LOCALISM AND THE OPIOID CRISIS: OVERCOMING STATE AND FEDERAL HURDLES TO CITY- AND COUNTY-RUN SUPERVISED INJECTION FACILITIES AND SYRINGE EXCHANGE PROGRAMS IN INDIANA

SAM THOMPSON*

I. INTRODUCTION

"[I]t is far less burdensome on both the courts and the [l]egislature for the law to presume the existence of local authority to act absent some express prohibition, than it is to require legislation spelling out every detail of every permissible action a municipality may take."[1]

Historically, public health in the United States was a fundamentally local concern.[2] In the eighteenth century, American cities enacted rules for trade-ship quarantine and the isolation of sick populations.[3] In the nineteenth century, it was cities that reacted to increased urbanization by establishing rules for sanitation.[4] In the late twentieth century, local innovation in public health "flourished" with such measures as smoking bans.[5] It is unsurprising then, in the wake of the opioid crisis, it is American cities and counties that are ground zero for innovation.[6]

At present, the opioid crisis is one of the most pressing concerns on a state, local, and national level: in 2017, the then-acting Department of Health and Human Services ("HHS") Secretary, Eric Hargan, declared the opioid epidemic a "nationwide public health emergency."[7] Months later, officials in eight states

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* J.D. Candidate, 2021, Indiana University Robert H. McKinney School of Law; B.A., 2009, Indiana University Kokomo, Kokomo, Indiana. In memory of my best friend and brother Luke, who would have found it hilarious that he was mentioned here; with a special thanks to Professor Nicolas Terry for his invaluable expertise and guidance.

1. Kole v. Faultless, 963 N.E.2d 493, 498 (Ind. 2012).

2. Daniel Goldberg, *NIMBYism Continues to Factor into Supervised Injection Site Policies*, HARV. U. SCH. L. (June 28, 2018), http://blog.petrieflom.law.harvard.edu/2018/06/28/nimbyism-continues-to-factor-into-supervised-injection-site-policies/ [https://perma.cc/PN2T-S2FM].

3. COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, INST. OF MED., THE FUTURE OF PUBLIC HEALTH 57 (1988).

4. *Id.* at 58.

5. 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, 1108 (2009).

6. *See generally* GEORGE WASHINGTON UNIV. MILKEN SCH. OF PUB. HEALTH, OPIOID USE DISORDER: CITY ACTIONS AND OPPORTUNITIES TO ADDRESS THE EPIDEMIC 1 (2018), https://www.nlc.org/sites/default/files/users/user75/NLC_OPIODS_bckgrndr_FINAL_032618_r2.pdf [https://perma.cc/BL2Y-BPCR].

7. Press Release, Sec'y Eric D. Hargan, U.S. Dep't of Health & Human Servs., HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis (Oct. 26, 2017), https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html [https://perma.cc/NZ94-PEU6].

similarly declared such an emergency.[8] At the local level, cities and counties across the United States are reacting in their own uniquely local ways.[9]

But, local governments[10] are in a precarious position to deal with Opioid Use Disorder ("OUD"). Facing opposition from state and federal officials, local governments must tread lightly and work collaboratively in order to implement successful solutions to the problem.[11] This opposition is borne out by the numbers: as of 2018, fifteen states prohibited Syringe Exchange Programs ("SEPs").[12] Of course, there has been a sea-change in SEPs' acceptance by state and federal governments. In fact, Indiana played a central role in SEPs' acceptance on a federal level: it was not until Indiana's HIV outbreak in 2015 that lawmakers removed a ban on federally funded SEPs.[13] Even so, Indiana localities continue to face challenges – as recent as the just-adjourned General Assembly session – from State lawmakers concerning local health-and-safety regulations.[14]

This does not mean, however, that cities are hamstrung to the whim of the State for "pretty much everything except to brush [their] teeth in the morning."[15] In this Note, I argue that local governments in Indiana have broad leeway to work within State statutory boundaries and that enabling SEPs and Supervised Injection Facilities ("SIFs") may be well within those boundaries.[16]

Indiana has given local governments legislative authority to act within a

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8. ASTHO Staff, *Emergency Declarations in Eight States to Address the Opioid Epidemic*, ASS'N ST. & TERRITORIAL HEALTH ORG. (Jan. 11, 2018), https://www.astho.org/StatePublicHealth/Emergency-Declarations-in-Eight-States-to-Address-the-Opioid-Epidemic/01-11-18/ [https://perma.cc/CGP5-DT2T].

