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Out of the Street and Into the State's Arms: An Answer for the Drug Crisis?

Robert Corcoran

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Introduction

Harm reduction is not a new, ground-breaking theory, but rather an underutilized approach in the United States that could lead to better public health outcomes for the nation's intravenous drug users. Under the harm reduction umbrella is decriminalization, safe needle exchanges, and supervised injection sites. Unsupervised drug use can lead to injections in dangerous places such as parks and bathrooms, increase the percentage of deaths due to overdose since medical professionals are not present to provide life-saving intervention, and lead to an increase in crime and other unsavory situations. Because of the problems mentioned above, this paper argues that the United States government should decriminalize the use of safe injection sites. The decriminalization of low quantities of hard drugs would also be necessary for supervised injection sites to operate effectively. Drug consumption facilities can be seen as the bridge to treatment, and these facilities provide drug users the opportunity to part ways with their habits and be reintegrated into society. As you will see, data from countries such as Portugal, Canada, Iceland, Australia, and the Netherlands, has demonstrated that supervised injection sites have been effective in decreasing the number of deaths due to overdose, lowering transmission of blood-borne diseases, reducing crime, and encouraging more drug users to receive treatment. Cities such as New York and Rhode Island have already recognized the public health benefits derived from these facilities and have either passed state legislation or identified legal workarounds in order to pilot these sites in the interim. Criminal punishment is not a viable solution, and the United States should start prioritizing health and safety over prison sentences. The right support and harm reduction tools could have an immense impact on public health in the United States, which quite frankly, has fallen behind with respect to adequate management of its population of intravenous drug users compared to that of other nations.

1. Brief History on Harm Reduction in the United States

For decades, the United States has been an opponent of harm reduction both domestically and internationally, and has a long-standing tradition of condemning drug use. Criminal law has been viewed as the most effective means for controlling drug use. Demonization of drugs has not prevented or reduced the use of drugs, instead it has created a context in which drugs are feared, there is anger toward drug users, and abstinence is the only acceptable policy.[1] Stereotypes and stigmatization has also surfaced as a result of United States policy. Furthermore, states have had the ability to implement harm reduction programs in opposition of the views expressed by the federal government; however opposition has set the country back many years and stifled programs before positive public health outcomes could be realized.[2] Activism and research have been critical to the promotion of harm reduction within the United States, and there has been cooperation between activists and AIDS researchers over the last few decades.[3] Activists have struggled to implement harm reduction measures in the United States and the role of researchers has been to provide data to justify large-scale expenditures on harm reduction programs.[4]

The discovery of AIDS in 1981 made harm reduction critical to reducing transmission of blood-borne infection.[5] It was not until the late 1980s that states began to implement syringe exchange programs.[6] The funding for these programs was primarily on the state and local level and that was the dilemma.[7] Before federal funds could be allocated toward the syringe exchange programs, research had to show that these programs were safe for the population and effective

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[1] *See* https://harmreductionjournal.biomedcentral.com/articles/10.1186/s12954-017-0178-6
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

with respect to achieving their outcomes.[8] However, without federal funding for syringe exchange, there existed very few programs that could be researched, and the government was refusing to fund the research as well.[9]

Data from these sites has shown that they have been effective in reducing HIV transmission among intravenous drug users.[10] Although the original intent of the syringe exchange programs was to reduce the transmission of blood-borne diseases among intravenous drug users, the programs have evolved into facilities that offer many different services. Some of those services consist of referral to substance abuse treatment, testing, counseling, and overdose education.[11] The facilities also distribute naloxone to drug users and their families in the event of an overdose.[12]

The United States has been experiencing an opioid epidemic since approximately 2002.[13] A large increase in the prescription of opioids to treat pain followed by a significant increase in the number of individuals who became addicted to opioids is responsible for the epidemic.[14] The research suggests that this epidemic can be seen through the increase in the number of overdose deaths from 16,849 in 2002 to 52,404 in 2015.[15] The increase can be seen in areas where harm reduction programs, specifically syringe exchanges, are lacking. It is no surprise that many programs in the United States remain underfunded, and the funding of new programs will be needed in order to meet the challenges of the opioid epidemic. The current challenges for harm reduction and research on harm reduction involve reducing the number of overdoses, decreasing

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[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.

transmission of infectious diseases, and providing services to intravenous drug users in suburban and rural areas.[16] These challenges are exacerbated by economic and transportation difficulties. As you will see, the international research surrounding safe consumption sites could help alleviate most if not all of the aforementioned challenges and provide public health support far beyond that of syringe exchanges.

