

SAFER BATHROOMS IN SYRINGE EXCHANGE PROGRAMS: INJECTING PROGRESS INTO THE HARM REDUCTION MOVEMENT

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The opioid crisis in the United States has affected and continues to affect the lives of hundreds of thousands of people. Driven by opioids and fentanyl, overdose is a leading cause of death. It has claimed more lives than guns, breast cancer, and car accidents. While some potential solutions have sought to strengthen criminal laws and provide harsher sanctions to drug dealers to combat drug abuse, harm reduction practices continue to best address the epidemic. For drug abuse, the principle of harm reduction focuses on reducing the risks and harms of unsafe drug use, acknowledging that users who are not ready for treatment exist and deserve safe ways to mitigate adverse consequences. With this guiding principle, some syringe exchange programs have taken anti-overdose measures in their bathrooms to safeguard their participants from death and other health issues. This Note advocates for the availability of safe bathrooms in syringe exchange programs by surveying the legal implications of their existence and exploring legal defenses for the practice.

INTRODUCTION

In 2016, over 60,000 drug overdose deaths occurred in the United States.¹ According to the Centers for Disease Control and Prevention, since 2000, there has been “a 200% increase in the rate of overdose deaths involving opioids.”² In fact, drug overdose “is killing people at a faster rate than the H.I.V. epidemic at its peak.”³ Although overdosing is one of the main causes of death in the United States, legislation and currently accepted mainstream harm reduction measures fail to properly

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1. Provisional Drug Overdose Death Counts, Ctrs. for Disease Control & Prevention, <http://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> [<http://perma.cc/J4UD-5PTM>] (last updated Jan. 21, 2018).

2. See Rose A. Rudd, Noah Aleshire, Jon E. Zibbell & R. Matthew Gladden, Ctrs. for Disease Control & Prevention, Increases in Drug and Opioid Overdose Deaths—United States, 2000–2014, 64 *Morbidity & Mortality Wkly. Rep.* 1378, 1378 (2016), <http://www.cdc.gov/mmwr/pdf/wk/mm6450.pdf> [<http://perma.cc/XW2P-ZUCK>].

3. Josh Katz, The First Count of Fentanyl Deaths in 2016: Up 540% in Three Years, *N.Y. Times* (Sept. 2, 2017), <http://www.nytimes.com/interactive/2017/09/02/upshot/fentanyl-drug-overdose-deaths.html> (on file with the *Columbia Law Review*).

address it.⁴ Currently, the accepted mainstream harm reduction measure is a Syringe Exchange Program (SEP).⁵ SEPs provide sterile syringes and collect used syringes from injection drug users to reduce blood-borne diseases such as HIV and hepatitis.⁶ Despite suffering a hard legal battle at formation, SEPs are now generally accepted and exist in many states.⁷ In some jurisdictions, “local authorities have operated syringe exchanges in reliance on their attorneys’ interpretation of general language in state drug laws.”⁸ In others, programs have gone a step further and sought declaratory judgments in courts.⁹ Some states have also clarified the legal basis for SEP implementation through state law itself.¹⁰ Funding has also been a source of controversy for SEPs. Generally, state and local entities fund SEPs.¹¹ The federal government did not lift the ban on financially supporting SEPs until 2016.¹² Although federal funds may now be used for most SEP expenses, programs still cannot use federal funds to purchase syringes.¹³

Presently, harm reduction proponents prefer and are advocating for another form of harm reduction measure that would realistically safeguard injection drug users against overdosing.¹⁴ Between 2002 and 2015, “there was a 6.2-fold increase in the total number of deaths” because of

4. Rudd, Aleshire, Zibbell & Gladden, *supra* note 2, at 1379–81; see *infra* notes 191–199 and accompanying text.

5. See *infra* note 47 and accompanying text.

6. See Ctrs. for Disease Control & Prevention, *Syringe Exchange Programs—United States, 2008, 59 Morbidity & Mortality Wkly. Rep.* 1488, 1488 (2010) [hereinafter SEP 2008], <http://www.cdc.gov/mmwr/pdf/wk/mm5945.pdf> [<http://perma.cc/Q2BL-KES6>] (describing SEPs and reporting on data regarding SEP activity and services in the United States).

7. See *infra* section I.B (discussing the different avenues through which SEPs received legal status).

8. Scott Burris, David Finucane, Heather Gallagher & Joseph Grace, *The Legal Strategies Used in Operating Syringe Exchange Programs in the United States*, 86 *Am. J. Pub. Health* 1161, 1164 (1996).

9. *Id.* at 1165 (detailing the various ways in which programs have sought legality for SEPs through the court system).

10. See *id.* at 1163 (explaining that many states have created laws specifically to legalize SEPs).

11. See *Funding Syringe Access, Harm Reduction Coal.*, <http://harmreduction.org/issues/syringe-access/tools-best-practices/funding-syringe-access/> [<http://perma.cc/5JZZ-33QV>] (last visited Jan. 21, 2018) (listing “funders for syringe access programs and activities” and noting that “local health departments, pharmaceutical companies, private donors and other entities” are good funding resources).

12. Laura Unger, *Funding Ban on Needle Exchanges Effectively Lifted*, *USA Today* (Jan. 7, 2016), <http://www.usatoday.com/story/news/nation/2016/01/07/funding-ban-needle-exchanges-effectively-lifted/78420894/> [<http://perma.cc/G7HR-NDPM>].

13. See *infra* section I.C.3 (discussing allocation of federal funds to specific functions of SEPs).

14. See *infra* notes 56–61 and accompanying text.

heroin overdosing.¹⁵ In 2016, fentanyl and heroin caused over 35,000 deaths.¹⁶ The harm reduction measure that seeks to prevent this rise is called a Supervised Injection Facility (SIF). SIFs allow injection drug users to use drugs on the premises with staff and medical personnel on hand to help monitor the intake.¹⁷ SIF advocates argue that SIFs prevent HIV, provide harm-focused help, and offer better social and medical services to an at-risk population than SEPs currently do.¹⁸ SIF opponents argue that SIF enactment will send the wrong message to citizens and will disrupt the public order.¹⁹ They argue that SIFs will encourage drug use and endanger communities by attracting drug users.²⁰ At this moment, there are only two SIFs in North America, and both are located in Canada.²¹ Although many cities in the United States have SIF proposals, there are still significant legal barriers to implementing a SIF.²² Some barriers include political groups, funding, and legality.²³

As a temporary medium between a SIF and a SEP, many SEPs have made their on-site bathrooms safer for drug use because they understand

15. Overdose Death Rates, Nat'l Inst. on Drug Abuse, <http://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates> [<http://perma.cc/3JZW-6NU6>] (last updated Sept. 2017).

16. Katz, *supra* note 3.

17. See Robert S. Broadhead et al., Safer Injection Facilities in North America: Their Place in Public Policy and Health Initiatives, 32 *J. Drug Issues* 329, 333 (2002) (explaining that "SIFs . . . offer a much larger array of health and social services for injectors administered by professionals").

18. Ian Malkin, Establishing Supervised Injecting Facilities: A Responsible Way to Help Minimise Harm, 25 *Melb. U. L. Rev.* 680, 696–703 (2001) (discussing the nature of the debate surrounding SIFs).

19. *Id.* (explaining that citizens might think that the government is condoning illegal drug intake and use).

20. *Id.* (outlining arguments as to why a SIF will attract more drug use within a surrounding area or neighborhood).

21. Supervised Injection Sites, Vancouver Coastal Health, <http://supervisedinjection.vch.ca/> [<http://perma.cc/Q8HM-EMU3>] (last visited Jan. 21, 2018).

22. See Lisa W. Foderaro, Ithaca's Anti-Heroin Plan: Open a Site to Shoot Heroin, *N.Y. Times* (Mar. 22, 2016), <http://www.nytimes.com/2016/03/23/nyregion/fighting-heroin-ithaca-looks-to-injection-centers.html> (on file with the *Columbia Law Review*) (unveiling a plan to implement a SIF in Ithaca, New York); Cornell Barnard, San Francisco Considering Safe-Injection Site for Drug Addicts, *ABC 7 News* (May 3, 2016), <http://abc7news.com/health/san-francisco-considering-safe-injection-site-for-drug-addicts/1322055/> [<http://perma.cc/2Q96-HK26>] (detailing how "Supervisor David Campos wants to bring [a SIF] to San Francisco, home to an estimated 22,000 drug users").

23. See Leo Beletsky et al., The Law (and Politics) of Safe Injection Facilities in the United States, 98 *Am. J. Pub. Health* 231, 231, 233–35 (2008) ("Without at least a reasonable claim to legality, a SIF would be vulnerable to police interference and could have difficulty obtaining funding. Clients could be arrested for drug possession, and staff members might fear arrest or discipline by professional licensing authorities."); SIF NYC, Supervised Injection Facilities: Legal Considerations for New York, <http://sifnyc.org/wp-content/uploads/2015/09/SIF-NYC-Legal-Briefing.pdf> [<http://perma.cc/P65D-5H6Y>] (last visited Jan. 21, 2018) (detailing a legal roadmap with its challenges for the purpose of obtaining a legal SIF in New York).

that injections in their bathrooms are likely to happen even when they warn their participants against injecting in their bathrooms.²⁴ In 2014, the Washington Heights CORNER Project announced that many of their participants use their bathrooms for drug injection regardless of their warnings against using drugs in their bathrooms.²⁵ Their organization saved over sixty lives from just the overdoses that happened in one bathroom.²⁶ The Washington Heights CORNER Project and VOCAL-NY, another New York City-based SEP, are two of the few organizations that adjusted their bathrooms to accommodate drug injecting participants that choose to inject in their facilities. In an interview, the Washington Heights CORNER Project stated that adjustments for safer bathrooms and placing safe-injection posters are still in line with the “principle that harm reduction applies.”²⁷ VOCAL-NY also equips its bathroom with impermeable tables, hand warmers, and sharps containers.²⁸

This Note addresses the legal uncertainty and liabilities SEPs may face in attempting to prepare for injection in their bathrooms and provides avenues to find legal bases and defenses for SEPs with safe bathrooms. Many commentators have suggested that SIFs—and by extension, SEPs permitting on-site drug use—are unlawful under several laws.²⁹ This Note examines this claim and argues that SEPs already have access to a range of legal defenses that would protect them in the event of prosecution. As harm reduction organizations wait for SIFs to be

24. See John Knefel, *The Controversial Answer to America’s Heroin Surge*, BuzzFeed (May 16, 2014), <http://www.buzzfeed.com/johnknefel/the-controversial-answer-to-americas-heroin-surge> [<http://perma.cc/A96F-FREE>] (“With heroin use at epidemic levels, harm reduction—a bold, long-contested approach to treating addicts—is gaining political traction.”).

25. *Id.*

26. Erica C. Barnett, *A Conversation with VOCAL-NYC’s Matt Curtis on Safe Injection and Consumption*, The C Is for Crank (June 22, 2016), <http://thecisforcrank.com/2016/06/22/a-conversation-with-vocal-nycs-matt-curtis-on-safe-injection-and-consumption/> [<http://perma.cc/2P3S-XXDR>].

27. Knefel, *supra* note 24.

28. See Barnett, *supra* note 26 (“There’s an electronic door strike, so that if somebody is unresponsive and somebody needs to get in there quickly, there’s two different staff offices in the drop-in center where you can push a button and the door will pop open.”).

29. See Mike Riggs, *Vermont’s U.S. Attorney Says Safe Injection Sites Encourage Illegal Drug Use. The Research Says She’s Wrong, Reason* (Dec. 15, 2017), <http://reason.com/blog/2017/12/15/vermonts-us-attorney-says-safe-injection> [<http://perma.cc/S7RH-EJRC>] (“The United States attorney with jurisdiction over Vermont announced this week that a proposal to introduce supervised injection facilities (SIFs) in the state would be illegal under federal law and would ‘encourage and normalize heroin use.’”); see also Johns Hopkins Bloomberg Sch. of Pub. Health, *Safe Injection Facilities: Policy Recommendations for Maryland*, <http://www.jhsph.edu/research/centers-and-institutes/institute-for-health-and-social-policy/awards-and-fellowships/lipitz-public-health-policy-faculty-awards/awardees/Safe-Injection-Policies.pdf> [<http://perma.cc/W6YU-MFNH>] (last visited Jan. 21, 2018) (“Safe injection facilities are not currently legal in Maryland.”).

implemented, clarifying the legal framework in which SEPs with safe bathrooms exist is a life-saving endeavor. It is also consistent with the new direction of drug policy.³⁰ State officials endorse SEPs to reduce the disease epidemic facing injection drug users through the availability of clean syringes,³¹ but an endorsement of injection-friendly SEP bathrooms can achieve more. Now that drug overdose is an increasing concern, SEPs with safe bathrooms can respond to the evolving drug epidemic and address the overdosing problem in the United States.³² More importantly, they are in line with harm reduction goals.³³

Part I of this Note will discuss the legal history and the current legal framework that allows and constrains SEP implementation and program operation. Part II will highlight the legal ambiguities and liabilities under which SEPs with safe bathrooms exist. Finally, Part III will present viable defenses that a SEP with safe bathrooms can use should it ever face prosecution.

I. A SUMMARY OF SEP IMPLEMENTATION GENERALLY

SEPs gained popularity and serious consideration from various legal entities as a response to HIV outbreaks in the United States.³⁴ SEPs are part of a “controversial public health strategy in the United States.”³⁵ This Part identifies harm reduction goals, relates the existing legal environment surrounding SEPs, and recounts the strategies SEPs used to acquire a legal basis. Section I.A provides an overview of harm reduction policies and goals. Section I.B recounts the historical approaches SEPs used to establish legality. Section I.C discusses the current legal framework within which SEPs must operate.

30. See *infra* section II.C (discussing the clashes and differences between criminal and public health law).

31. See *infra* section I.B (discussing the trend toward acceptance for SEPs).

32. See Scott Burris et al., *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 *St. Louis U. L.J.* 1089, 1101 (2009) (“Studies of existing SIFs have generally reported beneficial results for clients and positive or neutral results for the site neighborhood. . . . Reviews that collate available evidence report that SIFs have consistently led to less risky injection behavior and fewer overdose deaths among clients. . . .” (footnote omitted)).

33. See *infra* section I.A (delineating harm reduction goals and how SEPs with safe bathrooms or SIFs fit into this category).

34. See David Vlahov & Benjamin Junge, *The Role of Needle Exchange Programs in HIV Prevention*, 113 *Pub. Health Rep.* 75, 78 (1998) (discussing how syringe exchange programs in New Haven, New York City, and Tacoma reduced the HIV outbreak).

35. Richard Weinmeyer, *Needle Exchange Programs’ Status in U.S. Politics*, 18 *Am. Med. Ass’n J. Ethics* 252, 252 (2016) (“Although the scientific literature on these programs has presented strong evidence of their efficacy in curtailing transmission of diseases . . . among injection drug users, 33 states in this country have banned the practice . . . and federal law has long prohibited the US government from funding [S]EPs.” (footnotes omitted)).