9. *See generally* GEORGE WASHINGTON UNIV. MILKEN SCH. OF PUB. HEALTH, *supra* note 6.

10. Consistent with Indiana law, the term "local government," as used in this Note, refers to a county, municipality, or township government. *See* IND. CODE § 36-1-2-23 (2021).

11. *See infra* Section IV-B (noting federal and state opposition to SIFs).

12. German Lopez, *Needle Exchanges Have Been Proved to Work Against Opioid Addiction. They're Banned in 15 States,* VOX (June 22, 2018), https://www.vox.com/science-and-health/2018/6/22/17493030/needle-exchanges-ban-state-map [https://perma.cc/8NWN-SCBW].

13. John Stanton, *After Decades, Congress Effectively Lifts Ban on Federally Funded Needle Exchanges,* BUZZFEED (Jan. 5, 2016), http://www.buzzfeed.com/johnstanton/after-decades-congress-effectively-lifts-ban-on-federally-fu#.yeLaGdJxVQ [https://perma.cc/Z8ZK-J89D].

14. *See, e.g.*, S.B. 207, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2020).

15. Henry Grabar, *The Shackling of the American City,* SLATE (Sept. 9, 2016), https://slate.com/business/2016/09/how-alec-acce-and-pre-emptions-laws-are-gutting-the-powers-of-american-cities.html [https://perma.cc/NRD8-H78J] (quoting Jay Fisette, former chairman of the Arlington County Board in Virginia, and generally comparing a state's power to preempt local law to a "straitjacket").

16. *See* Scott Burris et al., *The Legal Strategies Used in Operating Syringe Exchange Programs in the United States*, 86 AM. J. PUB. HEALTH 1161 (1996) (discussing local SEPs as "successfully operating" without express state or federal authority) [hereinafter *The Legal Strategies Used in Operating Syringe Exchange Programs in the United States*].

sphere of local concern via the Home Rule Act of 1980 ("Home Rule Act").[17] The current body of Indiana case law delineates the Home Rule Act as it pertains mostly to local government organizations, zoning, and, to some extent, natural resources.[18] Notably, the Indiana Supreme Court has *not* addressed in what way the Home Rule Act would interact with health-and-safety regulations. In order to be given effect and contour, the Home Rule Act must be, to borrow Indiana Supreme Court Chief Justice Loretta Rush's exhortation, "appreciated, invoked, and properly applied."[19] Indeed, local health-and-safety concerns are currently a pertinent area of contention and concern where a little bit of proper application could yield clarity and solutions to issues regarding state and local conflict.

This is not to say that Indiana cities do not face an *incredibly* rocky path in considering SIFs and SEPs; they do. More than a few commentators argue that home rule authority is not a significant source of autonomy.[20] It has also been asserted that a locally authorized SIF would be on the "weakest footing" compared to a state-sanctioned facility.[21] Further, home rule authority seems to run contrary to the Indiana Supreme Court's jurisprudence.[22] Still, Indiana's current home rule jurisprudence is silent on the issue of the local government's ability to enact health-and-safety measures under home rule authority. In order to properly delineate the boundaries of the Home Rule Act, it must be invoked. The opioid crisis and relevant current litigation provide an opportunity for cities and counties to cautiously weigh their options, engage in diligent research, and develop case law by meeting the challenges that they will undoubtedly face. And, though it is not a magic bullet, Indiana's Home Rule Act offers a tool for local governments to try to meet these challenges.

II. SCOPE OF ARTICLE AND ARGUMENTS

While there has been a fair amount of action in combatting OUD, there are

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17. IND. CODE § 36-1-3-4(b) (2021) (granting local governments "all . . . powers necessary or desirable in the conduct of [their] affairs, even though not granted by statute").