2. Looking Beyond the United States

A. Portugal

In 2001, Portugal passed Law 30/2000, which made Portugal the first country to decriminalize (de jure) the possession, consumption, and acquisition of drugs.[17] This came in the wake of a record high number of drug-related casualties and some of the highest rates of HIV among intravenous drug users in the European Union.[18] Portugal was in search of a more realistic approach to the issue (i.e., a harm reduction path), and essentially abandoned their zero-tolerance policy. The purchase, possession, and consumption of drugs is still illegal under decriminalization, but the violations are now merely administrative offenses.[19] The Portuguese framework meant the end of punitive sanctions for drug possession, and the referral of drug offenses to regional panels known as Commissions for the Dissuasion of Drug Addiction (CDTs).[20] The purpose of CDTs is to dissuade the use of drugs and encourage drug users to seek treatment. Law 30/2000 mandates the creation of at least one CDT in each district to manage the

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[16] *Id.*
[17] *See* Elizabeth Smiley, MARIJUANA & OTHER DRUGS: LEGALIZE OR DECRIMINALIZE?, 33 Ariz. J. Int'l & Comp. Law 825 (2016).
[18] *Id.*
[19] *See* Hannah Laqueur, Uses and Abuses of Drug Decriminalization in Portugal, 40 Law & Soc. Inquiry 746 (2015).
[20] *See* Jordan Blair Woods, A DECADE AFTER DRUG DECRIMINALIZATION: WHAT CAN THE UNITED STATES LEARN FROM THE PORTUGUESE MODEL?, 15 UDC-DCSL L. Rev. 1, 16 (2011).

administrative sanctions or fines for drug use.[21] Therefore, an individual accused of using drugs makes an appearance in front of a CDT instead of a criminal court. The CDT is usually comprised of members from medical services and the legal profession.[22] Law 30/2000 allows drug users to carry ten daily doses of a drug; if the quantity exceeds that allowance then they are referred to criminal court.[23]

A priority of decriminalization is to destigmatize drug use, and therefore, CDTs focus on improving the health of the drug user rather than levying punishment. The CDT will determine if the individual is a recreational or dependent drug user and issue a judgment accordingly.[24] CDTs have discretion and apply numerous factors when making a judgment such as type of drug consumed, location, recreational or habitual use, and economic background of the user.[25] Based on the analysis by the CDT, a drug user could realistically get off with only a warning. Due to decriminalization, health services such as needle exchange programs, medication-assisted treatments, and supervised injection sites have flourished. Risk and harm reduction reforms have played an integral role in Portugal. Portuguese drug officials determined that the greatest barrier to treatment was the fear of government officials.[26] Removing the officials from the equation led to more drug users seeking treatment and better projects to support drug-dependent users.[27] Social workers also intervened by touring locations known to house large numbers of drug users and provide kits with hygiene products.[28] Portugal's government does not simply give up on

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[21] *Id.*
[22] *Id.* at 17.
[23] *Id.*
[24] *Id.* at 18.
[25] *Id.*
[26] *See* Lauren Gallagher, SHOULD THE UNITED STATES MOVE TOWARDS PORTUGAL'S DECRIMINALIZATION OF DRUGS?, 22 U. Miami Int'l & Comp. L. Rev. 207, 218 (2015).
[27] *Id.*
[28] *Id.*

those struggling with addiction, but continuously engages and re-engages to help those caught up in the system. Portugal's approach shows that even when people continue to use drugs, the government is still trying to provide them with the assistance and opportunities for a longer, better, and more fulfilling life.

Contrary to popular belief, decriminalization did not open the floodgates and expand Portugal's drug market. Portugal has seen a decrease in the number of drug users, and drug usage rates have decreased steadily.[29] Furthermore, Portugal has seen a decline in the number of deaths due to overdose, and infectious disease rates, due to users not sharing and re-using drug equipment, have dropped substantially since decriminalization took effect. The number of people entering treatment has increased, and the average age of individuals in treatment has also increased.[30] The increase in age suggests that there is a reduced number of young people dependent on drugs in Portugal.[31]

Since the enactment of 30/2000, Portuguese drug arrests decreased from over 14,000 to about 6,000.[32] The country also saw a decline in crimes linked to drugs such as a 60% decrease in assaults, 30% decrease in robberies, and a 10% decrease in theft.[33] The percentage of inmates in prison for drug-related crimes also decreased from 45% to about 21%.[34] Prisoners' heroin use also declined by about 14% and addiction rates decreased for all age groups.[35] Portugal's drug mortality rate is the lowest in Western Europe.[36] With respect to the healthcare system, the

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[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *See* Mallory Whitelaw, A Path to Peace in the U.S. Drug War: Why California Should Implement the Portuguese Model for Drug Decriminalization, 40 Loy. L.A. Int'l & Comp. L. Rev. 81 (2017).
[33] *Id*. at 96.
[34] *Id*.
[35] *Id*.
[36] *Id*.

number of cases of HIV decreased between 2001 and 2021 as well as the number of AIDS cases.[37] Based on the statistics, it is clear that Portugal's methods have been effective.

