://www.sfweekly.com/news/california-senate-passes-landmark-safe-consumption-site-bill> [<https://perma.cc/96SK-SV6W>].

265. Melanie Manson, *San Francisco Could Start a Safe-injection Site Program Under Bill Cleared by California Legislature*, L.A. TIMES (Aug. 27, 2018), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-may-2018-bill-to-let-san-francisco-test-out-safe-1535417740-htmstory.html> [<https://perma.cc/G5HE-VYK5>].

266. Laura Waxmann, *Mock Safe Injection Site Opens in SF Amid Threat of Federal Prosecution*, S.F. EXAMINER (Aug. 29, 2018), <http://www.sfexaminer.com/mock-safe-injection-site-opens-sf-amid-threat-federal-prosecution> (last visited Oct. 25, 2018) [<https://perma.cc/7XNR-W7LT>].

267. Melody Gutierrez, *California Bill to Let SF Open Safe Drug-injection Site is Vetoed by Brown*, S.F. CHRON. (Sept. 30, 2018), <https://www.sfchronicle.com/news/article/California-bill-to-let-SF-open-safe-13270836.php> [<https://perma.cc/C9X6-TCRP>].

268. CAL. LEGISLATIVE INFO., *supra* note 20 (noting vetoed status of AB-186 and documenting the text of Governor Brown's veto letter).

centers—with no corresponding requirement that the user undergo treatment—will reduce drug addiction.”²⁶⁹

In the days following the veto, San Francisco leaders pledged to continue finding a way to open an SCS,²⁷⁰ and Assembly Member Eggman, who introduced Assembly Bill 186, tweeted “We’ll be back next year.”²⁷¹ However, the episode shows the political difficulties that SCS proponents in the United States face in establishing the first legally operating SCS in the country.

V. SUPERVISED CONSUMPTION SITES IN AMERICA: THE PATH FORWARD

This Comment has so far introduced the concept of SCSs as a harm reduction measure to counteract the effects of the opioid epidemic, examined the research on SCSs and its implications for the potential efficacy of SCSs as public policy, and reviewed the legal position of SCSs under federal, Washington, and California law. This Part makes recommendations for individual jurisdictions to consider in order to put SCSs, their staff, and public officials in the best possible legal position should they decide to move forward with the establishment of SCSs.

A. *States Should Protect the Decisions of Public Health Authorities from the Reach of Ballot Initiative*

As the King County example illustrates, SCSs are at risk of facing scrutiny for their perceived unlawfulness or association with illegal behavior, and of being denied consideration of their potential merits as a public health measure. The primary issue with allowing SCSs or other public health issues to face a public vote is that in putting public health decisions on an electoral ballot, jurisdictions allow the opinions of laypeople to take precedent over the recommendations of public health professionals and experts, though real people’s lives are at stake. Even the threat of these ballot initiative measures could prevent the establishment of pilot programs, which are necessary to conduct additional research into the effectiveness of SCSs operating in the United States. Due to the

269. *Id.*

270. Heather Knight, *Breed Says Fight for Safe Injection Sites in SF Isn’t Over*, S.F. CHRON. (Oct. 2, 2018, 6:00 AM), <https://www.sfchronicle.com/bayarea/heatherknight/article/Breed-says-fight-for-safe-injection-sites-in-SF-13273455.php> [<https://perma.cc/A2TC-Q2A8>].

271. Assemb. Susan Eggman (@AsmSusanEggman), TWITTER (Sept. 30, 2018, 8:44 PM), <https://twitter.com/AsmSusanEggman/status/1046606749090734080> [<https://perma.cc/Z574-P6T5>].

existence of widespread stigma against drug users in the United States,²⁷² more targeted research and additional evidence may be required in order to for public opinion to become more closely aligned with that of the medical community.

The King County Superior Court decision in *Protect Public Health* was correct not only in a jurisprudential sense; it is sound public policy to ensure that public health decisions are informed by experts. Public health may be unique among political issues in that sound decision-making must necessarily rely on the opinions of those with advanced knowledge and expertise. Just as individuals rely on the assistance of doctors and health professionals for their knowledge of physiology and medicine, so must society as a whole rely; this extraordinary trust is at the very foundation of the medical profession. To that end, all jurisdictions that permit ballot initiatives should, like King County does in its charter,²⁷³ ensure that the decisions of public health authorities cannot be overturned directly at the ballot. This Comment does not mean to suggest that initiatives are inherently bad for public policy; widespread citizen participation and input in public decision-making is desirable and should be promoted. Nor should the decisions of health boards be immune from public scrutiny. All powers given to health boards are the result of decisions made by legislatures—legislators should be accountable for these decisions. However, by protecting public health decisions from ballot initiatives, governments can prevent reactionary actors from tearing down essential programs acting in the public interest before their benefits can be realized. When it comes to public health decisions, experts should be trusted to take the lead.