18. *See, e.g.*, Kole v. Faultless, 963 N.E.2d 493 (Ind. 2012) (addressing the organization of local government); City of Crown Point v. Lake County, 510 N.E.2d 684 (Ind. 1987) (addressing zoning regulation); Town of Avon v. West Central Conservancy Dist., 957 N.E.2d 598 (Ind. 2011) (addressing the regulation of water use).

19. *Cf.* Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALB. L. REV. 1353, 1384 (2019) (commenting on state litigants' failure to assert Indiana constitutional claims).

20. *See, e.g.*, Jesse J. Richardson, *Dillon's Rule Is from Mars, Home Rule Is from Venus: Local Government Autonomy and the Rules of Statutory Construction*, 41 PUBLIUS 662 (2011) (describing home rule as not truly endowing municipalities with any meaningful autonomy).

21. Leo Beletsky et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 AM. J. PUB. HEALTH 231, 233 (2008) (noting city attempts to authorize SIFs being successfully challenged under state law).

22. *See* Hunter v. City of Pittsburg, 207 U.S. 161, 178 (1907) (establishing state sovereignty over municipalities).

fundamental differences in interests between the state and local levels. These differences present a compelling case for the need for local action. Two of the safest and most effective solutions are SIFs and SEPs. In this Note, I argue that local government in Indiana is well-positioned to implement such facilities by way of its Home Rule Act.

After situating Indiana and its cities and counties in the opioid crisis, I present a brief overview of the efficacy of SEPs and SIFs and how local governments in Indiana might implement such measures. I explore how the Home Rule Act might interact with State drug and health law, demonstrating that there are at least tenable arguments to be made in support of a local government-run SIF or SEP. Separately, I also explore how local government might respond to the common objections made by the United States government when attempting to enjoin such facilities from opening.

This Note is not, however, a litigation road map. The case of *Safehouse v. United States* – where the United States government challenged an attempted Philadelphia SIF – is currently being briefed at the Third Circuit, and the parties' briefs are an excellent source of data and legal arguments.[23] Nor do I purport to do a deep dive into some of the more labyrinthine preemption doctrines or even *attempt* how to address the common NIMBY objections. Such is beyond the scope of this Note.

The thrust of this Note is this: Indiana's Home Rule Act remains all but un-litigated in the realm of health-and-safety regulations and is a potential source of meaningful authority. In order to properly understand and develop the boundaries through courts' understanding of the law, the Home Rule Act must be invoked as a source of authority for local action. This Note provides an overview of what this invocation could look like in the realm of combatting the opioid crisis.

III. OPIOID USE DISORDER PRESENTS A PRESSING AND ONGOING PROBLEM FOR INDIANA

In Indiana, the State's position on OUD does not look markedly different from that of the federal government. On his first day in office, Indiana Governor Eric Holcomb issued a statement agreeing with HHS's assessment, calling for an "all hands on deck" approach and creating the State's first Drug Czar.[24] Governor Holcomb subsequently signed into law several new acts addressing the crisis.[25] So far, the effects seem promising: preliminary numbers from the Indiana University Public Policy Institute and the Indiana State Department of Health

23. *See, e.g.*, Brief for Cato Inst. et al. as Amici Curiae in Support of Appellees, United States. v. Safehouse, 985 F.3d 225 (3d Cir. 2021) (No. 20-1422), 2020 WL 3833360.

24. NEXT LEVEL RECOVERY IND., PROGRESS REPORT 2 (2020), https://www.in.gov/recovery/files/Progress%20Report%20-%2011.12.2020.pdf [https://perma.cc/2SW9-WA2B].

25. *Id.*

indicate a decline in overdose deaths in Indiana cities in 2018.[26] But according to the Richard M. Fairbanks Foundation, in 2018, the federal funding that Indiana received to combat the opioid crisis was likely less than the total for which the State would have been eligible if the number of opioid-involved deaths had not been seriously undercounted.[27] Indeed, the continued economic detriment to the State reflects the Foundation's findings; researchers at Indiana University predicted that Indiana's economic damages due to the opioid crisis for the year 2018 would exceed *$4 billion*.[28] Certainly, lower casualties *are* progress. But not all is well. Through an assessment by the Centers for Disease Control and Prevention, Indiana did not see a significant change in heroin-involved deaths between 2017 and 2018.[29] This, coupled with the severe economic injury to the State, counsels in favor of an urgent fix. As the Executive Director of Washington's People's Harm Reduction Alliance puts it, even "one is too many."[30] While State efforts are promising, cities and counties are better positioned to address issues related to OUD.