B. Canada

Canada's "Insite" was North America's first legal supervised consumption site. It opened in Vancouver in 2003 under a Health Canada exemption.[38] An exemption may be granted by the Canadian government to allow a controlled substance or precursor to be used for specific scientific or medical purposes, or when it is determined to be in the public interest.[39] The exemption allows users to handle their drugs, but illegal drugs may not be purchased or exchanged inside any of the sanctioned supervised injection sites.[40] These harm reduction facilities help to curb the spread of disease, provide access to treatment, and intervene in the event of an overdose. Health officials in Canada boast the positive health impacts derived from Insite. Since Insite opened, the injection drug use rate, HIV infection rate, Hepatitis C, and deaths due to overdose have all declined in British Columbia.[41] The life expectancy rate in the surrounding area has also improved by about ten years.[42] Furthermore, more than 3.6 million individuals have injected drugs at Insite, and there have been 6,440 overdose interventions with zero resulting in a fatality.[43] In fact, overdose deaths in the area decreased by 35% after opening and the city overdose rate decreased by 9.3%.[44] Insite has been critical with respect to saving

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[37] *Id*. at 98.
[38] *See* Allyson Sam Sung, Drug Use and Punishment: A Public Health Crisis America Can No Longer Ignore, 17 Seattle J. Soc. Just. 129, 160 (2019).
[39] *See* https://www.canada.ca/en/health-canada/services/health-concerns/controlled-substances-precursor-chemicals/exemptions.html
[40] *See* Allyson Sam Sung, Drug Use and Punishment: A Public Health Crisis America Can No Longer Ignore, 17 Seattle J. Soc. Just. 129, 160 (2019).
[41] *Id*. at 164.
[42] *Id*.
[43] *See* Miki Saito, Decriminalize Drugs Now: A Dire Situation Becomes Much More Urgent, 20 Seattle J. Soc. Just. 357, 373 (2021).
[44] *Id*.

lives and improving the overall health of drug users by lowering the probability that a user will contract a disease.

C. The Netherlands

The Dutch established a policy which was founded on harm reduction ideology and principles. The legislature recognized that not all drugs are uniform and that there is a variance in risks. Therefore, they established a commission which proposed that drug policy be based on risk criteria, and policymaking would take into account the relative risks of illegal drugs.[45] Applying risk criteria, the Dutch codified the policy by creating two classes of drugs, schedule I (hard drugs) and schedule II (soft drugs), which reflect the respective risks of the spectrum of drugs.[46] According to the schedules, hard drugs would be heroin, cocaine, LSD, ecstasy; while soft drugs would consist of hash, marijuana, sleeping pills, and sedatives.[47] The Dutch enacted a policy where the law would not be enforced for the sale or possession of up to about 1/5th of an ounce of marijuana.[48]

Drug consumption rooms have been a reality in the Netherlands since 1994 when the first formal site opened in Maastricht.[49] In 2018, 24 drug consumption rooms were operational with the objective of nuisance control and health promotion.[50] The primary goals of the drug consumption rooms are to get people off the street that don't fit into the public space and offer them the opportunity to safely consume drugs while providing medical and social care.[51] There

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[45] *See* Amanda Kay, THE AGONY OF ECSTASY: RECONSIDERING THE PUNITIVE APPROACH TO UNITED STATES DRUG POLICY, 29 Fordham Urb. L.J. 2133, 2151 (2002).
[46] *Id.*
[47] *See* https://www.government.nl/topics/drugs/how-does-the-law-distinguish-between-soft-and-hard-drugs
[48] *See* Amanda Kay, THE AGONY OF ECSTASY: RECONSIDERING THE PUNITIVE APPROACH TO UNITED STATES DRUG POLICY, 29 Fordham Urb. L.J. 2133, 2151 (2002).
[49] *See* https://www.trimbos.nl/docs/eebe7cf1-179d-407b-94d0-8a202d8ec296.pdf
[50] *Id.*
[51] *Id.*

are two types of drug consumption rooms, integrated and specialized.[52] The integrated model provides needle exchange, HIV testing, food, internet, shelter, daytime activities, budget management, and medical consultation.[53] The specialized sites offer needle exchange, hygiene and medical support, HIV testing, and basic necessities for survival.[54] Most of the drug consumption rooms are open daily; however a few only offer services three days a week.[55] Furthermore, some sites have been found to only be operational three hours a day.[56] This could be troublesome for those users who rely on the site daily and could increase the risk of overdose on those days when the site is closed. For most drug users, there are no days off.

As a result of the drug consumption rooms, the heroin epidemic in the Netherlands was officially declared over in 2008.[57] Compared to the 30,000 heroin users in the Netherlands in the 1980s only about 14,000 are left, and the average age of these individuals is 55.[58] HIV and HCV rates decreased substantially, and public disturbance related to drug use decreased significantly.[59] In 2015, more than 31,000 people received drug treatment.[60] The Netherlands has seen similar results compared to other countries which have approved supervised injection sites.

