

## SAFE INJECTION SITES AND POTENTIAL FEDERAL RESPONSE

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### I. OPIOID CRISIS AND SAFE INJECTION SITES GENERALLY

The misuse and overuse of opioids have created a crisis in the United States.<sup>1</sup> Drugs involved in this crisis include prescription pain relievers, heroin, and synthetic opioids.<sup>2</sup> It is estimated that over 115 Americans die every day from an opioid overdose.<sup>3</sup> In 2016 alone, approximately 42,000 people died from overdosing on opioids.<sup>4</sup>

In an effort to decrease the death toll due to the opioid crisis, some U.S. cities are planning on creating safe spaces for drug users, known as supervised injection facilities.<sup>5</sup> Supervised injection facilities provide places for people who have previously attained illicit drugs to use those drugs under medical supervision.<sup>6</sup> Sites provide sterile injection equipment, access to medical staff, and information on treatment.<sup>7</sup> These facilities are also stocked with naloxone, an overdose-reversing drug.<sup>8</sup> Studies show that these facilities can save lives that would otherwise have been lost to drug overdose, prevent the spread of diseases such as HIV, and reduce hazardous syringe litter.<sup>9</sup>

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<sup>1</sup> *Opioid Overdose Crisis*, NATIONAL INSTITUTE ON DRUG ABUSE, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> (last visited Feb. 22, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *The Opioid Epidemic by the Numbers*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, <https://www.hhs.gov/opioids/sites/default/files/2018-01/opioids-infographic.pdf> (last visited Feb. 22, 2018).

<sup>5</sup> David Gutman, *Seattle, King County Move to Open Nation's First Safe Injection Sites for Drug Users*, THE SEATTLE TIMES (Jan. 28, 2017), <https://www.seattletimes.com/seattle-news/crime/seattle-king-county-move-to-create-2-injection-sites-for-drug-users/>.

Supervised injection sites are also known as “safe injection sites” or “supervised consumption facilities.”

<sup>6</sup> *Supervised Injection Sites*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/supervised-injection-facilities> (last visited Feb. 22, 2018).

<sup>7</sup> *Id.*

<sup>8</sup> Gutman, *supra* note 5.

<sup>9</sup> Steven D. Pinkerton, *How Many HIV Infections Are Prevented by Vancouver Canada's Supervised Injection Facility?*, 22 INT'L J. DRUG POL'Y 179, 179 (2011); Wood et al., *Changes in Public Order After the Opening of a Medically Supervised Safer Injecting Facility for Illicit Injection Drug Users*, CMAJ (Sept. 28, 2004),

Officials from Seattle and King County, Washington announced plans for safe consumption or injection sites around January of 2017.<sup>10</sup> After city officials visited Vancouver and Seattle, Philadelphia followed, announcing on January 23, 2017 that Philadelphia will encourage development of supervised injection facilities in the private sector.<sup>11</sup> Philadelphia will not operate the facilities, but will encourage community nonprofits and medical organizations to manage and fund these facilities.<sup>12</sup>

Countries with supervised injection sites currently include Switzerland, Germany, the Netherlands, Norway, Luxembourg, Spain, Denmark, Australia, and Canada.<sup>13</sup> Vancouver, B.C. implemented Canada's first safe consumption site and drug overdose prevention site in 2003.<sup>14</sup> King County, Washington is using Vancouver's Insite<sup>15</sup> as a model for implementation.<sup>16</sup>

## II. FEDERAL INVOLVEMENT

States have the authority to regulate for the public health and create a safe injection site through the police power.<sup>17</sup> The question then is whether the federal government can prevent a state from creating an injection site. Currently, the Controlled Substance Act, which would likely be the relevant source of law, does not proscribe safe injection sites.<sup>18</sup> Federal prohibition, therefore, seems unlikely.

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<http://www.cmaj.ca/content/cmaj/171/7/731.full.pdf>.

<sup>10</sup> Gutman, *supra* note 5.

<sup>11</sup> *City Announces Progress on Opioid Task Force Recommendations*, CITY OF PHILADELPHIA (Jan. 23, 2018), <https://beta.phila.gov/2018-01-23-city-announces-progress-on-opioid-task-force-recommendations/>.

<sup>12</sup> *Id.*

<sup>13</sup> DRUG POLICY ALLIANCE, *supra* note 6.

<sup>14</sup> *Supervised Injection Sites*, VANCOUVER COASTAL HEALTH, <http://www.vch.ca/public-health/harm-reduction/supervised-injection-sites> (last visited Feb. 22, 2018). See *Canada v. PHS Community Services Society*, 2011 S.C.C. 44 (2011) (holding that Insite was permitted to operate under an exception to Canada's Controlled Drugs and Substances Act).

<sup>15</sup> Canada allows Insite to operate under an exception to the federal anti-drug law, the Controlled Drugs and Substances Act. Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 56.1 (Can.). This facility dealt with 768 overdoses in 2015. JoNel Aleccia, *Is Vancouver's Safe Drug Use site a Good Model for Seattle?*, THE SEATTLE TIMES (MAY 22, 2017, 1:00 PM), <https://www.seattletimes.com/seattle-news/health/is-vancouvers-safe-drug-use-site-a-good-model-for-seattle/>.

<sup>16</sup> Aleccia, *supra* note 15.

<sup>17</sup> U.S. CONST. amend. X.