B. Where Possible, States Should Codify the Spokane County Principle to Give Flexibility to Local Health Departments

As the *Spokane County* court stated, “protecting and preserving the health of its citizens from disease is an important governmental function,”²⁷⁴ and preventing the spread of contagious disease gives health authorities “extraordinary power which might be unreasonable in another context.”²⁷⁵ For public health decisions to be effective, public health authorities must be able to get to the root of the issue they are addressing as quickly and efficiently as possible. People who have substance use

272. See Jennifer Ahern et al., *Stigma, Discrimination, and the Health of Illicit Drug Users*, 88 *DRUG & ALCOHOL DEPENDENCE* 188 (2007).

273. KING CTY., WASH. CHARTER § 230.40.

274. *Spokane Cty. Health District v. Brockett*, 120 Wash. 2d 140, 149, 839 P.2d 324, 329 (1992).

275. *Id.*

disorders may face imminent danger of overdose or contracting a blood-borne disease. These individuals do not have the luxury of time for the perfect solution, and simply demanding that they stop using drugs has failed to stop them from using or dying. The opioid crisis may be best addressed at a local level, as familiarity with neighborhoods and regions with greater concentrations of drug users may help with site placement and outreach.

For these reasons, *Spokane County*'s holding that criminal law does not negate the legality of a valid public health measure may be necessary for the establishment of SCSs and other harm reduction measures. A jurisdiction considering SCSs should push to formally enact a statute (1) exempting public health officials from criminal liability for actions taken in the course of their duties; (2) exempting the staff of any program established by a public health authority from criminal liability for actions taken in the course of their duties; and (3) immunizing the public from criminal liability resulting from proper utilization of a program approved by a public health authority. The last of these is not present in the *Spokane County* decision, but would be necessary to effectively promote these public health programs to the public without creating confusion.

The reason for enacting these exemptions is simple: People and groups should not face criminal liability for acting to save lives. It is thus in the public interest to ensure that criminal law does not stand in the way of a valid public health initiative.

In some states, merely codifying the *Spokane County* principle will not be sufficient, as local health boards do not have the freedom or flexibility to establish SCSs. Even if doing so were completely legal, they lack authority to create such programs without direction from the state. In these places, action at the state level may be necessary.

While public health authorities should have broad powers, it does not require much imagination to consider a scenario where these powers could be abused. For this reason, it is crucial that both state constitutions and the U.S. Constitution serve as a limitation on these powers. The *Spokane County* opinion indicated that a showing of a constitutional violation against the aggrieved party would have been sufficient for the court to take judicial action.²⁷⁶ Ensuring public health is an important government function, but it cannot take precedence over peoples' civil liberties.

C. *Where Necessary, States Should Enact Legislation Similar to California Assembly Bill 186*

Where state action is necessary to permit the establishment of SCSs,

276. *Id.*

Assembly Bill 186 can serve as an example for SCS proponents to push legislators to adopt. While people may agree or disagree with Assembly Bill 186's particular regulation of SCSs, the Bill itself serves to accomplish the same objective as state codification of the *Spokane County* holding, but in a more narrow way applying only to SCSs. This kind of state-level action is likely easier than decentralizing an entire public health structure, and can pave the way for local officials and groups to create localized SCS solutions, even if it does not give them the flexibility they might have in a state adopting the *Spokane County* principle.

There are substantial hurdles to promoting a state-level solution, demonstrated by the struggle to pass Assembly Bill 186 in California. Proponents of SCSs should continue to publicly advocate for the programs and promote the studies conducted so far on their effectiveness. As the public becomes more conscious of SCSs and the problems they help address, SCSs may become more normalized and less controversial. Of course, even a state government receptive to the idea of establishing SCSs may be dissuaded from enacting legislation out of fear of reprisal from the federal government. This is likely the largest hurdle to establishing legal, government sanctioned SCSs in the United States.

D. Congress Should Amend the Controlled Substances Act to Permit Supervised Consumption Sites

In order for SCSs to operate free of legal risk, both state and federal law must recognize their legality. This could take several different forms. Congress could require that prospective SCSs obtain the approval of the U.S. Department of Health and Human Services before operating, which would be analogous to Canadian law.²⁷⁷ Congress could simply leave it to the states to determine the steps required for an SCS to gain approval. Alternatively, Congress could amend 21 U.S.C. § 856 to permit SCSs by creating an exemption for sites intended to promote public health, eliminating the word “use” from the statute, or by repealing the statute altogether. It may be unlikely that Congress will take any of these actions in the near future, but SCS advocates, and the jurisdictions advocating for SCS operations, should nonetheless pressure Congress to eliminate the federal law barrier to SCSs.