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26. *Compare* Leslie Wells, *CHJR Researchers Examine Drug Overdose Deaths in Marion County*, O'NEILL SCH. IUPUI (July 22, 2019), https://blog.oneill.iupui.edu/2019/07/22/2018-overdose-deaths/ [https://perma.cc/NA8T-CMQQ] (reporting a decrease in the number of opioid-related overdose deaths in Marion County, from 329 in 2017 to 286 in 2019), *and* Lincoln Wright, *Overdose Deaths Down in 2018 After Record High Previous Year*, S. BEND TRIB. (Mar. 17, 2019), https://www.southbendtribune.com/news/publicsafety/overdose-deaths-down-in-after-record-high-previous-year/article_6ffaeaad-552f-573f-8920-486aa9ea6a8f.html [https://perma.cc/3Q6N-HWH6] (reporting a decrease in opioid-related overdose deaths in St. Joseph County from sixty-one in 2017 to forty-one in 2018), *with Opioid Overdose: 2017 Drug Overdose Death Rates*, CTR. FOR DISEASE CONTROL & PREVENTION (Mar. 17, 2020), https://www.cdc.gov/drugoverdose/data/statedeaths/drug-overdose-death-2017.html [https://perma.cc/LE6W-6VDH] (showing an increase in opioid-related overdose deaths from 2016 to 2017, giving Indiana the third-highest overdose rate increase in the nation).

27. Alex Cohen, *How Does Indiana's Federal Opioid Funding Compare to Its Opioid-Involved Overdose Deaths?*, RICHARD M. FAIRBANKS FOUND. (Apr. 10, 2019), https://www.rmff.org/how-does-indianas-federal-opioid-funding-compare-to-its-opioid-involved-overdose-deaths/ [https://perma.cc/Z5Z8-PUV5].

28. Ryan M. Brewer & Kayla M. Freeman, *Cumulative Economic Damages from 15 Years of Opioid Misuse Throughout Indiana*, 93 IND. BUS. REV. art 1 (2018), http://www.ibrc.indiana.edu/ibr/2018/spring/article1.html [https://perma.cc/W7HD-L6LV].

29. *Heroin Overdose Data,* CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/heroin.html [https://perma.cc/65RU-8TF4] (last updated Mar. 19, 2020).

30. Nadia Romero, *King County Overdose Deaths Rise, but No Agreement on How to Deal with Opioid Crisis*, Q13 FOX (May 9, 2018), https://q13fox.com/2018/05/09/still-no-agreement-on-how-to-deal-with-opioid-crisis-while-king-county-overdose-deaths-rise/ [https://perma.cc/D3TA-YWBG].

A. Indiana's Cities and Counties Are Uniquely Positioned to Address the Problem

Local officials are closest to the communities that they serve and, thus, are uniquely positioned to respond to the issues affecting those communities.[31] In fact, many local governments across the United States are already implementing solutions to combat OUD with innovations like establishing opioid-intervention courts and working across sectors to provide resources like housing and mental health support.[32]

Further, despite combatting OUD being one of the "top priorities" of HHS,[33] city and county leaders across the United States recognize that local needs do not always mirror the goals of the federal government – especially in responding to a drug crisis.[34] This same incongruity of interest can be seen between the state and local level in Indiana: Indiana Attorney General Curtis Hill has equated harm reduction efforts – such as SEPs – with an *increase* in harm.[35] Meanwhile, some localities, such as Marion County, have expressly approved of and adopted such measures.[36] Attorney General Hill recognizes that SEPs, such as the one in Scott County, Indiana, have been successful in the slowing of the spread of disease.[37] Yet, despite evidence to the contrary, Attorney General Hill claims that distributing clean syringes can lead to increased drug usage.[38] In what he describes as "the dangers of eroding personal accountability," Attorney General Hill warns that increased drug usage comes with an increased risk of overdose.[39] In other words, he contends, SEPs equal more overdoses. Attorney General Hill's skepticism is well-meaning – he writes passionately and empathetically – but it

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31. *See generally* METRO. AREA PLANNING COUNCIL, ADDRESSING THE OPIOID EPIDEMIC: CONNECTING PEOPLE TO SERVICES 1 (2019), https://www.mapc.org/resource-library/addressing-the-opioid-epidemic-connecting-people-to-services/ [https://perma.cc/7W3S-NYZ7].