A. *Overview of Harm Reduction*

Harm reduction is “a set of practical strategies and ideas aimed at reducing negative consequences associated with” certain human behaviors.³⁶ These principles are also used in fields related to cannabis, sex, alcohol, psychedelics, and other drugs.³⁷ Harm reduction for drug use emphasizes the “prevention of harm” rather than the “prevention of drug use” itself.³⁸ It recognizes that although drug use is illegal and harmful, individuals find it hard to quit—or simply do not quit—and need risk-reducing measures, whether legal or illegal.³⁹ Harm reduction meets “people where they are” rather than making judgments about where they should be in terms of their personal health and lifestyle.⁴⁰ It is a principle that prevents the spread of infection, reduces the risk of overdose, and addresses other related concerns.⁴¹

SEPs are an outcome of this harm reduction movement. SEPs are a social service that allow injection drug users to exchange their used syringes for clean syringes to reduce health risks associated with drug use itself and needle sharing.⁴² SEPs reduce the risk of transmission of

36. Principles of Harm Reduction, Harm Reduction Coal., <http://harmreduction.org/about-us/principles-of-harm-reduction/> [<http://perma.cc/RM8J-KDAP>] (last visited Jan. 22, 2018) (listing “principles central to harm reduction practice”).

37. See Karen Mary Leslie, Harm Reduction: An Approach to Reducing Risky Health Behaviours in Adolescents, 13 *Paediatrics & Child Health* 53, 53 (2008) (“In recent years, harm reduction has been successfully applied to sexual health education in an attempt to reduce both teen pregnancies and sexually transmitted diseases, including HIV.”); G. Alan Marlatt & Katie Witkiewitz, Harm Reduction Approaches to Alcohol Use: Health Promotion, Prevention, and Treatment, 27 *Addictive Behav.* 867, 868 (2002) (“[H]arm reduction offers a pragmatic approach to alcohol consumption and alcohol-related problems”); Elizabeth Hartney, Harm Reduction Tips for Marijuana Users, *Very Well*, <http://www.verywell.com/harm-reduction-tips-for-marijuana-users-22321> [<http://perma.cc/7RML-WGZ9>] (last updated Sept. 29, 2017) (offering marijuana users tips to help reduce the potential harm related to law, health, and safety of an individual’s marijuana use); Zendo Project: Psychedelic Harm Reduction, <http://www.zendoproject.org/> [<http://perma.cc/Q2P4-B82D>] (last visited Jan. 22, 2018) (providing tips for practicing harm reduction while on a psychedelic trip).

38. What Is Harm Reduction?, Harm Reduction Int’l, <http://www.hri.global/what-is-harm-reduction> [<http://perma.cc/7D4N-3LW9>] (last visited Jan. 23, 2018).

39. *Id.* (characterizing harm reduction as a more empathetic approach to treating drug users than prevention because of its recognition and acceptance of the fact that many drug users are unable or unwilling to stop using).

40. What Is Harm Reduction?, N.C. Harm Reduction Coal., <http://www.nchrc.org/harm-reduction/what-is-harm-reduction/> [<http://perma.cc/BWP3-3629>] (last visited Jan. 22, 2018).

41. Pub. Awareness Task Grp., Working with People Who Use Drugs: A Harm Reduction Approach 4 (2007), <http://librarypdf.catie.ca/PDF/PCatie/24911.pdf> [<http://perma.cc/N8DD-DUK2>] (offering a practical guide on harm reduction for healthcare professionals and community workers).

42. See Vlahov & Junge, *supra* note 34, at 76–77 (explaining that “[d]espite different organizational characteristics, the basic description and goals of [SEPs] are the same”).

Hepatitis C, HIV, and other diseases.⁴³ SEPs provide this service at no cost to the participant and protect their participants' identity by implementing procedures that support anonymity.⁴⁴ SEPs also provide participants with a wide range of medical and social services.⁴⁵ SEPs can establish trusting relationships with drug users who may be reluctant to access other services due to medical mistrust, fear of discrimination, or inability to afford care.⁴⁶ Various organizations such as the American Medical Association, the National Institutes of Health, and the Centers for Disease Control and Prevention support and endorse SEPs.⁴⁷

43. Ctrs. for Disease Control & Prevention, Drug Associated HIV Transmission Continues in the U.S. 2 (2002), <http://permanent.access.gpo.gov/lps63531/idu.pdf> [<http://perma.cc/CV6F-F4NX>] (noting that the one-time use of sterile syringes is the most effective way to limit HIV transmission associated with injection drug use); Gay Men's Health Crisis, Syringe Exchange: Effective Tool in the Fight Against HIV and Drug Abuse 3-4 (2009), http://www.gmhc.org/files/editor/file/SEP_report.pdf [<http://perma.cc/NGN8-LWLW>] (noting that the World Health Organization acknowledged "an 18.6% annual decrease in the HIV rate in 36 cities with SEPs compared to an 8.1% annual increase in 67 cities that did not contain SEPs"); Franklin N. Laufer, Cost-Effectiveness of Syringe Exchange as an HIV Prevention Strategy, 28 J. Acquired Immune Deficiency Syndromes 273, 276-78 (2001) (analyzing the cost-effectiveness and utility of SEP programs in New York State); see also Don C. Des Jarlais et al., HIV Incidence Among Injection Drug Users in New York City, 1990 to 2002: Use of Serologic Test Algorithm to Assess Expansion of HIV Prevention Services, 95 Am. J. Pub. Health 1439, 1439-41 (2005) (finding that over a twelve-year period in New York City, the number of new cases of HIV among injection drug users (IDUs) decreased while the number of syringes exchanged by SEPs increased from 250,000 to over 3 million).

44. N.Y.C. Dep't of Health & Mental Hygiene, Recommended Best Practices for Effective Syringe Exchange Programs in the United States 7, 11 (2010), <http://harmreduction.org/wp-content/uploads/2012/01/NYC-SAP-Consensus-Statement.pdf> [<http://perma.cc/DW6H-YCEA>] ("The anonymity of SEPs ensures the broad reach of services. IDUs will be discouraged from SEP utilization if they believe that association will increase the likelihood they are identified as an illicit drug user by any authorities." (footnote omitted)).

45. Ctr. for Innovative Pub. Policies, Needle Exchange Programs: Considerations for Criminal Justice 3, <http://harmreduction.org/wp-content/uploads/2012/01/NEPCriminalJusticeCIPP.pdf> [<http://perma.cc/9TCP-JXRV>] [hereinafter Considerations for Criminal Justice] (last visited Jan 22, 2018).

46. See Div. of Health Promotion & Disease Prevention, Inst. of Med., No Time to Lose: Getting More from HIV Prevention 114 (Monica S. Ruiz et al. eds., 2002), <http://www.nap.edu/read/9964/chapter/9> [<http://perma.cc/96C7-AR7F>] (noting how SEPs "serve as an important link to other medical and social services, particularly drug abuse treatment and counseling programs"); Steffanie A. Strathdee et al., Facilitating Entry into Drug Treatment Among Injection Drug Users Referred from a Needle Exchange Program: Results from a Community-Based Behavioral Intervention Trial, 83 Drug & Alcohol Dependence 225, 230 (2006) (explaining that SEPs that provide health services, case management, and transportation are effective in "increasing the proportion [of IDUs] that subsequently entered drug treatment").

47. See The Domestic Epidemic Is Worse than We Thought: A Wake-Up Call for HIV Prevention: Hearing Before the H. Comm. on Oversight & Gov't Reform, 110th Cong. 37 (2008) (statement of Anthony Fauci, National Institutes of Health) ("Clearly needle exchange programs work. There is no doubt about that."); Ctrs. for Disease Control & Prevention, Conference on HHS Implementations Guide to Support Certain

Opponents of drug-related harm reduction measures, including some public officials and police officers, argue that SEPs are not a proper prevention method because they negatively affect drug-related crime rates and send a message of drug acceptance.⁴⁸ They believe that syringe access will encourage individuals to gather in areas where these programs exist, resulting in an increase in crime.⁴⁹ They also believe that syringe access increases the number of discarded syringes in public spaces.⁵⁰ Challengers of SEPs argue that these programs send a “wrong message about illegal drug use.”⁵¹ Opponents express that supporting SEPs perpetuates the idea that “illegal drug use is an acceptable way of life.”⁵² Dave Cox, former Republican leader in the California State Assembly, and Barry McCaffrey, former U.S. Office of National Drug Control Policy director, agreed that providing syringe access negates the nation’s responsibility to protect children from drugs and disregards the need for the addiction treatment.⁵³ Indeed, it was McCaffrey who dissuaded President Clinton from providing federal funding for syringe exchange services.⁵⁴ Despite such criticisms, SEPs have garnered support, and

Components of Syringe Service Programs: Requesting a Determination of Need in Consultation with CDC 3 (2016), http://www.cdc.gov/hiv/pdf/risk/cdc-hiv-syringge-transcript_hhs_ssp_guidance_webinar.pdf [<http://perma.cc/H24Q-SXJR>] (“Over the past 25-some years, we have collect[ed] compelling evidence of [SEP]s’ effectiveness, safety and also cost-effectiveness for HIV prevention among [participants].”); Peter A. Clark & Matthew Fadus, Federal Funding for Needle Exchange Programs, 16 *Med. Sci. Monitor* 1, 10 (2010).

48. See *infra* notes 144–147 and accompanying text (discussing the arguments opposing SEPs and SIFs).

49. Human Rights Watch, *Injecting Reason: Human Rights and HIV Prevention for Injection Drug Users* 49 (2003) [hereinafter HRW, *Injecting Reason*], <http://www.hrw.org/sites/default/files/reports/usa0903full.pdf> [<http://perma.cc/N9TP-4D3U>] (“These officials frequently cite concerns either about the impact of syringe access programs on public order, or about the symbolic message sent by allowing injection drug users unimpeded access to syringes.”).

50. See *id.*

51. See *id.* at 50.

52. Sean Scully, *House Bans Funds for Free Needles*, *Wash. Times*, Apr. 30, 1998, at A3, 1998 WLNR 389536 (quoting Republican New York Representative Gerald B.H. Solomon); see also Allan R. Gold, *Bostonians Split on Mayor’s Idea of Needle Swap*, *N.Y. Times* (Mar. 24, 1988), <http://www.nytimes.com/1988/03/24/us/bostonians-split-on-mayor-s-idea-of-needle-swap.html> (on file with the *Columbia Law Review*) (“‘The answer to drugs must be an unequivocal no,’ wrote Bernard F. Cardinal Law, the Archbishop of Boston. ‘It is difficult to say that convincingly while passing out clean needles.’”).

53. HRW, *Injecting Reason*, *supra* note 49, at 50.

54. See Sheryl Gay Stolberg, *Clinton Decides Not to Finance Needle Program*, *N.Y. Times* (Apr. 21, 1998), <http://www.nytimes.com/1998/04/21/us/clinton-decides-not-to-finance-needle-program.html> (on file with the *Columbia Law Review*) (“After a bitter internal debate, the Clinton Administration . . . declined to lift a nine-year-old ban on Federal financing for programs to distribute clean needles to drug addicts, even as the Government’s top scientists certified that such programs did not encourage drug abuse . . .”).

proponents continue to use SEPs for HIV and hepatitis prevention and control.⁵⁵

Although SEPs are mostly accepted, organizations aspire to expand harm reduction principles by enacting SIFs.⁵⁶ Data show that SIFs prevent overdoses, lower the risk of diseases, lessen public-injection instances, and reduce the presence of dirty syringes in the streets.⁵⁷ Participants would be able to use drugs in the facility while medical staff and personnel monitor them for any signs of overdose or other related harms.⁵⁸ Through a SIF, a participant has a “safe and hygienic setting for injection.”⁵⁹ A SIF would further harm reduction principles because it would target the same at-risk population a SEP does, but it would prevent more overdose-related harms than a SEP currently can.⁶⁰ SIF implementation is supported by the American Medical Association (AMA).⁶¹

Similar to SEP opponents, SIF opponents fear that establishing a SIF will send the message that “injection drug use is acceptable and has official support.”⁶² For example, Ed Lee, the late Mayor of San Francisco, expressed that enacting a SIF in San Francisco would allow individuals to

55. See *supra* note 47 and accompanying text; see also Determination that a Demonstration Needle Exchange Program Would Be Effective in Reducing Drug Abuse and the Risk of Acquired Immune Deficiency Syndrome Infection Among Intravenous Drug Users, 76 Fed. Reg. 10,038, 10,038 (Feb. 23, 2011); Holly Hagan et al., Reduced Risk of Hepatitis B and Hepatitis C Among Injection Drug Users in the Tacoma Syringe Exchange Program, 85 Am. J. Pub. Health 1531, 1531 (1995).

56. See Martha Bebinger, Mass. Lawmakers Debate Supervised Injection Facilities, WBUR (Sept. 7, 2017), <http://www.wbur.org/commonhealth/2017/09/07/bill-supervised-injection-facilities> [<http://perma.cc/4ZRR-B6E2>] (“Mothers who’ve lost sons and daughters to an overdose told members of the Joint Committee on Mental Health, Substance Use and Recovery they believe their child would still be alive if Massachusetts allowed SIFs. . . . Members of the Massachusetts Health & Hospital Association . . . testified in favor of the measure.”); Jennifer Brown & Jon Murray, Denver Heroin Users Could Use Supervised Injection Site if Proposal Passes Multiple Hurdles, Denver Post (Nov. 5, 2017), <http://www.denverpost.com/2017/11/05/denver-heroin-drug-users-supervised-injection-site-proposal/> [<http://perma.cc/5V38-LPYZ>] (last updated Nov. 6, 2017) (noting that “Denver is on a path to become one of the first U.S. cities to open” a SIF).

57. See Burris et al., *supra* note 32, at 1101 (noting that a reduction in community incidence rates of HIV infection and Hepatitis B among injection drug users has also been noted in association with syringe exchange programs).

58. See Beletsky et al., *supra* note 23, at 231 (defining SIFs and describing the law and politics surrounding the issue in the United States).

59. *Id.*

60. SIFs increase access to information about drugs and health care, help provide sterile injection equipment, monitor drug injection, and offer counseling and other much-needed services to populations that are in need. See Supervised Injection Facilities, Drug Policy All., <http://www.drugpolicy.org/supervised-injection-facilities> [<http://perma.cc/CT9D-5YVS>] (last visited Jan. 22, 2018).

61. Press Release, Am. Med. Ass’n, AMA Wants New Approaches to Combat Synthetic and Injectable Drugs (June 12, 2017), <http://www.ama-assn.org/ama-wants-new-approaches-combat-synthetic-and-injectable-drugs> [<http://perma.cc/7RAQ-YPNG>].

62. Malkin, *supra* note 18, at 696.

“literally destroy their bodies and their minds in a city-funded shelter.”⁶³ John P. Walters, Hudson Institute’s chief operating officer and President George W. Bush’s director of drug control policy, opined that SIFs are “shameful” and that embracing any SIF proposals would require us to “adopt heartless indifference to the lives of the addicted.”⁶⁴ Some argue that there is no evidence supporting SIF effectiveness against HIV prevention and overdose.⁶⁵ Others believe that like a SEP, a SIF will also attract drug users and cause an increase in crime.⁶⁶

In spite of these criticisms, the United States incorporates harm reduction in societal practices and law. Twenty-one states have syringe exchange laws⁶⁷ that authorize some form of harm reduction. Additionally, there are prostitution, abortion, and tobacco practices that embody harm-reduction-motivated policies.⁶⁸ Frequently, harm reduction strategies are at odds with official law enforcement policies, since there are criminal laws that theoretically or practically restrain harm reduction efforts and organizations.⁶⁹

B. *Legalizing SEPs*

Although SEPs are now operating in most states,⁷⁰ SEPs faced a long legal trajectory to obtain legality and acceptance. The first SEP was

63. Joshua Sabatini, Mayor Ed Lee Faces Criticism for Opposing Supervised Injection Facilities, *S.F. Examiner* (Mar. 18, 2016), <http://www.sfexaminer.com/mayor-ed-lees-opposition-safe-injection-facilities-criticized/> [<http://perma.cc/E544-Z8M8>].