<sup>18</sup> The Controlled Substances Act prohibits distribution and dispensing of certain opioids, but safe injection sites would only assist in providing a safe place for a user, who

While state actors are not required to enforce federal drug policy,<sup>19</sup> the Supremacy Clause states that “the [l]aws of the United States . . . shall be the supreme [l]aw of the [l]and.”<sup>20</sup> This language provides for federal preemption of state law when state and federal law conflicts.<sup>21</sup> If a state passes a law legalizing a safe injection site, Congress could preempt that state law by passing an act prohibiting those sites, as long as the federal government is not requiring the state “to enact or administer a federal regulatory program.”<sup>22</sup> The Drug Enforcement Agency (“DEA”) would likely be the governmental body to enforce an act prohibiting safe injection sites under the current anti-drug model and the Controlled Substances Act (“CSA”).<sup>23</sup> The Controlled Substances Act regulates the manufacture and distribution of certain drugs, including opioids.<sup>24</sup> The CSA is a reference for state legislatures to use when enacting statutes criminalizing drug possession and provides the framework for the DEA to operate.<sup>25</sup> With about 9,000 employees and an annual budget of under \$3 billion, it is unlikely that the DEA would have the resources to prosecute individuals who visit safe injection sites.<sup>26</sup> The DEA could suggest a change to the

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previously obtain the drug, to inject the illicit substances, as well as provide an opioid antidote when necessary. Controlled Substances Act, 21 U.S.C. § 841(a).

<sup>19</sup> See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the federal government cannot commandeer state resources to enforce a federal regulation).

<sup>20</sup> U.S. CONST. art. VI, § 2.

<sup>21</sup> *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (noting a federal law preempts a state law when “compliance with both federal and state regulation is a physical impossibility”); see *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating a state law may be preempted if the state law “stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress”).

<sup>22</sup> *New York v. United States*, 505 U.S. 144, 188 (1992).

<sup>23</sup> *DEA Mission Statement*, DRUG ENFORCEMENT ADMINISTRATION, <https://www.dea.gov/about/mission.shtml> (last visited Feb. 22, 2018) (noting the DEA’s mission to enforce controlled substance laws of the United States and the DEA’s focus on major drug trafficking and manufacturing schemes).

<sup>24</sup> Controlled Substances Act, 21 U.S.C. § 811. The Act categorizes each substance based on any medical benefits they may provide and potential for overuse. 21 U.S.C. § 812. Heroin is considered a Scheduled I drug because it provides no medical benefit and has no accepted safety standards for use under medical supervision. 21 U.S.C. § 812(b)(1). Other prescription opioids fall into either Schedule II or Schedule III because they provide some medical benefit but may lead to severe dependence. 21 U.S.C. § 812(b)(2). See *Controlled Substances*, DEPARTMENT OF JUSTICE, [https://www.deadiversion.usdoj.gov/schedules/orangebook/c\\_cs\\_alpha.pdf](https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf) (last visited Feb. 22, 2018).

<sup>25</sup> See Controlled Substances Act, 21 U.S.C. § 811.

<sup>26</sup> *DEA Fact Sheet*, DRUG ENFORCEMENT ADMINISTRATION, [https://www.dea.gov/docs/DEA\\_Factsheet\\_june2016.pdf](https://www.dea.gov/docs/DEA_Factsheet_june2016.pdf) (last visited Feb. 22, 2018). See also Bobby Allyn, *Loophole in U.S. Law Could Protect Safe-Injection Site from Federal Crackdown*, WHYY (Jan. 12, 2018), <https://whyy.org/segments/loophole-u-s-law-protect->

CSA to prohibit or allow safe injection sites, but it is unlikely the DEA will pursue prosecution of individuals visiting safe injection sites.<sup>27</sup>

If Congress wanted to either prevent or encourage<sup>28</sup> safe injection sites, the most effective means would be through its spending power.<sup>29</sup> Congress has the power to provide for the general welfare of the United States, and the regulation of a safe place for people to use hazardous drugs could fall under the general welfare power.<sup>30</sup> The means chosen by Congress to address the safe injection site situation must be “reasonably calculated to advance the general welfare.”<sup>31</sup> As long as Congress attaches the funding to an act that is related to the opioid epidemic and the funding is not unduly coercive,<sup>32</sup> Congress would have the authority to encourage or discourage safe injection sites.

In conclusion, prohibition of a safe injection site under the current federal anti-drug scheme is not impossible, but is unlikely. Instead of DEA enforcement of controlled substance prohibition at the state level or Congressional adoption of a law preempting state legalization of safe injection sites, Congress may use its general welfare power to influence states’ decisions about whether to enact safe injection sites.

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safe-injection-site-federal-crackdown/.

<sup>27</sup> See Allyn, *supra* note 26.

<sup>28</sup> Many Seattle residents are concerned with a potential increase in crime while others argue a safe injection site will only create a larger problem, unless the sites are accompanied by treatment facilities. Vianna Davila, *King County Council to Weigh Measure on Safe-Injection Sites*, THE SEATTLE TIMES, (Oct. 20, 2017, 11:15AM), <https://www.seattletimes.com/seattle-news/homeless/king-county-council-to-weigh-measure-on-safe-injection-sites/>.

<sup>29</sup> See U.S. CONST. art I, § 8.

<sup>30</sup> See *id.*

<sup>31</sup> *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

<sup>32</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577–79 (2012).