32. GEORGE WASHINGTON UNIV. MILKEN SCH. OF PUB. HEALTH, *supra* note 6, at 13.

33. *5-Point Strategy to Combat the Opioid Crisis*, U.S. DEP'T HEALTH & HUM. SERV., https://www.hhs.gov/opioids/about-the-epidemic/hhs-response/index.html [https://perma.cc/3J9B-LTDP] (last visited Apr. 1, 2021).

34. *See generally* NAT'L LEAGUE OF CITIES & NAT'L ASS'N OF CTYS., A PRESCRIPTION FOR ACTION: LOCAL LEADERSHIP IN ENDING THE OPIOID CRISIS 18, 36 (2016), https://opioidaction.org/report/ [https://perma.cc/CWV4-AFFH] (comparing the interest of cities and counties in combatting OUD with the disparity between federal interests and local communities during the crack epidemic of the 1980s and 1990s).

35. Curtis Hill, *Handing Out Syringes to Addicts Is a Perilous Path,* IND. FAM. INST. (Aug. 24, 2017), http://www.hoosierfamily.org/blog/curtis-hill-handing-out-syringes-addicts-perilous-path [https://perma.cc/PD9M-GJY7].

36. *See* Jill Sheridan, *City-County Council Approves Syringe Exchange*, WFYI INDIANAPOLIS (June 18, 2018), https://www.wfyi.org/news/articles/syringe-exchange-approved-for-marion-county [https://perma.cc/DJX3-3F5B].

37. Hill, *supra* note 35.

38. *Id.*

39. *Id.*

is misplaced. Experts from the Richard M. Fairbanks Foundation, the National Research Council, the Institute of Medicine, and the Foundation for AIDS Research – to name a few – generally agree that SEPs neither increase drug usage nor the risk of overdose.[40] Moreover, research indicates that not only do SEPs not increase drug use, but the presence of SEPs in a community does not expand drug-related networks or increase crime rates.[41]

At the bottom, states remain instrumental in enabling localities to enact solutions to combat OUD. And, Attorney General Hill's commentary is a good example of the kind of opposition that localities can face from state authorities. Of course, as mentioned, the State itself continues to make strides. For example, Indiana's legislature has specifically enabled local governments to unilaterally declare a public health crisis in order to facilitate SEPs.[42] And, Governor Holcomb has signed into law legislation, which has added new treatment centers and strengthened regulations on prescription-drug databases.[43]

But it is cities and counties – rather than the State – that are closest to their citizens. To that end, many cities are taking direct local action in the opioid crisis by implementing solutions such as pre-arrest diversions, targeted treatment, mental-health task forces, and gap coverage for long-term inpatient treatment.[44] Indiana cities and counties can and should follow such leads in their fight to combat OUD. One such promising solution is the use of SIFs. To be sure, there has yet to be a legally sanctioned SIF in the United States.[45] But recent attempts – including Philadelphia's Safehouse, a proposed privately-run SIF – are informative: the arguments advanced by proponents bring front-and-center the abundance of evidence-based research demonstrating the safety and efficacy of SIFs and SEPs.[46]

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40. *See generally* Alex Cohen, *Do Needle Exchanges Lead to Higher Rates of Drug Abuse?*, RICHARD M. FAIRBANKS FOUND. (July 6, 2017), https://www.rmff.org/needle-exchanges-powerful-solution-drug-abuse/ [https://perma.cc/ZMV5-WKC9] [hereinafter *Do Needle Exchanges Lead to Higher Rates of Drug Abuse?*]; NAT'L RESEARCH COUNCIL & INST. OF MED., PREVENTING HIV TRANSMISSION: THE ROLE OF STERILE NEEDLES AND BLEACH 198-252 (Jacques Normand et. al. eds., 1995); *Public Safety, Law Enforcement, and Syringe Exchange*, AMFAR (Mar. 2013), https://www.amfar.org/uploadedFiles/_amfarorg/Articles/On_The_Hill/2013/fact%20sheet%20Syringe%20Exchange%20031413.pdf [https://perma.cc/QY3Z-3B37].