D. Australia

As it currently stands, there are two supervised injection facilities operating in Australia. The Uniting Medically Supervised Injecting Centre (MSIC) in Sydney, which opened in 2001, and the North Richmond Community Health Medically Supervised Injecting Room (MSIR) in

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[52] *See* https://quality.aidsinstituteny.org/Areas/AdvCommitt/Files/2019/Europe_HR_Farrell.pdf
[53] *Id.*
[54] *Id.*
[55] *See* https://www.trimbos.nl/docs/eebe7cf1-179d-407b-94d0-8a202d8ec296.pdf
[56] *Id.*
[57] *See* https://quality.aidsinstituteny.org/Areas/AdvCommitt/Files/2019/Europe_HR_Farrell.pdf
[58] *Id.*
[59] *Id.*
[60] *See* https://www.emcdda.europa.eu/system/files/publications/4512/TD0616155ENN.pdf

Melbourne.[61] The Victorian Government has extended the MSIC trial until June of 2023.[62] The MSIC has 16 injecting spaces available for use while the MSIR has 20 spaces available to the public.[63] The MSIR also has dental staff for basic oral health care, housing and legal services, alcohol treatments, and mental health counseling.[64] Both sites operate under legislation that exempts clients and staff from criminal liability.[65] Police are encouraged to exercise discretion when they encounter individuals located in the vicinity of or travelling to and from one of these sites.[66]

The decision to extend the supervised injection sites in Australia is evidence that the services the facilities provide are having a positive impact on those dependent on drugs. Over a period of 18 months, the North Richmond Centre had approximately 119,000 visitors and managed 3,200 overdoses.[67] It is estimated that 21 to 27 lives were saved.[68] The North Richmond Centre also provided screening, treatment, and monitoring of blood-borne diseases to approximately 300 people.[69] The MSIC in Sydney has supervised more than one million injections and managed over 8,500 overdoses without any fatalities.[70] The number of ambulance call-outs also dropped by 80% and those opioid-related fell by 20%.[71] There has also been a decrease in community reports of witnessing public injecting.[72] The sites have not contributed to

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[61] *See* https://filtermag.org/photo-essay-australia-safe-consumption-site/
[62] *See* https://adf.org.au/insights/medically-supervised-injecting-centres/
[63] *See* https://harmreductionjournal.biomedcentral.com/articles/10.1186/s12954-021-00471-x
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *See* https://adf.org.au/insights/medically-supervised-injecting-centres/
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*

crime reduction, but the number of publicly discarded needles and syringes were reduced by 50%.[73] Last but not least, 70% of local businesses and 78% of residents have shown support for the supervised injection sites.[74] Overall, the two sites have combined to provide better health outcomes for the percentage of the population that consumes drugs.

E. Iceland

Alpingi, Iceland's parliament, passed a bill which makes it legal for municipalities around the country to open safe injection sites for intravenous drug users.[75] The Health Minister looked at the positive effects of drug consumption facilities in other countries and argued that punishing drug addicts with prison sentences has long been proven to be ineffective at best.[76] The use of opioids has greatly increased over the past few years and deaths from overdose in Iceland are approaching the rate in the United States.[77] It is estimated that approximately 700 individuals use intravenous drugs in Iceland each year, and that between 25 and 40 people would use the safe injection site in the city of Reykjavik in the first year of operation.[78] The site will be centrally located, and in the downtown area.[79] Most of the intravenous drug users are located in the capital city and it is uncommon for them to seek assistance from nearby hospitals.[80] Intravenous drug users currently rely on the help of Red Cross volunteers who have been providing sterilized equipment for years.[81] These safe injection sites are intended to provide

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[73] *Id.*
[74] *Id.*
[75] *See* https://www.icelandreview.com/politics/althingi-legalizes-safe-injection-sites/
[76] *See* https://grapevine.is/news/2018/02/23/safe-consumption-centre-for-drug-addicts-to-open-in-reykjavik/
[77] *Id.*
[78] *See* https://www.icelandreview.com/politics/althingi-legalizes-safe-injection-sites/
[79] *Id.*
[80] *See* https://grapevine.is/news/2018/02/23/safe-consumption-centre-for-drug-addicts-to-open-in-reykjavik/
[81] *Id.*

sterile injection supplies, healthcare guidance, referrals to rehabilitation, overdose monitoring, and testing.[82] The local municipalities will bear the costs of healthcare services associated with safe injection facilities; however many believe that the government should be the one to bear the financial burden.[83]

Ylja is the first safe injection site to open in Iceland.[84] The city of Reykjavik applied for the license from the Directorate of Health and the facility will be operated by the Red Cross.[85] It will operate in central Reykjavik and there will always be two staff on shift that can intervene in the event of an overdose.[86] The site is mobile and will be open during the hours when the shelters are closed.[87] The site will provide sterile equipment to prevent infection and transmission of disease, needles in various sizes, and safe disposal boxes.[88] Intravenous drug users who utilize the site will also be able to obtain clothing such as thick socks, hats, and gloves.[89] Although the Health Minister approved the bill for the legalization of safe consumption sites, a bill that would have decriminalized the possession of illegal drugs in small amounts did not pass.[90] The director of the Icelandic Red Cross' harm reduction team was disappointed and believes that there will be a negative impact on at-risk populations.[91] The regulations on safe injection sites permit clients to carry illegal substances in small doses; however with the rejection of the decriminalization bill there is a complication in which those who wish to utilize the site can be arrested for possession

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[82] *See* https://www.icelandreview.com/politics/althingi-legalizes-safe-injection-sites/
[83] *Id.*
[84] *See* https://www.ruv.is/frett/2022/03/10/safe-injection-space-opens
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *See* https://www.icelandreview.com/politics/disappointment-as-health-minister-shelves-decriminalisation-bill/
[91] *Id.*

at a certain distance from the facility.[92] This is troublesome because it might deter intravenous drug users from approaching the site if there is fear that law enforcement might be lurking in the area waiting to arrest those carrying illicit drugs. It seems nonsensical to allow individuals to consume drugs at these sites, but punishing them for transporting or carrying the drugs they intend to inject at these facilities. The decriminalization of small quantities of illicit substances must accompany the legalization of drug consumption sites in order to achieve greater effectiveness.