64. John P. Walters, Opinion, Heroin Injection Sites Perpetuate Harm: Opposing View, *USA Today* (May 16, 2016), <http://www.usatoday.com/story/opinion/2016/05/16/heroin-injection-sites-drug-control-editorials-debates/84455286/> [<http://perma.cc/L92J-PG4C>].

65. See Malkin, *supra* note 18, at 700 (noting how opponents argue that there is a “deficiency of ‘hard’ empirical evidence specifically demonstrating the effectiveness” of SIFs).

66. Malkin, *supra* note 18, at 701 (“One . . . objection[] to the introduction of facilities is that they will attract drug-users and traffickers from outside the area—the ‘honey pot’ hypothesis. Traders, primarily, use this reason to justify their opposition to the establishment of facilities in their neighbourhoods.”).

67. Laws Related to Syringe Exchange, *Ctrs. for Disease Control & Prevention*, <http://www.cdc.gov/hepatitis/policy/SyringeExchange.htm> [<http://perma.cc/Y7YZ-92YL>] (last visited Jan. 23, 2018).

68. See *supra* note 37 and accompanying text.

69. See Considerations for Criminal Justice, *supra* note 45, at 1–3 (detailing the different interactions SEPs have with law enforcement).

70. See N. Am. Syringe Exch. Network, *Syringe Services Program Coverage in the United States—June 2014*, http://nasen.org/site_media/files/amfar-sep-map/amfar-sep-map-2014.pdf [<http://perma.cc/WHU3-XGPD>] (last visited Jan. 22, 2018) (mapping cities and states that have syringe exchange programs in 2014); More States and Cities Consider Needle-Exchange Programs to Reduce Spread of Infection, *P’ship for Drug-Free Kids* (Mar. 31, 2015), <http://www.drugfree.org/news-service/states-cities-consider-needle-exchange-programs-reduce-spread-infection/> [<http://perma.cc/W4V7-NXUA>] (noting that “there are about 200 needle-exchange programs in 33 states”).

created in Tacoma, Washington.⁷¹ SEPs came into existence through different legal strategies and have different degrees of legality. Comparatively, there are no legally sanctioned SIFs in the United States.⁷² There are significant legal considerations that are necessary to address before implementing a SIF.⁷³ SIF supporters must reconcile federal statutes with state or local laws and need to find a more stable common ground between public health laws and criminal laws.⁷⁴

SEPs exist in different degrees of legality and have come into being through a wide range of strategies, including “civil disobedience,” “gradual community acceptance,” and “local . . . funding and support.”⁷⁵ Generally, SEPs find legal justification in one of three ways: (1) pursuant to statutory, judicial, or executive authorization, (2) at the discretion of local law enforcement, or (3) under color of law.

1. *Statutory, Judicial, or Executive Authorization.* — Some SEPs have a clear legal basis. These SEPs have obtained this legality through either state legislation or judicial or administrative action.⁷⁶ States that have statutorily authorized SEPs include Connecticut, Hawaii, Maryland, and Massachusetts.⁷⁷ To support SEPs, other states provide an exemption from criminal liability and remove some legal barriers.⁷⁸ In a few states, officials either sought declaratory judgment or declared a state of emergency.⁷⁹ Before acquiring some sort of statutory legality, some SEPs started as conditional programs. For example, in 1990 Connecticut agreed to launch a “demonstration needle-and-syringe program in New

71. Considerations for Criminal Justice, *supra* note 45, at 3.

72. See Drug Policy All., Supervised Injection Facility 1 (Feb. 2016), [http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Supervised%20Injection%20Facilities%20\(Feb.%202016\).pdf](http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Supervised%20Injection%20Facilities%20(Feb.%202016).pdf) [<http://perma.cc/Y5RR-LLK7>] (“There are approximately 100 SIFs operating in at least 66 cities around the world in nine countries . . . but none in the United States.”).

73. See Beletsky et al., *supra* note 23, at 233–35 (explaining the legal ramifications of SIF implementation). Although SIFs are relevant to the discussion of SEPs with safe bathrooms, SIFs are not the focus of this Note. Like SEPs, SIFs face political barriers to implementation.

74. *Id.*

75. Considerations for Criminal Justice, *supra* note 45, at 3.

76. *See id.*

77. Conn. Gen. Stat. Ann. § 19a-124 (West 2017); Haw. Rev. Stat. Ann. § 325-112 (LexisNexis 2013); Md. Code Ann., Health–Gen. § 24-802 (LexisNexis Supp. 2014); Mass. Ann. Laws ch. 111, § 215 (LexisNexis 2013).

78. Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1163. For example, Oregon provides criminal exemptions by specifying that syringes and needles do not constitute drug paraphernalia under its criminal code. Or. Rev. Stat. § 475.525(3) (2015).

79. Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1163. For example, state officials in Washington sought declaratory judgment that needle exchange programs were authorized by existing state statutes. See *Spokane Cty. Health Dist. v. Brockett*, 839 P.2d 324, 332 (Wash. 1992) (finding that authorization for “needle sterilization” and “the use of appropriate materials” to combat the spread of HIV included the creation of needle exchange programs).

Haven.”⁸⁰ Similarly, in 1988 New York City established a “pilot needle and syringe exchange program.”⁸¹ Officials reasoned, “[W]hen you have a serious problem, you try to find serious solutions.”⁸² Declaring a state of emergency is another way in which SEPs have gained legality.⁸³ For example, while acting as governor of Indiana, Mike Pence “declared a public health emergency” and called for the creation of “temporary needle exchange programs” in order to address an outbreak of HIV in the state.⁸⁴ These declarations of public health emergencies are not a permanent solution, but they do lay out the beginnings of a blueprint for enacting more durable and widely accepted legislation.⁸⁵

2. *Discretion-Based.* — Some SEPs are not authorized by statute or declaratory judgment. Discretion-based SEPs manage to exist either as underground SEPs or at the discretion of police enforcement and city officials.⁸⁶ Those who run SEPs are at risk of being prosecuted since no exception is carved out in their state’s criminal laws.⁸⁷ Some discretion-based SEPs and related personnel have been formally prosecuted and taken to court.⁸⁸ Although most cases of this nature are dismissed because of successful nonenforcement strategies,⁸⁹ these SEPs are less stable than statutorily or judicially authorized SEPs. Consequently, those running underground SEPs are more often fearful of the legal

80. Lawrence Gostin, Law and Policy, in *Proceedings Workshop on Needle Exchange and Bleach Distribution Programs* 113, 121 (2000), http://www.ncbi.nlm.nih.gov/books/NBK236643/pdf/Bookshelf_NBK236643.pdf [<http://perma.cc/WC9L-BLHS>].

81. *Id.* at 119.

82. *Id.*

83. See Megan Twohey, Mike Pence’s Response to H.I.V. Outbreak: Prayer, Then a Change of Heart, *N.Y. Times* (Aug. 7, 2016), <http://www.nytimes.com/2016/08/08/us/politics/mike-pence-needle-exchanges-indiana.html> (on file with the *Columbia Law Review*) (declaring a state of emergency to allow “a program to distribute clean needles to drug users”).

84. Weinmeyer, *supra* note 35, at 252.

85. See *Considerations for Criminal Justice*, *supra* note 45, at 5–7 (explaining the different ways in which SEPs have found some legal basis).

86. See Beletsky et al., *supra* note 23, at 231 (detailing the circumstances under which an activist might create an underground SIF, which can be compared to the circumstances under which an underground SEP was created).

87. See Bennett Haeberle, Needle Exchanges Exist Underground in Indiana, *WISHTV* (Apr. 28, 2015), <http://wishtv.com/2015/04/28/needle-exchanges-exist-underground-in-indiana/> [<http://perma.cc/S6MB-BUSC>] (noting that state and local officials, including former Indiana Governor Mitch Daniels, avoided addressing underground syringe exchange programs in Indiana).

88. See *State v. Sorge*, 591 A.2d 1382, 1386 (N.J. Super. Ct. Law Div. 1991); cf. *People v. Cezar*, 573 N.Y.S.2d 352, 356 (Crim. Ct. 1991) (dismissing actions of the defendant, a proponent of syringe exchange programs).

89. For example, jury nullification, judicial declarations, and the necessity defense played a big role in favoring SEP legality. See *Considerations for Criminal Justice*, *supra* note 45, at 5–6 (discussing judicial declarations and the necessity defense); Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1163 (discussing the role of jury nullification).

repercussions of their actions.⁹⁰ Additionally, they are limited in their funding, visibility, access to syringes, and the amount of help they can actually provide.⁹¹

3. *Color of Law.* — In other states, SEPs rely on their state attorney general’s interpretation of applicable laws, or the “color of law.” In those states, local officials interpret the laws by “rejecting the common assumption that drug laws govern the legal analysis of syringe exchange programs, choosing instead to analyze these programs under the rubric of public health law.”⁹² Consequently, although some SEPs in these states operate without a clear legal basis, they do so under a color of law that supports their existence.⁹³ These SEPs are vulnerable to changes in administration.⁹⁴

C. *Laws that Shape SEP Formation and Operation*

Currently, SEPs exist under a complex set of legal regimes. This section details the state laws that explicitly provide SEPs with their legal basis. This section will also expound upon criminal laws as the main source of contention and controversy for SEPs. Federal laws also shape the existence of SEPs by limiting their existence to certain services. Together, these laws define the limitations and permissible services within which SEPs can operate.

1. *Syringe Exchange Laws.* — Currently, more than a third of the states explicitly authorize SEPs.⁹⁵ The statutes often have the objective of

90. See Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1163 (showing how the status of SEP legality correlates with the number of instances in which a SEP is taken into court); Renee Lewis, Pastor’s Underground Syringe Exchange Highlights South’s Heroin Explosion, *Aljazeera Am.* (Feb. 6, 2016), <http://america.aljazeera.com/articles/2016/2/6/nc-pastor-runs-underground-syringe-exchange.html> [<http://perma.cc/XR8G-G6EZ>] (explaining that an underground SEP in the state of North Carolina is dependent on informal agreements between Pastor James Sizemore and Fayetteville police chiefs since it lacks any legal backing).

91. See Elana Gordon, Harm Reduction Leaders Call on Gov. Wolf to Make Needle Exchanges Legal in Pa., *Why* (Jan. 13, 2018), <http://why.org/articles/harm-reduction-leaders-call-gov-wolf-make-needle-exchanges-legal-pa/> [<http://perma.cc/A7L8-9WPD>] (reporting that underground SEPs in Pennsylvania lack the resources to properly implement social services); Will Stone, Phoenix’s Underground Needle Exchange Offers Lifeline for Opioid Users, *KJZZ* (Aug. 31, 2017), <http://science.kjzz.org/content/527188/phoenixs-underground-needle-exchange-offers-lifeline-opioid-users> [<http://perma.cc/6ZGL-QME5>] (noting that one of Phoenix’s underground SEPs finds it hard to receive public support and funding).

92. See Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1164 (noting cities in Pennsylvania, Ohio, and California that justify SEPs through the color of law).

93. *Id.*

94. *Cf.* Burris et al., *supra* note 32, at 1109 (explaining how SIF legitimacy is contingent upon the beliefs of elected officials at a given time).

95. See Cal. Health & Safety Code § 121349 (West 2018); Colo. Rev. Stat. § 25-1-520 (2017); Conn. Gen. Stat. Ann. § 19a-124 (West 2011); Del. Code Ann. tit. 29, § 7991

reducing “the transmission of blood-borne diseases” and encouraging “intravenous drug users to seek substance abuse treatment.”⁹⁶ Generally, the statutes include SEPs in their definition of harm reduction and require public health education and activities for injection drug users.⁹⁷

Some statutes require staff and volunteers to complete a formal training to understand the “policies and procedures of the program and relevant regulations,” “[l]egal and law enforcement issues,” “[o]verdose prevention,” and other relevant issues.⁹⁸ These statutes also usually require SEPs to keep the records of participants confidential in order to promote the use of the SEP. They indicate that information gathered by a SEP “is not open for public inspection or disclosure” and that it cannot be used to “initiate or substantiate any criminal charge against a person who participates in the sterile hypodermic device program.”⁹⁹ Some statutes explain that SEP authorization “extends only to obtaining or possessing those hypodermic syringes and needles which have been distributed or collected pursuant to the approved plan.”¹⁰⁰ Additionally, some states require that their Department of Health approve SEP plans.¹⁰¹

Within the eighteen states that explicitly authorize SEPs, statutes of six states require local approval as a condition of syringe exchange

(2017); D.C. Code § 48-1103.01 (2012); Haw. Rev. Stat. Ann. § 325-112 (LexisNexis 2013); Ky. Rev. Stat. Ann. § 218A.500(5) (West 2015); Me. Rev. Stat. Ann. tit. 22, § 1341 (2016); Md. Code Ann., Health–Gen. § 24-802 (LexisNexis 2015); Mass. Ann. Laws ch. 111, § 215 (LexisNexis 2013); Nev. Rev. Stat. §§ 439.985–.994 (2015); N.J. Stat. Ann. § 26:5C-28 (West 2017); N.M. Stat. Ann. § 24-2C-4 (2015); N.C. Gen. Stat. § 90-113.27 (2016); 23 R.I. Gen. Laws § 23-11-19 (2014); Vt. Stat. Ann. tit. 18, § 4478 (2012); Wash. Rev. Code § 69.50.4121 (2015); N.Y. Comp. Codes R. & Regs. tit. 10, § 80.131 (2017).

96. N.M. Stat. Ann. § 24-2C-2; see also Cal. Health & Safety Code § 121349; Haw. Rev. Stat. Ann. § 325-113; Nev. Rev. Stat. § 439.985. As noted, these statutes sometimes provide immunity from criminal liability. See *supra* section I.B.

97. See, e.g., Del. Code Ann. tit. 29, § 7992; Me. Rev. Stat. Ann. tit. 22, § 1341. For example, New Mexico states:

These activities must include, but are not limited to, education about the risks of needle sharing behavior, safer drug injection techniques, individual counseling encouraging safer sexual practices, safe disposal of contaminated syringes and education to decrease the risk of blood-borne diseases, and substance abuse treatment. Community Health Service Providers that conduct Department of Health authorized Syringe Exchange Programs are required to incorporate those activities into a comprehensive Harm Reduction Program.

N.M. Code R. § 7.4.6-7 (LexisNexis 2009).

98. Nev. Rev. Stat. § 439.990; see also Colo. Rev. Stat. § 25-1-520; N.Y. Comp. Codes R. & Regs. tit. 10, § 80.131.

99. See Del. Code Ann. tit. 29, § 7993; Nev. Rev. Stat. § 439.993; Vt. Stat. Ann. tit. 18, § 4475; N.Y. Comp. Codes R. & Regs. tit. 10, § 80.135.