41. *See generally* Melissa A. Marx et al., *Trends in Crime and the Introduction of a Needle Exchange Program*, 90 AM. J. PUB. HEALTH. 1933 (2000).

42. IND. CODE § 16-41-7.5-5 (2021).

43. NEXT LEVEL RECOVERY INDIANA, *supra* note 24.

44. *See Opioid Epidemic,* MAYORS INNOVATION PROJECT, https://www.mayorsinnovation.org/policy/health/opioid-epidemic/#Examples [https://perma.cc/ZLT5-53DU] (last visited Apr. 1, 2021).

45. Lawrence O. Gostin et al., *Supervised Injection Facilities Legal and Policy Reforms*, JAMA NETWORK (Feb. 7, 2019), https://jamanetwork.com/journals/jama/fullarticle/2724457 [https://perma.cc/LW7P-GNWU] (noting that clandestine SIFs have been operating in the United States).

46. *See, e.g.*, Brief for Aids United et al. as Amici Curiae in Support of Appellees Safehouse

IV. SUPERVISED INJECTION FACILITIES AND SYRINGE EXCHANGE PROGRAMS OFFER A SAFE AND EFFECTIVE SOLUTION

A. The Efficacy of SEPs and SIFs Is Well-Established

SIFs have operated in Europe for decades.[47] Their main objectives include: reducing the risks of disease transmission, preventing drug-related overdose deaths, and connecting drug users with treatment and other services.[48] The operation of such a site is fairly straightforward; drug users come into a facility – with their own drugs – and are given sterile needles and a safe place to consume the drugs.[49] Participants are generally supervised by staff who may provide safety measures like providing fentanyl test strips and intervening with emergency care if necessary.[50] Some, like Safehouse, may even provide participants with certified peer counselors, recovery specialists, social workers, and case managers.[51] At no point in the process do SIF staff provide or handle controlled substances.[52]

As of 2019, there were over ninety such facilities operating in Europe.[53] According to researcher Dagmar Hedrich, the European Monitoring Centre for Drugs and Drug Addiction's lead harm reduction scientist, there have been *no* fatal overdoses in European drug-consumption rooms.[54] In 2003, Insite – the first legally authorized SIF in North America – opened in Vancouver, British Columbia.[55] A second Canadian SIF followed suit in 2017.[56] SIFs in Canada are

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& Affirmance at 2-4, United States v. Safehouse, 985 F.3d 225 (3d Cir. 2021) (No. 20-1422), 2020 WL 3638487.

47. *Drug Consumption Rooms: An Overview of Provision and Evidence*, EUR. MONITORING CTR. FOR DRUGS & DRUG ADDICTION (June 7, 2018), http://www.emcdda.europa.eu/topics/pods/drug-consumption-rooms_en [https://perma.cc/N9EC-WEP2] [hereinafter *Drug Consumption Rooms*]; *but see* Rick Lineslmes, *Safe Injection Rooms Save Lives – Yet the UK Government Continues to Oppose Them*, CONVERSATION (Oct. 24, 2019), http://theconversation.com/safe-injection-rooms-save-lives-yet-the-uk-government-continues-to-oppose-them-124952 [https://perma.cc/YSH4-Z4SD].

48. *Drug Consumption Rooms*, *supra* note 47.

49. Elana Gordon, *What's the Evidence That Supervised Drug Injection Sites Save Lives?,* NPR (Sept. 7, 2018), https://www.npr.org/sections/health-shots/2018/09/07/645609248/whats-the-evidence-that-supervised-drug-injection-sites-save-lives [https://perma.cc/5DFE-TSSQ].