3. United States

A.) Defense of Medical Necessity Not An Option

The New Jersey Code of Criminal Justice § 2C:3-2 explains the defense of necessity and justifications for the defense.[93] With respect to controlled substances or drug paraphernalia, the statute references in its general overview a decision from an intermediate appellate court in New Jersey, *State v. McCague*, in which the defense of medical necessity did not apply to the needle exchange workers' convictions for possession of a syringe when they were not confronted with a clear or imminent danger to themselves or others, dirty needles were not exchanged, and there was no evidence that the person to whom syringes were provided was a drug addict.[94] The statute references that because the actions of the defendants in *McCague* were not medically necessary, the defendants were convicted for furnishing a hypodermic syringe.[95] The statute also references a case where an appellant was not entitled to the defense of medical necessity to combat the state's indictment for possession of marijuana in which the drug was classified as illegal and the

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[92] *Id.*
[93] *See* N.J.S.A. § 2C:3-2
[94] *See* State v. McCague, 314 N.J. Super. 254 (App. Div. 1998)
[95] *Id.*

legislature clearly intended to exclude necessity as a defense to possession of marijuana.[96]

In *State v. McCague*, the defendants were members of the Chai Project, which was a nonprofit with the focus of promoting the health of the local community by preventing the spread of disease among intravenous drug users.[97] This would be achieved by encouraging drug counseling, treatment programs, and exchanging dirty needles for clean ones. In a three-year period, the exchange rate of needles increased from about 7 percent to 87 percent.[98] McCague was aware that the needle exchange program was against state law. He attempted to invoke the defense of medical necessity in order to justify the legality of such an operation. He presented expert testimony to support such necessity in which the witnesses testified that needle exchange programs, if implemented properly, could reduce the transmission of disease anywhere from thirty to seventy percent without increasing the rate of drug use.[99] Furthermore, witnesses testified that twenty percent of individuals who participate in these needle exchange programs enroll in drug treatment.[100] Although testimony showed that the program was warranted, the defense of medical necessity was not accepted by the court since there was no clear or imminent danger and the supplies were not provided to an individual who was suffering from a medical emergency.

A separate case, *Commonwealth v. Leno*, explored the defense of medical necessity further. The defendants were arrested for exchanging clean needles, and were convicted of unauthorized possession of instruments to administer controlled substances and unlawful

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[96] *See* State v. Tate, 102 N.J. 64 (1986)
[97] *See* State v. McCague, 314 N.J. Super. 254, 257 (Super. Ct. App. Div. 1998)
[98] *Id.*
[99] *Id. at 941*
[100] *Id.*

distribution of an instrument to administer controlled substances.[101] The court identified four elements that must be met in order to invoke the defense of necessity: (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his or her action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the legislature has not acted to preclude the defense by clear and deliberate choice.[102] The court further noted that a defendant asserting the necessity defense must show that the danger motivating his or her unlawful conduct is imminent, and that he or she acted out of necessity by engaging in the unlawful activity.[103] The analysis does not take into account the comparison of competing harms.[104] The court ultimately held that the prevention of possible future harm did not excuse violation of the law in anticipation of a potential public benefit.[105]

Based on the outcomes in the aforementioned cases, it would logically flow that if the defense of medical necessity is unavailable for those that violate the law by operating needle exchange sites, then the defense of medical necessity would be unavailable for those who violate federal law by opening safe consumption sites. The two are very similar with respect to purpose and the health goals that they aim to achieve. Furthermore, the prevention of harm and therefore the public health benefit that would be realized is irrelevant when it comes to violating the law. Therefore, the law must change so that the number of overdoses per year can decrease and those that are handcuffed by drug addiction can have access to resources for adequate treatment. If the medical necessity defense is unreliable for defendants than it can be argued that states would

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[101] *See* Commonwealth v. Leno, 415 Mass. 835, 836 (1993)
[102] *Id. at 455*
[103] *Id.*
[104] *Id. at 456*
[105] *Id. at 454*

have trouble justifying the operation of safe consumption sites based on a public health emergency. It is clear that the courts are not willing to make an exception for the health benefits that could be realized from the operation of safe consumption sites across the country, and that it would be extremely challenging for entities to convincingly demonstrate that there is imminent danger. The danger, that being the risk or possibility of overdose or disease transmission, can be seen as debatable or speculative to a certain degree, and it is difficult to say that the danger is imminent since it is unpredictable when an overdose will occur or the exact point where disease transmission will take place. The balance of competing harms is not taken into account by the court when it comes to medical necessity, and the balancing of harms is exactly the analysis one must undertake when determining if safe consumption sites should be legalized.