100. N.Y. Comp. Codes R. & Regs. tit. 10, § 80.135.

101. *Id.*; see also Ky. Rev. Stat. Ann. § 218A.500; N.M. Stat. Ann. § 24-2C-4.

authorization.¹⁰² Before even implementing a SEP and gaining local approval, the district board of health must approve the plan.¹⁰³ Generally, the board must consider the “scope of the problem being addressed,” the “[c]oncerns of the law enforcement community,” the “parameters of the proposed program,” and other issues.¹⁰⁴

2. *Criminal Laws.* — Prior to mainstream acceptance, many considered SEPs illegal under criminal law since they were not eligible for any exemption or immunity from drug-related offenses.¹⁰⁵ SEPs must navigate numerous criminal statutes, including drug paraphernalia laws, needle prescription statutes, and possession laws.

Drug paraphernalia laws generally “ban the manufacture, sale, distribution, or possession of a wide range of devices if the person knows that such devices may be used to introduce illicit substances into the body.”¹⁰⁶ To violate drug paraphernalia laws, there must be criminal intent. Each state defines paraphernalia differently, but generally courts have upheld the legality of statutes with broad definitions of drug paraphernalia.¹⁰⁷ Even though SEPs are now accepted, or at least tolerated, SEP directors are still occasionally arrested and underground SEPs still exist.¹⁰⁸ Additionally, although some SEP statutes provide exemptions for

102. Colo. Rev. Stat. § 25-1-520; Ky. Rev. Stat. Ann. § 218A.500; Mass. Ann. Laws ch. 111, § 215 (LexisNexis 2013); N.J. Stat. Ann. § 26:5C-28 (West 2017); Vt. Stat. Ann. tit. 18, § 4478; N.M. Code R. § 7.4.6.8.

103. For example, New Mexico states:

Community Health Services Providers that seek to implement authorized Syringe Exchange Programs must submit a written proposal to the Infectious Diseases Bureau of the New Mexico Department of Health that includes a Syringe Exchange Program as part of a comprehensive Harm Reduction Program to reduce the transmission of infectious diseases among Injection Drug Users and encourage intravenous drug users to seek substance abuse treatment.

N.M. Code R. § 7.4.6.8.

104. Colo. Rev. Stat. § 25-1-520. Additionally, under the authorization of some state laws, syringe exchanges are limited to a one-for-one exchange. See Conn. Gen. Stat. Ann. § 19a-124 (West 2017); Haw. Rev. Stat. Ann. § 325-113 (LexisNexis 2013).

105. Ctrs. for Disease Control & Prevention, Syringe Exchange Programs—United States, 1994–1995, 44 *Morbidity & Mortality Wkly. Rep.* 684, 685 (1995), <http://www.cdc.gov/mmwr/PDF/wk/mm4437.pdf> [<http://perma.cc/24YN-6PWY>].

106. Gostin, *supra* note 80, at 115.

107. *Id.*; see also *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (holding that broad local paraphernalia laws are constitutionally valid).

108. Terry DeMio et al., *Police: Needle Exchange Director Had Paraphernalia*, *Cincinnati.com* (Aug. 6, 2016), <http://www.cincinnati.com/story/news/2016/08/06/needle-exchange-director-arrested-faces-drug-charges/88333210/> [<http://perma.cc/4QRA-VZJ5>] (“The director of the Cincinnati Exchange Project was arrested with an uncapped needle and drug paraphernalia . . . in Norwood . . .”); Tessie Castillo, *What Will Naloxone Do for the Secret Needle Exchanges of the South?*, *Substance.com* (Aug. 4, 2014), <http://www.substance.com/what-naloxone-secret-needle-exchanges-the-south/10229/> [<http://perma.cc/DGR8-7TWK>] (noting that “clandestine syringe exchanges have long sidestepped the law”).

the use of syringes, they do not provide immunity for the use of cookers, ties, or any related tools needed to use the syringes effectively.¹⁰⁹

Needle prescription statutes also affect SEPs. Generally, under these laws, “sale, distribution, or possession of hypodermic syringes or needles” is prohibited without a valid prescription.¹¹⁰ These laws often affect the availability of syringes for participants because medical staff or pharmacies cannot knowingly distribute syringes for illegal uses.¹¹¹ Some states significantly restrict over-the-counter sale of such needles as well.¹¹² It was through civil disobedience that SEPs sometimes violated these laws in favor of distributing clean syringes to reduce the risk of HIV transmission among their participants during arduous HIV epidemics.¹¹³

Drug-possession laws also influence SEPs—especially when participants’ syringes contain drug residue.¹¹⁴ Possession is an act characterized by (1) the mens rea of knowing, and (2) the showing of dominion or control over the controlled substance.¹¹⁵ These laws are both interpreted and enforced differently in each state that has them.¹¹⁶

3. *Federal Laws.* — In the past, federal law prohibited the U.S. government from funding SEPs.¹¹⁷ Through the Public Health and Welfare Act, federal law stipulated that “[n]one of the funds . . . shall be used to provide individuals with hypodermic needles or syringes so that such individuals may use illegal drugs.”¹¹⁸ In 2016, the ban was partially lifted:

109. See Emily Winkelstein, Harm Reduction Coal., Guide to Developing and Managing Syringe Access Programs 19, 36, 39 (2010), <http://harmreduction.org/wp-content/uploads/2011/12/SAP.pdf> [<http://perma.cc/R9B6-5L44>] (explaining the purpose of ties and cookers and their illegality). Even when a state exempts participants from adhering to drug paraphernalia laws in certain cases, participants are still being charged with paraphernalia possession. Melanie Asmar, Syringe Exchange: New Law Allowing Participants to Carry Needles Doesn’t Always Work, Westword (July 29, 2014), <http://www.westword.com/news/syringe-exchange-new-law-allowing-participants-to-carry-needles-doesnt-always-work-5910095> [<http://perma.cc/LN3L-KGT3>] (“The most common situation occurs when a person is arrested on a warrant and taken to jail. If the police find syringes among their belongings, they’re also sometimes charged with possession.”).

110. Gostin, *supra* note 80, at 117.

111. *Id.*

112. *Id.*

113. *Id.*

114. See, e.g., N.Y. Penal Law § 220.03 (McKinney 2018).

115. See *id.* § 220 (detailing controlled substances and definitions); *id.* §§ 220.03–.21 (stating the laws of possession of a controlled substance); see also *id.* § 220.25 (stating a presumption of possession); *id.* § 220.60 (explaining possession of precursors of controlled substances); *id.* §§ 220.70–.72 (defining possession of methamphetamine-manufacturing materials and precursors); *id.* §§ 221.05–.30 (defining possession of marijuana).

116. See generally Markus Dirk Dubber, Policing Possession: The War on Crime and the End of Criminal Law, 91 J. Crim. L. & Criminology 829, 855–56 (2001) (surveying the different interpretations of possession in many states).

117. Weinmeyer, *supra* note 35, at 252.

118. 42 U.S.C. § 300ee-5 (2012).

The federal government “still will not fund the syringes themselves, but they . . . [now] fund all the additional program elements from the staff to the facilities, as well as the other wraparound services provided to participants.”¹¹⁹ Additionally, § 856(a)(1) and (a)(2) of the Controlled Substances Act limit SEPs in that there is an understanding that SEPs should not explicitly provide spaces for drugs, assuming that such activity could violate this statute.¹²⁰

4. *Selective Nonenforcement.* — A SEP’s relationship to law enforcement is important. In various documents regarding best practices or policies, organizations explain that the relationship that a SEP has with law enforcement is crucial to a SEP’s success.¹²¹ Although at their core “police and public health officials” share the same purpose of ensuring and protecting “the health and safety of the public,”¹²² police attempt to fulfill this purpose in different ways. Law enforcement has the ability to exercise discretion “in enforcement and prosecution under federal and state statutes.”¹²³ States could choose “not to enforce” a law “based on the public health imperatives of” an epidemic.¹²⁴ On the other hand, states could also choose to enforce the applicable laws and not exercise their prosecutorial discretion.

II. THE AMBIGUOUS LEGAL EXISTENCE OF SEPS WITH SAFE BATHROOMS

Currently, there is no legislative or legal impediment to offering participants bathrooms for personal use, assuming that they are used for lawful personal activities. However, SEPs with safe bathrooms have taken on the implicit role of providing drug users with a space where they can inject drugs. States do not legally acknowledge the current existence of some types of SEPs with safe bathrooms. Thus, explicit lawful state authorizations for SEPs do not discuss or acknowledge the presence of safe bathrooms as a place where there is a risk of drug use.¹²⁵ SEPs with safe bathrooms serve an important purpose and advance treatment and safety policies by targeting harder-to-reach populations, but they have an

119. Tessie Castillo, Congress Lifts the Ban on Federal Funding for Syringe Exchange Programs, Huffington Post: The Blog (Jan. 20, 2016), http://www.huffingtonpost.com/tessie-castillo/congress-lifts-the-ban-on_b_9032362.html [<http://perma.cc/4PMT-ZZDA>].

120. 21 U.S.C. § 856(a)(1)–(2) (2012); see *infra* section IIA (discussing SEPs with practices that strictly adhere to § 856(a)).

121. See N.Y.C. Dep’t of Health & Mental Hygiene, *supra* note 44, at 5 (introducing the best practices in New York from various organizations); Considerations for Criminal Justice, *supra* note 45, at 1–2 (explaining that a strong SEP will have successful relationships with officials and law enforcement).

122. Considerations for Criminal Justice, *supra* note 45, at 6.

123. Gostin, *supra* note 80, at 115.

124. *Id.*

125. See *supra* section I.C.1 (relaying the general format and requirements of SEPs as defined by state laws).

unfortunate and ambiguous legal existence. This Part highlights liabilities that SEPs with safe bathrooms could incur. Section II.A details the operations and protocols of safe bathrooms in SEPs that could create SEP liability. Section II.B discusses the laws and their consequent liabilities that could apply to SEPs with safe bathrooms. Section II.C discusses how this uncertainty and these liabilities further the division that is often found between criminal law and public health.

A. *Understanding SEPs with Safe Bathrooms*

Oftentimes, participants in SEPs use the clean needles they receive from the SEPs and inject in the SEPs' bathrooms.¹²⁶ When they were first established, SEPs implemented policies that deterred users from injecting in their bathrooms. Today, some of these policies remain. To deter injection in the bathrooms, some SEPs use blue lights to make it harder for a participant to find a vein.¹²⁷ Other organizations prevent participants from using the bathroom for twenty-four hours after having received syringes.¹²⁸ Other organizations provide syringes at the end of a participant's stay in the SEP to discourage participants from using the syringes in their bathrooms.¹²⁹

Some SEPs are now taking a completely different approach by taking anti-overdose measures in the bathrooms. Washington Heights CORNER Project and VOCAL-NY, two of New York's SEPs, are at the forefront of this trend: Although their official policy is that participants cannot use these bathrooms for drug use, they allow and provide accommodations that are conducive to safe bathroom drug injection.¹³⁰ The CORNER Project has a handwritten "rules of the bathroom" sign, as well as a "metal medical table, two hazardous material disposal boxes, and good vein maintenance posters" in its safe bathrooms.¹³¹ It also has a "digital clock and [a] wall-mounted speaker next to the open, single toilet."¹³² Additionally, there is always "someone checking in on an intercom every

126. See Knepfel, *supra* note 24.

127. See Alexis Crabtree et al., *A Qualitative Study of the Perceived Effects of Blue Lights in Washrooms on People Who Use Injection Drugs*, 10 *Harm Reduction J.* 1, 7 (2013) (finding that blue lights in bathrooms do not deter drug users from engaging in public injection).

128. *Bathroom Etiquette: Injecting at the Exchange Part 1*, Harm Reduction Coal. (Apr. 19, 2016), <http://harmreduction.org/publication-type/podcast/eighty-three/> [<http://perma.cc/9EHJ-E4SQ>] [hereinafter *Bathroom Etiquette*] (discussing the different practices and concerns SEPs across the country have regarding their bathroom policies).

129. *Id.*

130. Knepfel, *supra* note 24.

131. *Id.*

132. *Id.*

three minutes to make sure the user is still conscious.”¹³³ VOCAL-NY is similar to the Washington Heights CORNER Project in that it offers the same safe bathroom amenities for the same concerns. The transparency of both VOCAL-NY and the CORNER Project stand in stark contrast to those SEPs that are less open about their bathroom policies and only admit to placing “sharps container[s]” in their bathrooms.¹³⁴

Other SEPs do take a similar approach, but because of the taboo nature of the topic, they refuse to expressly acknowledge that they make safe-injection accommodations to their bathrooms. SEP organizations are sensitive about discussing their bathroom policies outside of the harm reduction community.¹³⁵ In a podcast interview, three staff members of three different SEP organizations changed their names to preserve anonymity of both their programs and their policies.¹³⁶ Some SEPs explain that they do not expressly condone drug use on their premises.¹³⁷ Thus, a participant is denied bathroom use if the participant enters a SEP claiming they want to use drugs on their premises.¹³⁸

However, many SEPs reason that facilitating drug injection in their premises is appropriate because otherwise, participants would publicly inject.¹³⁹ Previously, neighborhood restaurants complained to these SEPs about how the SEP participants were injecting in restaurant bathrooms or corners of restaurants or other commercial businesses.¹⁴⁰ Public bathrooms are one of the most frequently used public injection locations

133. Sanjay Gupta, Opioid Addiction and the Most Controversial Bathroom in New York, CNN (Oct. 26, 2017), <http://www.cnn.com/2017/10/25/health/opioid-addiction-bathroom-safe-injection-site/index.html> [<http://perma.cc/466J-6PBA>].

134. Knefel, *supra* note 24. There are other SEPs that are similar to the Washington Heights CORNER Project and VOCAL-NY in that they “adapted from an existing single use bathroom with modifications made to allow for a private space suitable for injection.” Harm Reduction Coal., *Alternatives to Public Injecting 15* (2016), <http://www.harmreduction.org/wp-content/uploads/2016/05/Alternatives-to-Public-Injection-report.pdf> [<http://perma.cc/TL2P-QGV6>].

135. See Bathroom Etiquette, *supra* note 128.

136. *Id.*

137. See IDUHA Public Injection & Onsite Bathroom Position Statement, Injection Drug Users Health All. (May 12, 2015), <http://iduha.org/about-us/public-injection-onsite-bathroom-position-statement/> [<http://perma.cc/SS8S-UHHK>] [hereinafter IDUHA Statement] (relaying that although IDUHA organizations do not encourage on-site drug use, they do “support organizational policies and practices that promote safety and prevent fatal overdose,” which may include the use of safe bathrooms).