CONCLUSION

The United States currently faces a drug overdose problem on a massive scale, and prohibition and deterrence strategies have failed to

²⁷⁷. See *supra* Section II.A.

keep drug overdose deaths from rising rapidly over the past several years. SCSs are a harm reduction strategy that allows drug users to consume drugs on site supervised by health professionals. SCSs have been successfully implemented outside of the United States, and research shows that they are effective in preventing fatal overdoses, preventing the spread of disease, and reducing the public nuisance resulting from public drug use. Federal law poses a barrier to the operation of SCSs, but public health authorities in multiple United States jurisdictions have made plans to establish them anyway in order to combat the epidemic of fatal overdoses. The King County Board of Health approved such a plan, which was met with a proposed voter initiative to ban SCSs within the county. The voter initiative initially qualified for the ballot, but following a lawsuit by a public health organization and the City of Seattle, the King County Superior Court struck down the initiative because it interfered with a valid decision of the Board of Health. In San Francisco, efforts by local officials to establish SCSs have been defeated by political actors at the state level. In order to establish SCSs and put them in the best possible legal position, jurisdictions should take steps to protect public health decisions from ballot initiatives, allow local public health boards to operate without being constrained by criminal law, pressure their state legislatures to pass authorizing legislation where necessary, and demand that Congress amend the Controlled Substances Act to permit SCSs.

ADDENDUM

On December 6, 2018, the Washington State Supreme Court unanimously affirmed the King County Superior Court's decision in *Protect Public Health v. Freed* to enjoin I-27 from the electoral ballot, holding that I-27 improperly infringed on the King County Council's budgetary authority.²⁷⁸ Though the Freed appellants sought to portray I-27 as "essentially a binary public policy decision—heroin injection sites: yes or no,"²⁷⁹ the Court found that the text of I-27 belied this interpretation, as I-27 would have affected only the ordinance appropriating funding to CHEL sites.²⁸⁰ Therefore, the Court found that I-27 did not propose an official public policy against the establishment of SCSs, but rather sought to invalidate a budgetary measure that was already enacted by the King County Council.²⁸¹ Because Washington statute explicitly delegates the power to budget and appropriate public funds to each county's legislative authority, both in general²⁸² and for public health work specifically,²⁸³ the Court held that I-27 did not reach the King County Council's decision to fund a CHEL site.²⁸⁴

While the Washington State Supreme Court's decision clears one hurdle in the way of the establishment of CHEL sites, the issue is not yet fully resolved in King County. More than two years after the King County task force outlined and recommended CHEL sites, neither King County nor the City of Seattle have actually opened such a site as siting remains an issue.²⁸⁵ Further, the Court did not hold that CHEL sites were outside the reach of initiative altogether, merely that I-27 could not invalidate the budget ordinance funding them.²⁸⁶ However, the decision buys time for

278. *Protect Pub. Health v. Freed*, No. 95134-9, slip op. at 12–13 (Wash. Dec. 6, 2018).

279. *Id.* at 10.

280. *Id.* ("Considering the only ordinance enacted was the appropriation ordinance, if enacted I-27 would arguably invalidate this appropriation.").

281. *Id.* at 11–12.

282. WASH. REV. CODE § 36.40.080 (2018).

283. WASH. REV. CODE § 70.12.025 (2018).

284. *Protect Pub. Health*, slip op. at 12.

285. Asia Fields, *Washington Supreme Court Rules Against Initiative to Block Public Funding of Safe-injection Sites*, SEATTLE TIMES (Dec. 6, 2018, 5:58 PM), <https://www.seattletimes.com/seattle-news/washington-supreme-court-rules-against-initiative-to-block-public-funding-of-safe-injection-sites/> [https://perma.cc/MT7K-PREX].

286. *Protect Pub. Health*, slip op. at 11 ("[W]e do not question whether a different initiative could be used to set policy concerning CHEL sites . . .").

Seattle and King County officials to make steps toward implementation of CHEL sites before another initiative can reach the ballot, perhaps allowing the benefits of CHEL sites to be realized before their enactment is challenged again. In doing so, the decision reflects the importance of protecting public health decisions from initiative generally, which allows public health officials to act in the greater public interest rather than out of political expediency. In order for government to be able to adequately respond to the ongoing drug crisis and to save the lives of drug users, nothing less is required.