B.) U.S. v. Safehouse

"Courts are not arbiters of policy. We must apply the laws as written."[106] That is what the court in *Safehouse* conveyed when a nonprofit sought to open one of America's first safe-injection sites. Safehouse favors a harm reduction approach to the drug crisis in which they would deploy a public health response. This response would consist of medical staff trained to observe drug use, counteract overdoses, and offer treatment for those who battle with addiction on a daily basis.[107] Safehouse will care for wounds, offer drug treatment and counseling, refer people to social services, distribute overdose-reversal kits, and exchange used syringes for clean ones.[108] Safehouse would also feature a consumption room, in which staff would distribute clean syringes as well as test drugs for harmful substances.[109] Staff would observe for signs of

[106] *See* United States v. Safehouse, 985 F.3d 225, 230 (3d Cir. 2021)
[107] *Id.* at 229.
[108] *Id.* at 231.
[109] *Id.*

overdose and intervene if necessary. It can be argued that those who visit Safehouse to consume drugs would be more open to accept counseling and treatment after they have safely consumed drugs, since they would not be distracted or inhibited by withdrawal symptoms.

The court in *Safehouse* acknowledges that many Americans believe that federal drug laws should move away from law enforcement and toward harm reduction. It is undebated that the opioid crisis has worsened, and everyday Americans die from overdose. Yet, the court expressly stated that Safehouse would violate § 856(a)(2) by knowingly and intentionally opening their site to individuals for the purpose of using illicit substances.[110] 21 U.S.C. § 856 states that:

> **(a)** Unlawful acts. Except as authorized by this title, it shall be unlawful to—
>
> **(1)** knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;
>
> **(2)** manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.[111]

The court highlighted that the statute focuses on the third party's purpose, in this case the purpose of those who wish to visit Safehouse to consume controlled substances, and not the purpose of those who maintain and operate the safe consumption site.[112] Safehouse cannot simply ignore those consuming drugs on their premises, and willful blindness or deliberate ignorance would not suffice as a legal justification for allowing such activity to occur.[113]

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[110] *Id.* at 232.
[111] *See* 21 U.S.C.S. § 856
[112] *See* United States v. Safehouse, 985 F.3d 225, 232 (3d Cir. 2021)
[113] *Id.* at 233.

Therefore, in order for the government to prevail, it must show or demonstrate the purpose of those who visit these types of sites is to distribute or use drugs, and the defendant must have the requisite *mens rea*, knowingly and intentionally.[114] The purpose requirement is what ultimately impeded Safehouse's progress toward opening a legal supervised consumption site. The court emphasized that for most of the visitors, using drugs at Safehouse would not simply be incidental, but a significant or main purpose of their visit.[115]

C.) Rhode Island

Rhode Island passed legislature that would create a two-year pilot program for safe drug injection sites that would commence in March 2022.[116] Thus, it has become the first U.S. state government to officially sanction the use of safe injection sites.[117] The Rhode Island Department of Health will be responsible for creating regulations for the safe injection sites and will also be responsible for managing the licensing.[118] The regulations require that each safe consumption site be licensed by the state and have the approval of the host town or city.[119] Each site must also be staffed with medical professionals, who will be trained in CPR, overdose response, and administration of naloxone.[120] Rhode Island's harm reduction sites will offer naloxone, which is a medicine that can counteract an overdose.[121] The centers will also provide referrals for housing, employment, and legal assistance.[122] The safe injection sites will also be required to report deaths

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[114] *Id.* at 245.
[115] *Id.* at 238.
[116] *See* https://www.thenationshealth.org/content/51/8/7
[117] *Id.*
[118] *Id.*
[119] *See* https://www.providencejournal.com/story/news/healthcare/2021/12/04/rhode-island-harm-reduction-regulations-safe-injection-sites-ri/8853070002/
[120] *Id.*
[121] *See* https://www.congress.gov/117/meeting/house/114265/documents/HHRG-117-IF14-20211202-SD024.pdf
[122] *See* https://www.providencejournal.com/story/news/healthcare/2021/12/04/rhode-island-harm-reduction-regulations-safe-injection-sites-ri/8853070002/

to the Department of Health.[123] These sites would provide individuals with a clean, safe environment to consume drugs under the supervision of medical professionals. They will also offer clean supplies, fentanyl test strips, and recovery assistance. Governor Dan McKee recognizes that these harm reduction centers are an effective way to tackle the public health crisis surrounding opioids, and a way to mitigate the risk of death from overdose and help direct people toward treatment and drug rehab.[124] Supervised injection sites have the capability of preventing the spread of disease, reducing deaths, and improving health. In 2020, drug overdose deaths topped 93,000 and more than 400 of those were reported in Rhode Island.[125] Overdose deaths are the leading cause of accidental death in the United States and such deaths rose more than 30% in 2020 due to a deadlier drug supply and the Covid-19 pandemic.[126] Rhode Island is the first state to enact harm-reduction centers on a statewide scale and will essentially test the idea that reducing harm to drug users is more effective than criminalization. However, it would not be surprising if the passage of this legislation sparks opposition from either the federal government or the cities in which private groups seek to open these safe consumption sites.