138. Knefel, *supra* note 24.

139. *Id.*

140. Martha Bebinger, Public Bathrooms Become Ground Zero in the Opioid Epidemic, WBUR (Apr. 3, 2017), <http://www.wbur.org/commonhealth/2017/04/03/public-bathrooms-opioids> [<http://perma.cc/H4B8-HPFE>] [hereinafter Bebinger, Ground Zero]; see also Sarah Beller, A New York Needle Exchange in Action, *The Fix* (May 29, 2013), <http://www.thefix.com/content/new-york-needle-exchange91710> [<http://perma.cc/W9NN-HJZR>] (“Though safe injection sites are illegal in the US, needle exchange programs end up providing de facto ‘oversight’ that is otherwise lacking.”).

in New York City.¹⁴¹ Taeko Frost, former Executive Director of the Washington Heights CORNER Project, explained that by not overly deterring participants from using their bathroom for drug injection they are just practicing harm reduction principles, and not talking about on-site injections does not do “anybody any favors.”¹⁴² According to the Injection Drug Users Health Alliance, public injection increases fatal overdoses, and “one third of harm reduction program participants reported injecting drugs” in public in New York.¹⁴³

Opponents argue that SEPs should not exist, or should only exist in limited circumstances, because they believe the government should not facilitate drug use and that it sends a message of drug-use acceptance.¹⁴⁴ Supporting SEP existence, they reason, abandons the message of urging drug users to receive treatment.¹⁴⁵ Opponents express that this harm reduction measure enables drug users to “meet people and network to get drugs.”¹⁴⁶ Tony Clement, Canada’s former federal health minister, argued that it is not ethical for “health-care professionals to support the administration of drugs that are of unknown substance . . . [and] cannot otherwise be legally prescribed.”¹⁴⁷

However, some critics overlook and undervalue the benefits of harm reduction measures. There is no relationship between syringe access and increased crime, nor do SEPs send a message of drug injection acceptance.¹⁴⁸ Instead, they help drug users access health care and substance abuse treatments, services they would normally be too afraid to seek under other circumstances.¹⁴⁹ SEPs are successful in that their presence

141. Brett Wolfson-Stofko, *Public Bathroom Drug Use Study in New York City* (2015), http://sifnyc.org/wp-content/uploads/2015/09/Public-Bathroom-Drug-Use-in-New-York-City.9.21.15.FINAL_.pdf [<http://perma.cc/DHY5-HG3Z>].

142. Knefel, *supra* note 24.

143. Injection Drug Users Health All., *Public Injection Drug Use Among NYC Harm Reduction Participants 1*, <http://sifnyc.org/wp-content/uploads/2015/07/IDUHA-Epi-Brief-Public-Injection-Drug-Use-among-NYC-Harm-Reduction-Participants.pdf> [<http://perma.cc/6JHN-KCBG>] (last visited Jan. 22, 2016); see also *supra* text accompanying notes 48–55 (noting arguments against SEPs generally).

144. See *supra* text accompanying notes 48–55 (explaining that opponents of SIFs and SEPs with safe bathrooms argue that supporting these syringe establishments condones and normalizes drug use).

145. See *supra* text accompanying notes 48–55.

146. Dan Delmar, *Safe Injection Facilities: Compassionate or Enabling?*, *Métropolitain* (Sept. 4, 2008), <http://www.themetropolitain.ca/articles/view/229> [<http://perma.cc/52K4-YKPU>].

147. *Id.*

148. See *supra* section I.A (providing arguments favoring SEP enactment).

149. AIDS United, *Syringe Exchange Programs: Critical to Public Health and Public Safety 1–2*, http://www.aidsunited.org/data/files/Site_18/2014AidsUnited-FactSheet-SyringeExchange.pdf [<http://perma.cc/22YQ-3ANK>] (last visited Jan. 22, 2018); see also Malkin, *supra* note 18, at 701 (explaining that drug users tend not to approach hospitals or government offices for fear of police detection or arrest).

has “led to a dramatic drop in new [HIV] infections among intravenous drug users over the past two decades.”¹⁵⁰ Additionally, though it is a difficult trend to measure, even the simplest markers indicate that SEPs reduce public injection rates: One study comparing a city without SEPs to a city with SEPs found that there were eight times as many discarded syringes on the streets of the city that does not provide SEP access to drug users.¹⁵¹

B. *Liabilities Potentially Incurred by SEPs with Safe Bathrooms*

SEPs accommodating for drug injection in their bathrooms create legal ambiguities. The laws that provide SEP legality and support across the country do not address drug injection within the premises. Additionally, these SEPs with safe bathrooms are not SIFs, as these SEPs do not directly monitor a participant’s injection or high.¹⁵² The SEPs with safe bathrooms do not expressly advertise their premises as a place where participants can openly inject.¹⁵³ Yet, they occupy an interesting space in the United States, where they are providing services that save lives through the prevention of fatal overdoses. Although SEPs are currently not able to expressly monitor or indicate they allow drugs on the premises, they do monitor the bathroom itself for instances of overdose.¹⁵⁴ Without a legal framework, SEPs that provide safe bathrooms are in jeopardy, may be deterred by uncertainty, and are subject to many possible legal challenges. This section explores these legal challenges, concluding that SEPs seeking to make their bathrooms safe for injection must develop strategies to defend their practices under current law.

1. *Section 856(a)*. — Section 856 of the Controlled Substances Act provides that it is 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;

150. See Laura Nahmias, Report Documents Success of State Needle Exchange Program, Politico (Dec. 4, 2014), <http://www.politico.com/states/new-york/albany/story/2014/12/report-documents-success-of-state-needle-exchange-program-017909> [<http://perma.cc/7QDB-D2NW>] (noting that SEPs have virtually eradicated “the incidence of AIDS transmission through contaminated needles, according to a report quietly released by the state’s AIDS Institute”).

151. See Hansel E. Tookes et al., A Comparison of Syringe Disposal Practices Among Injection Users in a City with Versus a City Without Needle and Syringe Programs, 123 *Drug & Alcohol Dependence* 255, 258 (2012) (finding “eight times the number of syringes on walkthroughs in Miami as compared to San Francisco”).

152. See Knefel, *supra* note 24.

153. See *id.* (“The issue is so sensitive that no other organizations or people . . . were willing to talk about their current or past bathroom policies on the record.”).

154. E.g., *id.* (“[A]n employee at the front desk can communicate with [a drug user] through the speaker next to the toilet. If there’s no response from the bathroom, the staff will physically check on the person . . .”).

(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.¹⁵⁵

SEPs with safe bathrooms could potentially violate either prong of the federal statute. Opponents could claim that the SEPs “knowingly . . . maintain” or allow others to use the space “for the purpose of . . . using any controlled substance.”¹⁵⁶ In the United States, under the implementing regulations of the Controlled Substances Act, heroin is a controlled substance and is illegal to possess without a DEA license.¹⁵⁷

To satisfy § 856(a)(1), generally, the prosecution would need to argue that the SEP is maintained “for the specific purpose” that drugs be used there.¹⁵⁸ Prosecutors could point to several factors supporting the claim that SEPs with safe bathrooms purposely provide their space for others to use for drug injection.¹⁵⁹ SEPs with safe bathrooms are often equipped with hazardous waste disposal bins specifically designed for used needles, metallic tables that allow better angles for injection, and posters on the walls that give guidance on how to properly find veins.¹⁶⁰ The prosecution would argue that this is essentially providing an

155. 21 U.S.C. § 856(a)(1)–(2) (2012).

156. 21 U.S.C. § 856(a)(1)–(2). To convict a SEP with safe bathrooms under § 856(a)(1), a court would have to find that the SEP (1) knowingly (2) maintained the SEP (3) for the purpose of using a controlled substance. *Id.* § 856(a)(1). To convict it under § 856(a)(2), a court would have to find that the SEP (1) managed or controlled the SEP (2) as either an owner, lessee, agent, employee, or mortgagee and (3) knowingly and intentionally rented, leased, or made available for use the place for the purpose of unlawfully storing, distributing, or using a controlled substance. *Id.* § 856(a)(2).

157. 21 C.F.R. § 1308.11 (2017).

158. See *United States v. Wilson*, 503 F.3d 195, 198 (2d Cir. 2007) (indicating that the phrase “for the purpose” in § 856(a)(1) “applies to the intent of the person with an interest in the premises”); *United States v. Chen*, 913 F.2d 183, 189–90 (5th Cir. 1990) (agreeing with the defendant’s argument that she “could not be convicted under § 856(a)(1) unless she ‘maintained’ her motel for the specific purpose that drugs be distributed there”). The “purpose” requirement in § 856(a)(1) “applies to the person who knowingly opens or maintains a place” and does not relate “to what activity takes place there, caused by others.” *Id.*

159. See *United States v. Verners*, 53 F.3d 291, 297 (10th Cir. 1995) (noting that although the defendant “was apparently not sleeping at the house, it appears that one of his primary purposes in maintaining his place in the home was as a base of operations to run a drug manufacturing and distributing business”); *United States v. Banks*, 987 F.2d 463, 467 (7th Cir. 1993) (noting that “playing a managerial or supervisory role in the” distribution, manufacture, or use of drugs satisfies the purpose requirement under § 856(a)(1)).

160. See *supra* notes 131–134 and accompanying text (pointing to a SEP with safe bathrooms’ placement of sharps containers, warning signs, intercoms, knocking policies, and other amenities that exist to prevent overdosing).

environment to help and possibly even encourage the usage of drugs in these bathrooms. Further, the frequency with which clients overdose, the number of needles discarded in the hazardous waste bins, and the general interaction with clients afterward would all support a finding of purpose. By implicitly or explicitly allowing their participants to use the bathrooms for injection, a SEP is purposely accepting drug use on their premises.

Section 856(a)(2) prohibits an entity with a premises “from knowingly and intentionally allowing its use for the purpose”¹⁶¹ of “unlawfully manufacturing, storing, distributing, or using a controlled substance.”¹⁶² Therefore, “purpose” refers to the purpose “not of the [entity] with the premises, but rather of those who are permitted to engage in drug-related activities there.”¹⁶³ Prosecutors could claim that a SEP making available its bathroom for using controlled substances by participants constitutes a crime.¹⁶⁴ By using a controlled substance in the SEP bathrooms, participants would satisfy the purpose needed to convict the SEP under § 856(a)(2). The prosecution would only have to prove that the SEP “knew of and intentionally allowed the activity to continue.”¹⁶⁵ Proving that a SEP had knowledge of drug use in its bathrooms under § 856(a)(2) would require similar factual support as proving purpose under § 856(a)(1).¹⁶⁶

161. *Wilson*, 503 F.3d at 197.

162. 21 U.S.C. § 856(a)(2) (2012).

163. *Wilson*, 503 F.3d at 197; see also *United States v. Tebeau*, 713 F.3d 955, 960 (8th Cir. 2013) (“Section 856(a)(2), by contrast, applies ‘to the person who may not have actually opened or maintained the place for the purpose of drug activity, but who has knowingly allowed others to engage in those activities’ by making the place available for unlawful use.” (quoting *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990))); *United States v. Bilis*, 170 F.3d 88, 89 (1st Cir. 1999) (discussing a defendant who was indicted for “managing and controlling a building for the purpose of the unlawful distribution and use of controlled substance”); *Banks*, 987 F.2d at 465 (“Subsection (a)(1) makes it illegal to open or maintain a place in order to manufacture, distribute, or use drugs, while (a)(2) makes it illegal to provide a place for others to engage in the proscribed activities.”); *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991) (“§ 856(a)(2) is designed to apply to the person who may not have actually opened or maintained the place for the purpose of drug activity, but who has knowingly allowed others to engage in those activities.”); *Chen*, 913 F.2d at 190 (noting that under § 856(a)(2) “the person who manages or controls the [property] and then rents to others[] need not have the express purpose in doing so that drug related activity take place,” as long as “others have the purpose”).

164. See *Tebeau*, 713 F.3d at 957 (holding that an owner of “more than 300 acres of land” who provided its premises to music festivals where drugs were used and sold violated § 856(a)(2)).

165. *United States v. Harrison*, 133 F.3d 1084, 1086 (8th Cir. 1998).

166. See *supra* text accompanying notes 158–161.

2. *Drug-Possession Laws*. — Most states have laws that criminalize the possession of a controlled substance.¹⁶⁷ These laws often find possession when a defendant “possessed the substance,” it was done “knowingly,” the substance was a “controlled substance,” and such possession was “unlawful.”¹⁶⁸ Some states have exceptions for paraphernalia, hypodermic needles, and residue.¹⁶⁹ The exceptions usually come from the governing public health law.¹⁷⁰ However, these laws do not exempt SEPs with safe bathrooms since SEPs were never intended to provide a space for drug use.¹⁷¹

If police find participants using drugs in SEPs with safe bathrooms, the SEP could be held accountable through either actual possession or constructive possession. Constructive possession would be the stronger case. Constructive possession exists when circumstantial evidence shows that an individual who is not actually the possessor has dominion and control over the contraband.¹⁷² A prosecutor could argue that SEPs with safe bathrooms have dominion and control over those bathrooms and thus have dominion and control over the heroin being used inside them.¹⁷³ For example, in *People v. Manini*, the New York Court of Appeals held that when an entity or person exercises a level of control over the area in which property is found, or over the person from whom the property is seized (sufficient to give him or her the ability to use or dispose of the property), the entity or person has constructive possession.¹⁷⁴ Similarly, in Illinois, the defendant in *People v. Scott* was found guilty of constructive possession.¹⁷⁵ Even though he did not consume drugs himself, Mr. Scott was aware that his cohabitant, whose overdose prompted

167. See, e.g., 720 Ill. Comp. Stat. Ann. 570/402 (West 2018); Me. Rev. Stat. Ann. tit. 17, § 1107 (2016); Mont. Code Ann. § 45-9-102 (2017); N.J. Stat. Ann. § 2C:2-1 (West 2015); Ohio Rev. Code Ann. § 2925.11 (West 2016).

168. N.Y. Penal Law § 220.03 (McKinney 2008); see also N.J. Stat. Ann. § 2C:2-1 (describing the requirements for possession under New Jersey law); *Commonwealth v. Amparo*, 686 N.E.2d 201, 202 (Mass. App. Ct. 1997) (showing that convictions are set aside when possession is not proven, including when there is no evidence that the defendant “rented, occupied, spent a great deal of time at or exercised control over the apartment or its contents”).

169. See, e.g., N.Y. Penal Law § 220.03.

170. See, e.g., *id.*

171. See *supra* section II.A.

172. See N.Y. Penal Law § 220.25. See generally John F. Harvey, Topic Survey, Criminal Law—Establishing Minimum Evidentiary Requirements for Constructive Possession of Narcotics—*United States v. Zavala Maldonado*, 23 F.3d 4 (1st Cir. 1994), 29 Suffolk U. L. Rev. 921 (1995) (defining constructive possession and highlighting the different interpretations of constructive possession used by different circuit courts).

173. Cf. Considerations for Criminal Justice, *supra* note 45, at 5–7 (noting that SEP staff could face possession charges for drug equipment or even drugs themselves).

174. 594 N.E.2d 563, 569 (N.Y. 1992).

175. 505 N.E.2d 42, 44 (Ill. App. Ct. 1987).

police investigation, was using.¹⁷⁶ Further, although he “claim[ed] he argued with her over her use of illegal drugs,” “[n]eedles used for administering drugs were found lying under a table next to the sofa bed where defendant slept.”¹⁷⁷ Additionally, that “he could or should have been aware of their presence and existence . . . [was found to be] further evidence of defendant’s knowledge and control.”¹⁷⁸

Scott bears a striking resemblance to what a case against a SEP with a safe bathroom would look like. Like Mr. Scott, a SEP would have to argue that it had no control or dominion over the person using the drug or the area in which the drug is present or where the drug use is occurring. A prosecutor could counter that a SEP does indeed have control over the participant given that the participant is only allowed into the bathroom with the SEP’s permission.¹⁷⁹ Although the SEP could claim that it was not aware of the drug use on its premises, this is a weak argument for many SEPs since some place disposal containers and posters delineating the safest way to inject.¹⁸⁰ As previously stated, this sort of evidence would demonstrate knowledge or even purpose.¹⁸¹ Despite this, there are still arguments that a SEP can make in its defense. Instead of focusing on any control it might have over the bathroom area, a SEP could focus its arguments on its overall lack of dominion over the drug users or the substances themselves more directly.