50. *See* United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019).

51. *See id.*

52. *See id.*; *see also Supervised Consumption Services*, DRUG POL'Y ALLIANCE, http://www.drugpolicy.org/issues/supervised-consumption-services [https://perma.cc/G6X8-5VQL] (last visited Apr. 2, 2021).

53. Drug Consumption Rooms, *supra* note 47.

54. Cara Tabachnick, *Wary of an Opioid Epidemic, Europe Pushes Safe Sites for Drug Use*, STAN. SOC. INNOVATION REV. (2019), https://ssir.org/articles/entry/Wary_of_an_Opioid_Epidemic_Europe_Pushes_Safe_Sites_for_Drug_Use [https://perma.cc/578X-Y5AS].

55. *Supervised Consumption Sites*, VANCOUVER COASTAL HEALTH, http://www.vch.ca/

legally authorized under an exemption from prosecution under Canadian drug law.[57] If would-be operators of United States sites are looking for evidence of the efficacy of SIFs, the Canadian numbers are illuminating: there were 1,983 overdose interventions at just one Vancouver SIF in 2017 alone.[58]

Many of the risks involved with injection drug use stem from not just the dangerous drug itself, but rather the scarcity of clean injection equipment, and user behavior linked to their fear of prosecution.[59] For example, opiate overdose is often reversible with the use of naloxone, but those witnessing an overdose are often hesitant to administer it because of fear of legal ramifications.[60] Also, the likelihood of contracting diseases increases dramatically when users take to "shooting galleries," which are public places like "homes – privately owned, abandoned, and otherwise – that are frequented by [users] for the purpose of injecting."[61] Where needle exchanges and outreach certainly reduce the risk of blood-borne diseases associated with injection drug use, SIFs are unique in that they can address both the need for a hygienic setting as well as allay problems related to the "behavioral influence . . . and other factors" present in shooting galleries.[62]

Of course, it is unsurprising that a program where health workers oversee the use of illegal drugs – particularly injectable drugs – is subject to a lack of support and fears that the facility will increase crime.[63] Such attitudes are reflected at the highest level of law enforcement in the United States: Deputy Attorney General Rod Rosenstein promised prosecution of proposed sites, repeating the fallback argument of many detractors that SIFs *encourage* drug use.[64] Indeed, there are a handful of examples of organizations around the United States working to enable

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public-health/harm-reduction/supervised-consumption-sites [https://perma.cc/XS35-NLVU29] (last visited Apr. 2, 2021); *see also* Lawrence O. Gostin et al., *Supervised Injection Facilities Legal and Policy Reforms*, 321 JAMA 745 (2019) (noting that clandestine SIFs have been operating in the United States).

56. *Supervised Consumption Sites*, *supra* note 55.

57. *Id.*

58. *Insite User Statistics,* VANCOUVER COASTAL HEALTH, http://www.vch.ca/public-health/harm-reduction/supervised-consumption-sites/insite-user-statistics [https://perma.cc/XC93-78S3] (last visited Apr. 2, 2021).

59. Beletsky et al., *supra* note 21, at 231.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See Supervised Consumption Services*, *supra* note 52.

64. Bobby Allyn, *Justice Department Promises Crackdown on Supervised Injection Facilities,* NPR (Aug. 30, 2018), https://www.npr.org/sections/health-shots/2018/08/30/642735759/justice-department-promises-crackdown-on-supervised-injection-sites [https://perma.cc/A5EM-VGYC]; *see also* Jessica Cohen, *Supervised Injection Facilities Face Obstacles, but That Shouldn't Stop Them*, HEALTH AFF. (Nov. 29, 2018), https://www.healthaffairs.org/do/10.1377/hblog20181127.121405/full/ [https://perma.cc/YDE3-YJDM] (detailing some of the common objections to SIFs).

SIFs and SEPs in their own communities, and each was met with more than a modicum of opposition.[65]

B. Local Attempts at SIFs in the United States Have Been Mostly Unsuccessful

Thanks to recent litigation, the best-known example of a SIF in the United States is probably Philadelphia's Safehouse.[66] Safehouse is front-and-center in the SIF conversation because it was recently the subject of a federal lawsuit.[67] Although Safehouse may be the most recent attempt, there are several other jurisdictions that have proposed or even approved implementing SIFs.[68] The following examples demonstrate the difficulties faced by SIFs' proponents.