D.) New York City

New York City established the first government approved supervised injection sites in the United States.[127] These sites are located in East Harlem and Washington Heights.[128] Mayor Bill de Blasio and his team worked around state laws to make the safe consumption sites a reality. By using needle exchange licenses already possessed by existing facilities, these facilities were able

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[123] *Id.*
[124] *See* https://www.vice.com/en/article/7kvd8b/safe-injection-sites-in-the-us
[125] *See* https://www.thenationshealth.org/content/51/8/7
[126] *See* https://www.congress.gov/117/meeting/house/114265/documents/HHRG-117-IF14-20211202-SD024.pdf
[127] *See* https://www.nytimes.com/2021/11/30/nyregion/supervised-injection-sites-nyc.html
[128] *See* https://nypost.com/2021/12/02/de-blasio-opened-safe-injection-sites-without-state-permits/

to legally provide supervised injection of illicit drugs on their premises.[129] It is unlikely that the licenses will provide the necessary authority to permit these sites to operate indefinitely due to potential federal challenges under § 856. However, the research and outcomes derived from these facilities might be the groundwork for the implementation of more permanent legislation in the future. The mayor also has the ability to declare the opioid crisis a public health emergency; however such a unilateral declaration could be legally tenuous.[130] If the supervised injection sites remain unchallenged by the Biden Administration, the action taken by New York City could pave the way for similar sites in other states to operate without judicial interference. Along with providing an avenue for lawmakers to allow these sites to operate, the burden on law enforcement would be eased as well by not having to prosecute individuals who choose to utilize these facilities.

Those with substance use disorders will be able to inject illicit drugs under the supervision of medical professionals who have special training to respond to overdoses. Along with the ability to consume illicit drugs under medical supervision, individuals will also be referred to addiction treatment centers and receive other remedies to assist in the termination of these practices and help individuals lead healthier lives. These sites will also provide clean needles, which will result in a reduction of the spread of HIV and other diseases. The establishment of such sites is a harm reduction strategy with the ultimate goal of reducing the number of deaths from drug overdoses. These supervised sites are equivalent to prevention centers and the state of New York is working with law enforcement (NYPD) to allow those struggling with drug addiction to utilize the sites without the fear of arrest or punishment that

[129] *Id.*
[130] *Id.*

often accompanies such consumption.[131] The opioid crisis is a real concern for public health officials and overdose prevention centers are a means of reducing deaths and effectively addressing the crisis. It has been reported that there were over 2,000 fatal overdoses in 2020 in New York City alone.[132] In a study conducted by the New York City Health Department, the safe consumption sites could save up to 130 lives per year.[133] Comparing the study conducted by the health department to the statistics on deaths due to overdose, it would appear that federal legislation legalizing such sites would be a logical response.

4. Proposal

In order to effectively address the most pressing issues surrounding drug use and possession, the United States needs to maintain and expand current harm reduction approaches and decriminalize use and possession of drugs. Harm reduction is a social justice movement that is built around the respect for the rights of individuals who use drugs. Given the experience with harm reduction abroad, decriminalization of low quantities of drugs and the legalization of safe injection sites would have a positive impact on public health. The United States criminal justice system would experience an immediate relief from decriminalizing the possession and use of low quantities of drugs and by classifying such conduct as administrative offenses. The Portuguese decriminalization model has led to substantial decreases in incarceration rates, HIV/AIDs, and fatalities from drug overdoses.[134] As previously mentioned, Portugal has seen a decrease in the overall number of intravenous drug users, a decrease in deaths due to overdose, a decrease in

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[131] *See* https://www.npr.org/2021/11/30/1054921116/illegal-drug-injection-sites-nyc
[132] *See* https://www.wsj.com/articles/first-supervised-injection-sites-for-drug-users-open-in-new-york-city-11638299919
[133] *Id.*
[134] *See* Lauren Gallagher, SHOULD THE UNITED STATES MOVE TOWARDS PORTUGAL'S DECRIMINALIZATION OF DRUGS?, 22 U. Miami Int'l & Comp. L. Rev. 207, 218 (2015).

infectious diseases or blood-borne illnesses, a reduction in crime, and an increase in the number of individuals entering drug addiction treatment.[135] If the United States were to adopt a model similar to that of Portugal, it could experience a decrease in deaths nationwide due to overdose, lower infectious disease rates, a decrease in drug-related arrests, a decrease in crime linked to drug abuse, and the percentage of drug users seeking treatment would rise.