As a solution, officials can exercise prosecutorial discretion to not bring charges against SEPs.¹⁸² However, prosecutorial discretion is largely dependent on the political climate surrounding the agency or organization itself.¹⁸³ Regardless, this section demonstrates that there are grounds for liability for SEPs with safe bathrooms, especially when a statute or exemption is not found.¹⁸⁴ Defenses by SEPs arguing that they do not expressly allow drug use are unlikely to be successful given their control over the bathroom areas; after all, SEPs could potentially stop participants from using drugs by putting in blue lights or restricting access to the bathroom itself.¹⁸⁵

176. *Id.* at 45.

177. *Id.*

178. *Id.* (citing *People v. Burke*, 483 N.E.2d 674, 680 (Ill. App. Ct. 1985)). In some states, constructive possession is interpreted as “knowledge coupled with the ability and intention to exercise dominion and control.” *Commonwealth v. Brzezinski*, 540 N.E.2d 1325, 1331 (Mass. 1989).

179. See *supra* section II.A.

180. See *supra* notes 159–160 and accompanying text.

181. See *supra* notes 159–166 and accompanying text.

182. See *supra* section I.C.4.

183. See *Considerations for Criminal Justice*, *supra* note 45, at 1–2 (discussing competing policy objectives faced by police executives).

184. See *supra* section I.C.1 (showing how syringe exchange laws do not exempt SEPs from legal liability that would allow them to have safe bathrooms).

185. See IDUHA Statement, *supra* note 137.

C. *Practical Implications: A Clash of Laws and Societal Views*

This uncertainty furthers the division often present between criminal law and public health. For drug use, criminal law seeks to “create a scarcity of drugs and drug injection equipment, and to punish users.”¹⁸⁶ The laws were created with the belief that “the result will be a reduction in drug abuse and the cycle of related violence.”¹⁸⁷ The government’s response has been to use the “strategy of interdiction and increased prison sentences.”¹⁸⁸ This response was not successful in reducing drug law offenses, which “increased from 50,000 in 1980 to over 400,000 by 1997.”¹⁸⁹

On the other hand, public health laws and initiatives seek to make drug injection equipment “more readily available” to prevent the spread of diseases, while offering myriad “educational and therapeutic interventions within the health system.”¹⁹⁰ Although criminal law attempts to protect the community and reduce access to drugs, in practice it both exacerbates the dilemma and creates new ones.¹⁹¹ While criminal law believes in a strict trajectory of abstinence and treatment, public health law does not.¹⁹² Criminal law faults the individual and tries to deter actions by assigning blame and punishment.¹⁹³ The public health approach acknowledges that an individual is not directly responsible for her drug-use problem since it understands that social factors like poverty, resources, and self-medication also play a role in consumption.¹⁹⁴

186. Gostin, *supra* note 80, at 113.

187. *Id.*

188. Nat’l Comm’n on AIDS, *The Twin Epidemics of Substance Use and HIV 1* (1991), <http://babel.hathitrust.org/cgi/pt?id=purl.32754061566182;view=1up;seq=7> (on file with the *Columbia Law Review*).

189. A Brief History of the Drug War, Drug Policy All., <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0> [<http://perma.cc/3TX8-8TLN>] [hereinafter A Brief History] (last visited Jan. 22, 2018).

190. Gostin, *supra* note 80, at 113.

191. Cf. Richard Elliott, Ian Malkin & Jennifer Gold, Canadian HIV/AIDS Legal Network, *Establishing Safe Injection Facilities in Canada: Legal and Ethical Issues 5* (2002), <http://www.aidslaw.ca/site/wp-content/uploads/2013/04/Canada-SIFs-ENG.pdf> [<http://perma.cc/CEC6-MLWC>] (“The criminal approach to drug use was ostensibly designed to decrease the various health and social problems that result from the use of and addiction to various substances. This approach, however, has simply failed to achieve its objectives.”).

192. See *id.* at 6 (noting that unlike criminal law, “[a] harm-reduction approach does not identify abstinence as the necessary goal of any intervention”).

193. Sanford H. Kadish, Stephen J. Schulhofer, Carol S. Steiker & Rachel E. Barkow, *Criminal Law and Its Processes 82–100* (9th ed. 2012) (discussing the purposes of criminal punishment).

194. See Drug Talk, Nat’l Council on Drug Abuse, <http://ncda.org/jm/index.php/publications/drug-talk/66-poverty-a-drug-abuse> [<http://perma.cc/6YCM-ZSTP>] (last visited Jan. 22, 2018) (“Local research has seen a strong correlation between substance use and abuse and homelessness.”); Martin Yim, *Addiction and Poverty Connected*, Borgen Project (July 20, 2015), <http://borgenproject.org/addiction-poverty-connected/> [<http://perma.cc/>

Because it is “unethical to demand from someone something of which they are physically or mentally incapable,” SEPs with safe bathrooms make no such demand and instead strive to account for the unique characteristics of each individual.¹⁹⁵

The problem is further exacerbated when law enforcement is faced with having to implement laws that they know will “contribute to the spread of HIV in their community.”¹⁹⁶ Often, a public official will have to make the choice of following either a public health or a criminal law narrative.¹⁹⁷ Additionally, many government officials now openly admit past drug use, and criminal laws often do not reflect public opinion.¹⁹⁸ Public opinion now favors “sensible reforms that expand health-based approaches while reducing the role of criminalization in drug policy.”¹⁹⁹

III. PAVING THE WAY FOR THE LEGAL ACCEPTANCE OF SEPS WITH SAFE BATHROOMS

Until SIFs are enacted or supported, SEPs with safe bathrooms provide an important service to not only their participants but also the surrounding community. SEPs with safe bathrooms propagate harm reduction ideology.²⁰⁰ On a smaller scale, SEPs work to prevent “fatal overdose incidents involving heroin and other opioid drugs.”²⁰¹ Public injection threatens community well-being because drug users will either use drugs on the streets and expose individuals to illegal behavior or leave behind used syringes that endanger bystanders.²⁰² Although overdoses do occur, SEP personnel in SEPs with safe bathrooms prevent participant death.²⁰³ As previously stated, the Washington Heights CORNER Project announced that many participants use their bathrooms

YBM4-5YA3] (stating that research “suggests that literacy, education, poverty, income equality and unemployment are factors that lead to drug abuse, further complicating the relationship”).

195. Elliott, Malkin & Gold, *supra* note 191, at 6.

196. See *Considerations for Criminal Justice*, *supra* note 45, at 1.

197. *Id.*

198. See *A Brief History*, *supra* note 189 (stating that many politicians, including New York City’s Mayor Bloomberg and President Obama, have candidly discussed prior drug use).

199. *Id.*

200. See *supra* section II.A (explaining the goals of harm reduction that justify SEPs providing syringes to drug users).

201. See Burris et al., *supra* note 32, at 1097 (“Injection drug use—and particularly injection in public—threatens the community well-being in the form of discarded needles and the intoxicated behavior of those who inject publicly.” (footnote omitted)).

202. *Id.*

203. See Gupta, *supra* note 133 (noting that personnel are on hand to reverse overdoses); Knepfel, *supra* note 24 (same); see also *Bathroom Etiquette*, *supra* note 128 (identifying measures taken to prevent death from overdose).

for drug injection.²⁰⁴ Allowing SEPs with safe bathrooms to exist also prevents drug injection in restaurant and other public restrooms. One study found that 58% of surveyed restaurant managers “encountered drug use in their business bathrooms.”²⁰⁵ Like a SIF, SEPs with safe bathrooms “target high-risk, socially marginalized [drug users] who would otherwise inject in public spaces” and not participate in normal SEP programs.²⁰⁶

This Part explores the different defenses that support the existence of SEPs with safe bathrooms with different degrees of legal protection. Section III.A discusses a possible interpretation of SEP and related laws to accommodate safe bathrooms. Section III.B highlights the purpose of § 856(a) (2) in reconciling it with SEPs that have safe bathrooms. Section III.C examines the potential use of state-of-emergency declarations to protect SEPs with safe bathrooms. Section III.D argues that a SEP with safe bathrooms can aptly excuse its practices with the necessity defense.

A. *State SEP and Related Laws Already Implicitly Authorize SEPs with Safe Bathrooms*

Although it might seem as though syringe exchange laws are limited to the hypodermic needle itself, these laws can be interpreted to necessitate that SEPs have safe bathrooms to meet the requirements in authorization statutes.²⁰⁷ In order to receive authorization to conduct a SEP, most plans must demonstrate “the need for a hypodermic syringe and needle exchange program in the targeted community(ies)” and “organizational capability to provide comprehensive harm reduction services.”²⁰⁸ Additionally, once plans have been approved, they must follow certain procedures “to ensure staff security” and policies for the “distribution and collection of hypodermic syringes and needles, including the number of needles that can be provided to a plan participant in a single transaction.”²⁰⁹ State health departments generally encourage SEP plans to have “injection control practices and needle stick accident protocols” and conduct “[s]yringe [e]xchange sessions in a manner that does not

204. Knefel, *supra* note 24.

205. Brett Wolfson-Stofko et al., *Drug Use in Business Bathrooms: An Exploratory Study of Manager Encounters in New York City*, 39 *Int'l J. Drug Pol'y* 69, 69 (2017).

206. Beletsky et al., *supra* note 23, at 231.

207. N.Y. State Dep't of Health AIDS Inst., *Policies and Procedures: Syringe Exchange Programs 10* (2016) [hereinafter *N.Y. State Policies and Procedures*], http://www.health.ny.gov/diseases/aids/consumers/prevention/needles_syringes/syringe_exchange/docs/policies_and_procedures.pdf [<http://perma.cc/8SR7-228M>] (acknowledging that procedures may exist for certain aspects of SEPs that intersect with informal implementation of safer bathrooms in SEPs).

208. N.Y. Comp. Codes R. & Regs. tit. 10, § 80.135 (Supp. 2017); see also *supra* section I.C.1 (delineating the laws in place that mandate that plans include certain requirements under syringe exchange laws).

209. N.Y. Comp. Codes R. & Regs. tit. 10, § 80.135; see also *supra* section I.C.1 (describing state syringe exchange laws).

promote loitering, unruly behavior, . . . or that in any way detracts from the safety and serenity of the neighborhood.”²¹⁰

Additionally, many states have recently enacted some legal protections for individuals who assist in reversing overdoses.²¹¹ Several protections generally allow third parties to possess and administer naloxone, a drug that reverses opioid overdoses and saves lives.²¹² Through a national advisory, the United States Surgeon General, Dr. Jerome M. Adams, urged that Americans should carry and be prepared to administer naloxone.²¹³ He noted that naloxone availability and administration from all individuals alike is a “a key part of the public health response to the opioid epidemic.”²¹⁴ SEPs carry naloxone on hand and the requirements of some of the plans described above seem to encourage the practice.²¹⁵

All of these requirements and protections might reasonably lead a SEP to implement the sort of adjustments that some SEPs have already adopted. When the introduction of SEPs was first being considered, elected officials and their legal counsel acted “on reasonable interpretations of unsettled law.”²¹⁶ Although lacking a clear legal basis, SEPs have often operated under color of law supported by such reasonable interpretations and “negotiation[s] . . . between exchangers and law enforcement.”²¹⁷ Consequently, advocates of SEPs with safe bathrooms can argue that it is reasonable to equip bathrooms with items that promote safe injection. Participants will use bathroom spaces whether it is encouraged or deterred.²¹⁸ As previously stated, drug users often seek public bathrooms in which to inject without the owner’s permission.²¹⁹ SEPs that have actively tried to deter drug injection in their bathrooms

210. N.M. Code R. §§ 7.4.6.8, 7.4.6.10 (LexisNexis 2009).

211. See Iowa Code § 147A.18 (2017); Nev. Rev. Stat. § 453C.100 (2015); S.D. Codified Laws § 34-20A-105 (2016). Many states have also provided immunity to individuals who administer naloxone to prevent overdosing. See Idaho Code § 54-1733B (2017); Minn. Stat. § 604A.04 (2017); Wis. Stat. § 450.11 (2018).

212. Opioid Overdose Reversal with Naloxone (Narcan, Evzio), Nat’l Inst. on Drug Abuse, <http://www.drugabuse.gov/related-topics/opioid-overdose-reversal-naloxone-narcan-evzio> [<http://perma.cc/YUZ6-BBD4>] (last updated Apr. 2018).

213. U.S. Dep’t of Health & Human Servs., Surgeon General’s Advisory on Naloxone and Opioid Overdose <http://www.surgeongeneral.gov/priorities/opioid-overdose-prevention/naloxone-advisory.html> [<http://perma.cc/Q34X-DUM8>] (last visited Apr. 7, 2018).

214. *Id.*

215. See *supra* notes 207–210 and accompanying text.

216. Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1164.

217. *Id.* at 1165.

218. See Crabtree et al., *supra* note 127, at 7 (“[I]nstalling blue lights is unlikely to deter injection drugs use in public washrooms, and may increase drug use-related harms.”).

219. Bebinger, Ground Zero, *supra* note 140; cf. Atalanta, A Medical Student Becomes a Diabetic and Finds Public Disapproval, KevinMD (Oct. 31, 2011), <http://www.kevinmd.com/blog/2011/10/medical-student-diabetic-finds-public-disapproval.html> [<http://perma.cc/KC8Y-899Y>] (finding disapproval for injecting insulin in public as a diabetic).

have ultimately failed to prevent it.²²⁰ Additionally, at least one study indicates that using blue lights to deter drug injection is not effective.²²¹ The study found that even though drug users do not like blue lights since it “make[s] it more difficult for them to find their veins,” about half of them “would not be deterred from injecting in” blue-light bathrooms if they had no alternative.²²²

Since blue lights are not an absolute deterrence, installing them in a SEP may promote unsafe practices.²²³ Other deterring practices would have similar results and effects.²²⁴ Thus, equipping bathrooms with items that promote safe injection would also serve to ensure staff safety, and it could be interpreted to fall under comprehensive harm reduction services, which some syringe exchange laws require.²²⁵ Additionally, placing sharps containers in SEP bathrooms would help SEP staff to collect used syringes, something syringe exchange laws also require.²²⁶ Since SEPs partially provide the community with syringes, they arguably also have a duty to provide a reliable mechanism for retrieving those needles back. It is reasonable to assume that SEPs can safeguard their bathrooms to conform to syringe exchange program requirements.²²⁷ Notably, this solution is only valid in states that have authorization statutes.²²⁸

220. See *supra* notes 127–129 and accompanying text (noting mechanisms implemented to deter drug use in public bathrooms).

221. See Crabtree et al., *supra* note 127, at 4 (“Even among those who said they would try to avoid blue-lit bathrooms, almost half . . . described strategies they would use to overcome some of the inconvenience imposed by blue lights.”).

222. *Id.* at 2, 4–5.

223. See *id.* at 2 (“Theoretically, blue lights could compound the risk of injecting in public washrooms by increasing the probability that people who use injection drugs will miss the target vein and inject into surrounding tissue and by promoting other unsafe practices such as deep vein injecting . . .”).

224. See *supra* notes 127–129 and accompanying text (describing the different ways SEPs have tried to deter bathroom injections in the past).

225. See *supra* section I.C.1 (detailing the laws in place that mandate that plans include certain requirements under syringe exchange laws).

226. See *supra* note 209 and accompanying text (describing New York SEP policies for distributing and collecting syringes and referring to other syringe exchange laws).

227. The New York State Department of Health AIDS Institute sets out some safety recommendations for SEPs with bathrooms, which suggest that allowing drug injection in SEPs to occur is a reasonable step as part of complying with syringe exchange laws. See N.Y. State Policies and Procedures, *supra* note 207, at 10–11 (making recommendations such as installing clearly marked naloxone kits, training staff as overdose responders, maintaining hygiene “to avoid injection site infections,” and having an intercom system to facilitate communication between staff and participants using the bathroom).

228. See *supra* section I.B.1 (delineating SEP authorization through statutory, judicial, and executive means).

B. *SEPs with Safe Bathrooms Do Not Fall Under § 856(a)*

As previously discussed, SEPs with safe bathrooms may also be liable under 21 U.S.C § 856.²²⁹ However, SEPs with safe bathrooms can argue that they do not satisfy the purpose requirement for either § 856(a)(1) or § 856(a)(2).²³⁰ Additionally, most of the cases tried under § 856(a) involve for-profit entities and not health or rehabilitation institutes. Although the trend is not determinative, it does mean courts will have to grapple with the idea of applying § 856(a) to health-related entities whose purpose is to rehabilitate and save lives.

In general, most cases under § 856(a) have involved places that have either profited from drug activities or have involved some form of manufacture and distribution of drugs.²³¹ There is no case law involving the prosecution of nonprofit health institutions. In *United States v. Tamez*, the defendant explained to the government agent that he financed his business with proceeds from narcotics sales.²³² In *United States v. Chen*, Chen encouraged drug sales in her motel so that tenants could pay their rent.²³³ In *United States v. Roberts*, Roberts and Binder converted cocaine to sell and stored “packs of crack cocaine” and “equipment required for the manufacture and packaging of crack cocaine.”²³⁴ The defendant in *United States v. Lancaster* helped an undercover officer buy crack in his home.²³⁵

SEPs with safe bathrooms do not fall under § 856(a)(1) because they are not maintained for the purpose that drugs be used on the premises.²³⁶ A SEP’s purpose is to “provide [access to] free sterile syringes and collect used syringes from injection drug users,”²³⁷ not to allow for the use of controlled substances on its premises. Safety precautions are placed in the bathrooms for the purpose of preventing overdoses and

229. See *supra* section II.B.1 (detailing the potential liability SEPs with safe bathrooms may face under either prong of the federal statute).

230. See *supra* section II.B.1.

231. Reducing Americans’ Vulnerability to Ecstasy Act of 2002: Hearing on H.R. 5519 Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary, 107th Cong. 21 & n.1 (2002) (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU).

232. 941 F.2d 770, 772 (9th Cir. 1991).

233. 913 F.2d 183, 186 (5th Cir. 1990).

234. 913 F.2d 211, 219 (5th Cir. 1990).

235. 968 F.2d 1250, 1252 (D.C. Cir. 1992).

236. Circuits have generally expressed that while “purpose” in § 856(a)(1) does not mean only sole purpose, it does involve primary or significant intent that is not merely incidental to another legitimate purpose. See *id.* at 1253 (noting that the consumption of drugs that is “merely incidental” to another purpose does not satisfy § 856(a)(1)); *Roberts*, 913 F.2d at 220 (rejecting sole purpose as the necessary requirement to satisfy § 856(a)(1)); *Chen*, 913 F.2d at 188–90 (defining purpose as specific intent to satisfy § 856(a)(1)).

237. SEP 2008, *supra* note 6, at 1488.

not for the use of controlled substances.²³⁸ Unlike the defendants in *Tamez*, *Chen*, *Roberts*, and *Lancaster*—whose stated purposes were considered merely pretextual and who profited from drug use, manufacture, or distribution—SEPs do not manufacture or distribute controlled substances and do not have a for-profit interest in participants using controlled substances on the premises.²³⁹ Even if a court decides to view one of the purposes of maintaining SEPs with safe bathrooms as using a controlled substance, “the consumption of drugs therein” is “merely incidental” to the purpose of providing access to sterile syringes to participants.²⁴⁰ Generally, courts agree that while it is unnecessary to maintain a place solely for the purpose of conducting drug activities to incur § 856(a)(1) liability, drug activity that is merely incidental to the purpose of the place does not satisfy 856(a)(1).²⁴¹ Some SEPs are encouraged to safeguard against and prepare for reversing overdoses on the premises.²⁴²

SEPs with safe bathrooms should also not be held liable under § 856(a)(2) because they are decidedly different from the entities that have been prosecuted. Defendants normally held liable under 856(a)(2) have either had an interest solely in drug activity itself or been engaged in activities on the premises that go beyond merely safeguarding against overdoses.²⁴³ SEPs should not fall within the realm of 856(a)(2) defendants because their only purpose of having overdose accommodations is to save lives. In *United States v. Tebeau*, the defendant safeguarded against overdose but also instructed security personnel “to move sellers away from the front gates to avoid detection by [law enforcement] officers” and gave them a list of drugs that “were permissible at the camp.”²⁴⁴ In

238. See *supra* notes 24–28 and accompanying text (describing different safety precautions implemented in these bathrooms, including impermeable tables, hand warmers, and sharps containers).

239. See *supra* notes 231–235 and accompanying text.

240. *Lancaster*, 968 F.2d at 1253.

241. *Id.*; see also *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995) (“[T]he purpose of manufacturing cocaine need not be the sole purpose for which the ‘place’ is used. . . . On the other hand, manufacturing, distributing, or using drugs must be more than a mere collateral purpose of the residence.”); *Roberts*, 913 F.2d at 220 (noting sole purpose is not necessary to convict under § 856(a)(1)). Note that while all circuits mainly agree with this statement, the Seventh, Tenth, and Fifth Circuits have formulated different tests to decide what cases fall between these limits. See Michael E. Rayfield, Comment, Pure Consumption Cases Under the Federal “Crackhouse” Statute, 75 U. Chi. L. Rev. 1805, 1805–06 (2008).

242. The New York State Department of Health has recommended procedures on how to best prevent overdoses in the places where users are likely to use, explicitly mentioning syringe exchange bathrooms. See N.Y. State Policies and Procedures, *supra* note 207, at 10 (discussing how state recommendations acknowledge that procedures may exist for certain aspects of SEPs that intersect with informal implementation of safer bathrooms in SEPs).

243. See *supra* notes 231–235 and accompanying text.

244. 713 F.3d 955, 958 (8th Cir. 2013).

United States v. Coles, the defendant managed and controlled an apartment for the interest of “unlawfully manufacturing, storing, distributing, or using a controlled substance” as evidenced by the defendant himself coaching “his cousin to cook crack.”²⁴⁵

Consequently, applying § 856(a) to SEPs would defeat the purpose of the statute. First, SEPs with safe bathrooms support congressional intent. Passed as part of comprehensive drug legislation, § 856 was created “[t]o strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops, . . . to provide strong Federal leadership in establishing effective drug abuse prevention and education programs, [and] to expand Federal support for drug abuse treatment and rehabilitation efforts, and for other purposes.”²⁴⁶ Congress envisioned that this statute would prevent “situations in which . . . property contributes to the use, manufacture, or distribution of . . . drugs.”²⁴⁷ As previously discussed, SEPs’ activity supports “drug abuse treatment and rehabilitation efforts”; thus, § 856’s application to SEPs with safe bathrooms would undercut one of the statute’s animating purposes.

Second, the recent expansion of § 856(a) supports that SEPs with safe bathrooms are not encompassed within the purpose of § 856(a) because they do not encourage drug use to obtain a profit or the drug consumption itself. In 2003, Congress passed the Illicit Drug Anti-Proliferation Act, which amended § 856(a) to more directly pass on criminal liability to rave promoters and nightclub owners.²⁴⁸ In a previous version of the bill, then-Senator Joe Biden, sponsor and writer of both bills, explained that rave promoters encourage drug use and fiscally benefit from it by “selling over-priced bottles of water,” “charging entrance fees to ‘chill rooms,’” and promoting things that “enhance the effects of the drugs that patrons . . . ingest[.]”²⁴⁹ Biden was concerned that raves “promote Ecstasy” and “exploit American youth.”²⁵⁰ Unlike raves, SEPs with safe bathrooms do not profit from or promote drug use. As previously stated, these SEPs promote safety and are prepared to actively prevent overdoses to the extent that they occur within their premises. The concern for which the bill was passed does not exist for SEPs with safe bathrooms.

245. 558 F. App’x 173, 181 (3d Cir. 2014).

246. 132 Cong. Rec. S13,779 (daily ed. Sept. 26, 1986) (excerpt of H.R. 5484). See generally Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

247. Rayfield, *supra* note 241, at 1808.

248. See Illicit Drug Anti-Proliferation Act, Pub. L. No. 108-21, § 608, 117 Stat. 650, 691 (2003) (codified in scattered sections of 21 and 28 U.S.C.); Christopher Haas, Note, Owner and Promoter Liability in “Club Drug” Initiatives, 66 Ohio St. L.J. 511, 535–36 (2005).

249. RAVE Act, S. 2633, 107th Cong. § 2 (2002).

250. *Id.*

C. *Declarations of Public Health Emergencies Should Encompass SEPs with Safe Bathrooms*

A declaration of emergency vests the “local health department, mayor, or other executive authority with extraordinary power to respond as the necessity requires.”²⁵¹ When a state of emergency is declared, government can temporarily suspend statutes, regulations, and rules and provide for “statutory immunities and liability protections for those involved in response activities.”²⁵² Currently, there are some SEPs that operate because officials declared a public health emergency.²⁵³ Although the legal force of declarations is uncertain, “[e]mergency declarations are best understood as signals for law enforcement officials to avoid arresting SEP personnel and participants and to cease disrupting their activities.”²⁵⁴

Because some states have already declared a public health emergency for the opioid crisis, officials should allow for the existence of safe bathrooms in SEPs.²⁵⁵ Recently, more than five states have declared some form of public health emergency to address the opioid crisis.²⁵⁶ Most of

251. Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1164.

252. ASTHO, *Emergency Declarations and Authorities: Fact Sheet 2* (2012), http://www.astho.org/uploadedFiles/Programs/Preparedness/Public_Health_Emergency_Law/Emergency_Authority_and_Immunity_Toolkit/04EmergDecAuthorities%20FS%20Final%203-12.pdf [<http://perma.cc/UFF3-TXJW>]; see also Model State Emergency Health Powers Act (The Ctr. for Law and the Pub.'s Health at Georgetown and Johns Hopkins Univ., Proposed Draft 2001) (noting that “state and local officials are authorized to use and appropriate property as necessary for the care, treatment, and housing of patients”); Erin Mershon & Andrew Joseph, *These States Declared an Emergency over the Opioid Crisis. Here’s What Happened*, PBS News Hour (Aug. 10, 2017), <http://www.pbs.org/newshour/health/states-declared-emergency-opioid-crisis-heres-happened> [<http://perma.cc/T7HW-BL32>] (noting the use of emergency declarations to deal with the opioid crisis); cf. Amanda L. Tyler, *Suspension as an Emergency Power*, 118 *Yale L.J.* 600, 603–04 (2008) (noting that the Suspension Clause can likely mean that it “does not simply remove a judicial remedy but [also] ‘suspends’ . . . rights”).

253. See *supra* note 84 and accompanying text (describing Indiana’s declaration of a state of emergency to enact SEPs).

254. Lawrence O. Gostin & Zita Lazzarini, *Prevention of HIV/AIDS Among Injection Drug Users: The Theory and Science of Public Health and Criminal Justice Approaches to Disease Prevention*, 46 *Emory L.J.* 588, 689–90 (1997) (“Officials reason that this designation legitimizes efforts to protect the public health in ways that are sanctioned by the state.”).

255. Note, this solution often depends on law enforcement and state officials to dictate the best course of action to combat the opioid crisis.

256. E.g., State of Alaska Declaration of Disaster Emergency (Feb. 14, 2017), http://gov.alaska.gov/wp-content/uploads/sites/5/2017021417_Opioid-Disaster-Declaration.pdf [<http://perma.cc/689Y-8YN8>]; State of Arizona Declaration of Emergency and Notification of Enhanced Surveillance Advisory (Jun. 5, 2017) <http://www.azdhs.gov/documents/prevention/womens-childrens-health/injury-prevention/opioid-prevention/opioid-emergency-declaration.pdf> [<http://perma.cc/9KFC-M4C6>]; Exec. Order No. 17-146, State of Florida Executive Order: Opioid Epidemic (May 3, 2017), <http://www.flgov.com/wp-content/uploads/2017/05/17146.pdf> [<http://perma.cc/KQ75-PBSR>]; Exec. Order No. 01.01.2017.02,

these emergency declarations include language allowing for the suspension of laws that would otherwise challenge the existence of SEPs with safe bathrooms. They support “any action necessary to protect the public health.”²⁵⁷ For example, these declarations allowed for an increase in availability of naloxone, a medicine that reverses overdoses.²⁵⁸ Through the declaration of emergency, governors have given individuals and organizations “the ability to directly dispense and administer the lifesaving drug naloxone.”²⁵⁹ Similarly, they can allow for the existence of SEPs with safe bathrooms since they are a measure that operationally addresses the overdose crisis.²⁶⁰ Even though declarations usually expire within thirty days of enactment, they can pave the way for more permanent solutions.²⁶¹ Generally, some policies or orders can be extended for longer if enacted by the state legislature.²⁶²

D. *SEPs with Safe Bathrooms Act out of Necessity*

Under the “necessity” defense, an entity may legally act in an otherwise criminal manner in order to avoid greater harm in emergency situations.²⁶³ This defense is found in most states and is mostly

State of Maryland Executive Order Regarding the Heroin, Opioid, and Fentanyl Overdose Crisis Declaration of Emergency (Mar. 31, 2017), http://governor.maryland.gov/wp-content/uploads/2017/03/0391_001.pdf [<http://perma.cc/M5EJ-8HFU>].

257. Exec. Order No. 17-146, *supra* note 256.

258. Amanda Michelle Gomez, *This Is How 6 States Declared an Emergency over the Opioid Crisis, with No National Precedent*, ThinkProgress (Oct. 23, 2017), <http://thinkprogress.org/this-is-how-6-states-declared-an-emergency-over-the-opioid-crisis-with-no-national-precedent-0a5537d19e51/> [<http://perma.cc/3D7V-PVHD>].

259. State of Alaska Declaration of Disaster Emergency, *supra* note 256.

260. See State of Maryland Executive Order Regarding the Heroin, Opioid, and Fentanyl Overdose Crisis Declaration of Emergency, *supra* note 256, at 3 (authorizing “the preparation of plans, programs, and infrastructure for emergency management operations”).

261. See Erin Mershon & Andrew Joseph, *How U.S. States Have Used Emergency Declarations to Fight the Opioid Epidemic*, STAT (Aug. 9, 2017), <http://www.statnews.com/2017/08/09/opioids-state-of-emergency-states/> [<http://perma.cc/EAR2-BLLN>].

262. For example, after Virginia State Health Commissioner Marissa J. Levine declared a public health emergency, the state legislature passed bills to increase naloxone availability. See State of Virginia Declaration of Public Health Emergency (Nov. 21, 2016), <http://www.vdh.virginia.gov/commissioner/opioid-addiction-in-virginia/declaration-of-public-health-emergency/> [<http://perma.cc/V84J-8ZCQ>]; see also H.B. 1453, Gen. Assemb. (Va. 2017); S.B. 848, Gen. Assemb. (Va. 2017).