Decriminalization allows drug users to get the treatment that they need without the stigmatization of criminal proceedings. The government would essentially provide harm reduction programs instead of increased spending on the prosecution of these individuals. As an alternative to punishment, the government would essentially adopt a model that would be designed to break the individual's dependence on drugs altogether. This approach is designed to help and improve the lives of drug addicts. The decriminalization model would also create a more efficient policy for police to follow and law enforcement would be integral in helping guide individuals to treatment. By not having to arrest individuals for drugs, police can focus their efforts and resources on more serious crimes. Intravenous drug use can be seen as a victimless crime since it is the individual using the drugs that is ultimately harmed. To further amplify the need for the coexistence of the decriminalization of low quantities of illicit substances and the legalization of safe injection sites, one can look to the concerns raised by prominent individuals in Iceland. The Health Minister of Iceland struck down a bill that would essentially decriminalize the possession of low quantities of illicit drugs. However, a total ban on the possession of drugs would raise fear in the minds of intravenous drug users. Those that need to use the facilities the most would be hesitant to come within the vicinity of these sites due to fear that law enforcement is waiting to arrest them. This type of fear is enough to render the

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[135] *Id.*

supervised injection facilities futile.

The legalization of safe injection sites, or at the very least, implementation of pilot programs is another harm-reduction approach that could effectively address the opioid epidemic. The data from the two needle exchanges in New York City that have been converted into safe injection sites will be critical in determining if more sites would be beneficial across other states. The use of the needle exchange licenses that New York used to operate the safe consumption sites could establish precedent or entice other states to follow a similar legal path. Hopefully, the establishment of these two sites will spark a cultural change where drug use is not stigmatized and those who use drugs are met with treatment rather than punishment. It is possible that states could simply pass their own legislation similar to that of Rhode Island and each state department of health could formulate and enforce their own regulations regarding the safe injection sites. States would also be more knowledgeable and equipped to handle their population of intravenous drug users and would be able to place their consumption sites in an accessible location for those who would benefit the most. Safe consumption sites will accomplish much of the same public and individual health goals as clean needle exchanges and will often expand upon these services by offering treatment and counseling. As of now, similar to clean needle exchanges, no academic studies have shown a correlation between safe consumption sites and increases in community drug use.

Supervised consumption sites promote treatment for drug use disorders and provide a safe location for individuals to consume drugs and receive treatment for an overdose if necessary. Safe injection sites also save lives by creating the circumstances for medical professionals to intervene in the event of an overdose. Therefore, safe consumption sites seek to lower mortality rates from overdose. As seen in Canada and the Netherlands, supervised

consumption sites have resulted in lower drug use, HIV, and Hep C, and the sites have reported zero fatalities due to overdose. When it comes to establishing effective operation, the supervised consumption sites should remain open continuously and provide services beyond a simple room to consume drugs in order to have the greatest impact on the lives of the drug users. It should be made clear that no exchange of drugs shall be allowed within the safe injection site, similar to the rules of Insite in Canada, and that drug users must bring the drugs they wish to consume. Law enforcement should also exercise discretion, similar to that in Australia, when it comes to policing those with the intent to use the consumption rooms. Discretion will result in fewer incarcerated individuals and focus more on improving the health of drug users rather than imprisoning them. The implementation of safe consumption sites would also force the legislature to decriminalize drug consumption to some degree because as noted in *Safehouse*, knowingly and intentionally maintaining a premises for the purpose of drug consumption violates federal law. A combination of harm reduction tools could provide the United States with more positive health outcomes and yield similar results to a dozen other countries that have already taken the leap.

Conclusion

The federal crack house statute, 21 U.S.C. § 856, makes it difficult for states to open safe consumption sites without encountering legal obstacles. States have found it challenging to move beyond the idea and planning stages because of the impediment that federal legislation creates. New York City and Rhode Island have recognized that safe injection sites are a valuable harm reduction tool and have either passed state legislation or used existing licenses to operate these sites for the time-being. It is clear from policymakers that enthusiasm and support for the war on drugs is waning and that lawmakers need to start considering other options such as safe needle

exchanges, consumption sites, and any other proposals that place health before punishment.

Based on the data and experience with harm reduction sites outside the United States, it is clear that the zero-tolerance policy is no longer a viable option. The United States appears to be trailing other countries when it comes to managing their intravenous drug use population. Safe consumption sites have been operating legally in other countries for decades and have shown to have a positive impact on public health. There is a substantial amount of evidence that safe injection sites can reduce overdose deaths, lower the rate of transmission of blood-borne diseases, and even prevent crime. Portugal, Canada, the Netherlands, Australia, and Iceland all provide illustrations of what drug consumption sites could look like in the United States.

The war on drugs is an outdated and costly response to the drug epidemic that the nation is facing. Public funds are used to prosecute individuals for drugs instead of being spent on harm reduction resources such as drug treatment. The United States strongly favors prohibition, and the punitive nature of its drug policies goes far beyond that of many other countries. The use of the criminal justice system to control drug use has proven to be ineffective. Outdated polices have also marginalized drug users and have forced them to resort to high-risk behaviors. It is evident that there is public and legislative willingness to lift certain drug laws and pass legislature to provide support to certain groups. The experience outside the United States shows that small legislative change could have dramatic impacts, and that criminal punishment of drug use has little to no effect on changing the behaviors of habitual drug users. The United States does not have research or data on the effectiveness of supervised injection sites due to their illegality, and thus must rely on the statistics of other countries that are more progressive in the area of harm reduction. Without the implementation of harm reduction programs, the drug crisis will only worsen.