263. Although courts sometimes treat justification and necessity as interchangeable, they are not the same. See Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. & Criminology 289, 289 (1975). A justification is not necessity because it is not an excuse. *Id.* Justification “makes harmful conduct proper and noncriminal” while excuse “excuses the actor from criminal liability even though the actor was technically not justified in what he did.” *Id.* at 289–90. For a discussion on destroying property and the necessity defense, see generally George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 Duke L.J. 975, 981 (1999).

accepted.²⁶⁴ Generally, the elements are that (1) the defendant acted to avoid a significant risk of harm, (2) no adequate lawful means could have been used to escape the harm, and (3) the harm avoided was greater than that caused by breaking the law.²⁶⁵ The necessity defense was developed through the common law²⁶⁶ and has been used to justify illegal actions to prevent the spread of fire, disease, and death.²⁶⁷ The rationale behind this defense is that a person should not be punished if “his act of breaking the law prevents more evil than it causes.”²⁶⁸

Originally, SEPs used this argument to justify having hypodermic needles because they were “necessary to avert a greater harm . . . [of] the imminent danger of needle-borne transmission of disease.”²⁶⁹ In one study, the defendants in the majority of the cases examined escaped conviction primarily due to the necessity defense.²⁷⁰ Although the potential use of this argument has been effective for deterring prosecution or conviction, this argument has produced mixed results in different states. For example, New York and New Jersey accepted the defense while Massachusetts did not consider it.²⁷¹

People v. Bordowitz was one of the first cases in which necessity was used as a defense against being charged for knowingly possessing hypodermic instruments.²⁷² The court explained that possession of hypodermic needles, while illegal under the statute, was justified because preventing the sharing of used needles could avert the greater harm of

264. See Laura J. Schulkind, Note, Applying the Necessity Defense to Civil Disobedience Cases, 64 N.Y.U. L. Rev. 79, 82 n.17 (1989) (“Virtually all jurisdictions have rejected the traditional requirement that the emergency arise out of a physical force of nature, such as flood or fire.”).

265. See *id.* at 82 (“The common elements of the necessity defense . . . include the following: (1) the actor has acted to avoid a significant evil; (2) there are no adequate legal means to escape the harm; and (3) the remedy is not disproportionate to the evil sought to be avoided.”).

266. See Arnolds & Garland, *supra* note 263, at 291 (explaining the history and elements of the necessity defense).

267. See *Seavey v. Preble*, 64 Me. 120, 123 (1874) (using necessity to shield a doctor from liability when he damaged property in the course of preventing the spread of smallpox). Note that the necessity defense cannot be used to “excuse criminal activity intended to express the protestor’s disagreement with positions reached by the lawmaking branches of the government.” *United States v. Dorrell*, 758 F.2d 427, 432 (9th Cir. 1985).

268. See Arnolds & Garland, *supra* note 263, at 290 (“The rationale behind the excuse defenses was stated by Mr. Justice Holmes: ‘Detached reflection cannot be expected in the presence of an uplifted knife.’” (quoting *Brown v. United States*, 256 U.S. 335, 343 (1921))).

269. Considerations for Criminal Justice, *supra* note 45, at 6 (internal quotation marks omitted) (quoting Gostin & Lazzarini, *supra* note 254, at 686).

270. Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1162–63 (examining the legal strategies used in operating SEPs across the United States and finding that “[i]n all but two cases [studied], defendants escaped conviction through either jury nullification or the successful use of the necessity defense”).

271. Considerations for Criminal Justice, *supra* note 45, at 6.

272. 588 N.Y.S.2d 507 (Crim. Ct. 1991).

spread of HIV.²⁷³ The court reasoned that there were no “meaningful available options” because “evidence revealed [that] insufficient drug programs exist[ed] for the number of addicts in New York.”²⁷⁴ The defendants’ acts of possession were reasonable since they were “necessary as an emergency measure to avert an imminent public injury.”²⁷⁵

Even if SEPs with safe bathrooms have intentionally and knowingly violated possession laws or the crack-house statute, defendants could argue that they “nevertheless . . . have committed no crime.”²⁷⁶ The result of applying this defense in the different states would likely be mixed, but much more favorable to SEPs with safe bathrooms than it was in the past since there is the benefit of SEP case precedent. Since SEPs have proven to be helpful, SEPs with safe bathrooms would have a basis to be looked at as helpful too. Indeed, “evidence of the efficacy of syringe exchange has continued to grow.”²⁷⁷ As of now, more states are accepting of SEPs.²⁷⁸ Additionally, evidence of success from the different countries that have SIFs can also be used to advance harm reduction in the United States.²⁷⁹

Against this backdrop, using the necessity argument should be easier for SEPs with safe bathrooms than it once was for early SEPs. Similar arguments to those made for the use of SEPs can be advanced in support

273. See *id.* at 512 (“The distinction, in broadest terms, during this age of the AIDS crisis is death by using dirty needles versus drug addiction by using clean needles. The defendants’ actions sought to avoid the greater harm.”).

274. *Id.* at 511.

275. *Id.*

276. See Arnolds & Garland, *supra* note 263, at 289 (explaining the rationale of using the defense of necessity).

277. Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1164.

278. See *supra* note 70 and accompanying text (noting the increase of SEPs in a majority of states).

279. See MSIC Evaluation Comm., Final Report of the Evaluation of the Sydney Medically Supervised Injecting Centre 36 (2003), <http://www.indro-online.de/sydneyfinalreport.pdf> [<http://perma.cc/N5HX-Y94N>] (noting that in Sydney, Australia, SIFs “effectively managed 409 drug overdoses with no reported ongoing adverse sequelae” and that “[s]everal other clinical and behavioural incidents were also managed”); Kate Dolan et al., Drug Consumption Facilities in Europe and the Establishment of Supervised Injecting Centres in Australia, 19 *Drug & Alcohol Rev.* 337, 338 (2000) (“Supervised injecting centres currently operate in a number of cities in The Netherlands, Switzerland and Germany. . . . Over the years this approach attracted a growing number of young people who did not want to, or could not, stop drug use as traditional drug services had little to offer them.”); Kathleen Dooling & Michael Rachlis, Vancouver’s Supervised Injections Facility Challenged Canada’s Drug Laws, 182 *Can. Med. Ass’n J.* 1440, 1442 (2010) (noting Insite, North America’s first SIF, is effective); M.J. S. Milloy et al., Estimated Drug Overdose Deaths Averted by North America’s First Medically-Supervised Safer Injection Facility, 3 *PLoS ONE* 1, 1 (2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2556397/pdf/pone.0003351.pdf> [<http://perma.cc/7HEF-DM4Q>] (showing that the Vancouver SIF has averted overdose deaths and urging that this “should inform the ongoing debates over the future of the pilot project”).

of SEPs with safe bathrooms. SEPs with safe bathrooms could argue that they have not committed a crime even though they might have broken the law. SEPs with safe bathrooms would avert the greater harm—that of death. If it comes down to allowing deaths due to overdose or breaking the law, SEPs with safe bathrooms could argue that they should break the law. The increasing incidence of opioid-related deaths has led the U.S. Department of Health and Human Services (HHS) to declare that there is an opioid epidemic.²⁸⁰ HHS’s acknowledgement of the gravity of the epidemic is one of the reasons why local officials from different cities have either proposed plans to implement SIFs in their city or announced that they favor SIF establishment.²⁸¹ The New York City Department of Health and Mental Hygiene said that data show a “dramatic increase in the number of unintentional drug poisoning (overdose) deaths.”²⁸² According to the Centers for Disease Control and Prevention, more than

280. U.S. Dep’t of Health & Human Servs., *About the U.S. Opioid Epidemic*, <http://www.hhs.gov/opioids/about-the-epidemic/> [<http://perma.cc/UL36-FGP8>] (last visited Mar. 2, 2018).

281. See City of Ithaca, *The Ithaca Plan: A Public Health and Safety Approach to Drugs and Drug Policy 3–8* (2016), <http://www.cityofithaca.org/DocumentCenter/View/4224> [<http://perma.cc/CKB7-C6R2>] (providing findings that support SIF establishment for Ithaca, New York); Keegan Hamilton, *Seattle Plans to Open Safe Spaces for Addicts to Use Heroin—and That’s Smart*, *Vice News* (Sept. 16, 2016), <http://news.vice.com/article/seattle-heroin-overdose-addiction-supervised-injection-consumption> [<http://perma.cc/F5VP-TPTL>] (noting that King County Executive Dow Constantine is endorsing “safe consumption sites”); *Safer Injection Facilities—San Francisco Should Take the Initiative*, *Hive Online* (June 7, 2016), <http://www.hiveonline.org/safer-injection-facilities-san-francisco-take-initiative/> [<http://perma.cc/KGN9-9WU6>] (noting that “the California Assembly Public Safety Committee held a legislative hearing on AB 2495, which was introduced by Assembly member Susan Talamantes Eggman to permit localities to establish supervised consumption services (SCS)”); see also *Heroin & Prescription Opiate Addiction Task Force, King Cty., Final Report and Recommendations 26* (2016), http://www.kingcounty.gov/~media/depts/community-human-services/behavioral-health/documents/herointf/Final-Heroin-Opiate-Addiction-Task_Force-Report.ashx [<http://perma.cc/CG9B-YER4>] (recommending the construction of two “Community Health Engagement Locations . . . where supervised consumption occurs for adults with substance use disorders in the Seattle and King County region”); Dan Goldberg & Gloria Pazmino, *Council, de Blasio Administration to Study Supervised Injection Facilities*, *Politico* (Sept. 28, 2016), <http://www.politico.com/states/new-york/city-hall/story/2016/09/council-de-blasio-administration-to-study-supervised-injection-facilities-105869> [<http://perma.cc/J8X5-6NWX>] (“The New York City Council . . . is expected to allocate \$100,000 to the city’s health department to study supervised injection facilities . . .”); cf. *Dirk VanderHart, Should Portland Have a Safe Drug Injection Site?*, *Portland Mercury* (June 6, 2016), <http://www.portlandmercury.com/news/2016/06/29/18302057/should-portland-have-a-drug-injection-site> [<http://perma.cc/8CFZ-PD2B>] (noting how various organizations are endorsing the idea of establishing SIFs).

282. Denise Paone & Hillary Kunins, *N.Y.C. Dep’t of Health & Mental Hygiene, 2016 Advisory #8: Increase in Drug Overdoses Deaths and Increased Presence of Fentanyl in New York City 1–2* (2016), <http://www1.nyc.gov/assets/doh/downloads/pdf/han/advisory/fentanyl-overdose.pdf> [<http://perma.cc/2UVV-RJWG>].

half a million people died from drug overdoses from 2000 to 2015.²⁸³ Every day, ninety-one Americans die from opioid overdose.²⁸⁴ The defendants in *People v. Bordowitz* contended that they were preventing the spread of HIV infection, thereby saving lives.²⁸⁵ Similarly, SEP defendants with safe bathrooms can claim that they were preventing fatal overdoses, thereby saving lives.

This argument finds additional support from the values that were considered in *Seavey v. Preble*.²⁸⁶ The court, which allowed the necessity defense for a defendant who prevented the spread of a disease, explained “where the public health and human life are concerned the law requires the highest degree of care.”²⁸⁷ Using the necessity argument is challenging, but its use is not as stringent as it was before.²⁸⁸ It was not too long ago that defendants were allowed to use the necessity defense for climate action in courts.²⁸⁹ Additionally, even when there was no precedent for SEPs to use the necessity defense, the majority of the cases cited in one study resulted in acquittal rather than conviction.²⁹⁰ Several scholars agree that the necessity defense is much more available to use in courts today than it was in the past.²⁹¹ With the SEPs’ precedent of using

283. Drug Overdose Deaths in the United States Continue to Increase in 2015: Understanding the Epidemic, Ctrs. for Disease Control & Prevention, <http://www.cdc.gov/drugoverdose/epidemic/> [<http://perma.cc/45X5-YUNF>] (last visited Jan. 22, 2018).

284. *Id.*

285. See 588 N.Y.S.2d 507, 509 (Crim. Ct. 1991) (“By providing clean needles to drug addicts, coupled with health care counseling, the defendants argue . . . their actions fall squarely within the provisions of the ‘necessity’ justification defense.” (citations omitted)).

286. 64 Me. 120, 121 (1874) (noting that the value of public health and human life “will not allow of experiments to see if a less degree of care will not answer”).

287. *Id.*

288. See *supra* notes 266–271 and accompanying text (explaining the historical use of the necessity defense in SEP litigation).

289. Andrew Buncombe, Anti-Pipeline Campaigners Found Not Guilty by Judge Because ‘Protest Against Climate Change Crisis’ was Legal ‘Necessity,’ Independent (Mar. 28, 2018), <http://www.independent.co.uk/news/world/americas/pipeline-protesters-boston-protest-not-guilty-climate-change-karenna-gore-mary-ann-driscoll-a8276851.html> [<http://perma.cc/QP6J-UMGH>] (noting that activists protesting against a pipeline construction “were found not responsible by reason of necessity” by a judge); Andy Rowell, History Made as Activists Use “Necessity Defense” for Climate Action in Trial Today, Oil Change Int’l (Jan. 11, 2016), <http://priceofoil.org/2016/01/11/history-made-as-activists-use-necessity-defense-for-climate-action-in-trial-today/> [<http://perma.cc/KP2D-Z3QG>] (noting that for the “first time ever . . . a US court has allowed defendants to use the ‘necessity defense’ in a case relating to climate action”).

290. Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1162.

291. For an explanation of the impact of the increased availability of the necessity defense, see John Alan Cohan, Civil Disobedience and the Necessity Defense, 6 *Pierce L. Rev.* 111, 121 (2007) (“Necessity has the potential to validate decisions according to sympathy, conscience, or prejudice rather than according to law.”); Shaun P. Martin, The Radical Necessity Defense, 73 *U. Cin. L. Rev.* 1527, 1529 (2005) (contending that “the necessity defense, notwithstanding its seemingly innocuous nature, articulates a pro-

the necessity defense, SEPs with safe bathrooms' use of the defense would be easier to invoke because harm reduction is more accepted than it was before.²⁹²

CONCLUSION

This Note explores the history of the existence of SEPs and details the new harm reduction initiative of providing safe bathrooms for injection drug use by participants. This Note also provides different legal defenses SEP advocates can turn to in order to provide these bathrooms with some legal standing until the implementation of a SIF. If the status of these bathrooms remains ambiguous, then SEPs are limited in their capacity to help participants.²⁹³ Ways in which SEPs with safe bathrooms can attain some legal assurance include working under color of law, operating in a state-of-emergency framework, or claiming necessity in a prosecution. Fatal overdoses are preventable through the existence of safer bathrooms. In the face of an unprecedented crisis, these facilities are needed. And as this Note demonstrates, it is imperative that we marshal the law to support their creation.

foundly revolutionary principle, both as a jurisprudential doctrine and as a vehicle for social change”).

292. See Burris, Finucane, Gallagher & Grace, *supra* note 8, at 1162–63 (explaining that syringe exchangers have successfully used the necessity defense, arguing that the allegedly unlawful act “was reasonably intended to avert a greater harm”).

293. See *id.* at 1164 (noting that lacking “a clear legal basis . . . make[s] fundraising over the long term more difficult in many instances”).