California Governor Jerry Brown recently vetoed a proposed immunity statute that would have allowed SIFs in the state.[69] Before Governor Brown's veto, San Francisco was on track to be the site of the first legally authorized SIF in the United States.[70] On the other side of the country, New York City's mayor, Bill de Blasio, petitioned the New York Health Commissioner – who is authorized to license "research studies that may include the possession of controlled substances" – to issue a license that would allow the city to erect several injection sites under the premise that they would be legally authorized research centers.[71] While initially, New York Governor Andrew Cuomo had signaled support for such a proposal, there has been little movement on the initiative and, predictably, some hesitation.[72] Legislative efforts to allow facilities in Denver were similarly abandoned.[73] In King County, Washington, initially,

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65. *See infra* Section IV-B (discussing challenges facing SIFs in the United States); *see also Supervised Injection Sites Are Coming to the United States: Here's What You Should Know*, U. S. CAL. DEP'T NURSING (May 2, 2019), https://nursing.usc.edu/blog/supervised-injection-sites/ [https://perma.cc/JB74-LCE4] (mentioning at least three United States cities considering SIFs).

66. United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019).

67. Allyn, *supra* note 64.

68. *See Supervised Injection Sites Are Coming to the United States: Here's What You Should Know, supra* note 65.

69. German Lopez, *The Trump Administration's Threat Against Safe Injection Sites Is Working*, VOX (Oct. 2, 2018), https://www.vox.com/policy-and-politics/2018/10/2/17927864/safe-injection-site-trump-jerry-brown-california [https://perma.cc/7GRV-HFMS].

70. William Neuman, *De Blasio Moves to Bring Safe Injection Sites to New York City*, N.Y. TIMES (May 3, 2018), https://www.nytimes.com/2018/05/03/nyregion/nyc-safe-injection-sites-heroin.html?smtyp=cur&smid=tw-nytmetro [https://perma.cc/VE7S-72LA].

71. *Id.*

72. Vaidya Gullapalli, *New York City Plan for Overdose Prevention Center Runs into Resistance by Some Officials*, APPEAL (Jan. 23, 2019), https://theappeal.org/politicalreport/new-york-city-plan-for-overdose-prevention-centers-runs-into-resistance/ [https://perma.cc/4UC3-GKND].

73. Anna Staver, *Colorado Lawmakers Won't Vote on Safe Injection Sites in 2019. House Democratic Leader Blames Denver.*, DENV. POST (Feb. 19, 2019), https://www.denverpost.com/

successful efforts at erecting a municipally-run SIF were withdrawn due to the looming threat of federal litigation.[74]

Officials have premised their reluctance to move forward with SIFs on everything from the perceived increase in drug abuse to fear of political consequences.[75] This, of course, is nothing new – just remember our Indiana examples with SEPs. But, why are state and local governments reticent when tasked with tamping down a problem with the magnitude of – in New York City's case – one overdose death per six hours?[76]

One reason is undoubtedly concerned constituents. The so-called "not in my backyard" ("NIMBY") factor "considerably erodes enthusiasm" for the proposal and implementation of SIFs.[77] Indeed, public concerns were a factor in Madison County, Indiana's abandonment of their SEP in 2017.[78] If SEPs can provoke enough backlash for a county to abandon life-saving measures, it is not difficult to guess that SIFs would fare no better. In large part – and as far back as 2003 – the United States government's opinion has reflected that of NIMBY evangelists.[79] Former drug-policy director John Walters opined that "[t]here are no [such things] as safe injection sites."[80]

Yet a brief look into a handful of local attempts at combatting the opioid crisis reveals that local, government-run SIFs and SEPs in Indiana may not be entirely foreclosed. Attitudes continue to change as the crisis persists.

C. Indiana Municipalities Are Well-Positioned to Establish Government-Run SIFs and SEPs

Indiana cities and counties *are* taking local action to combat the opioid crisis. The following examples of local governments' willingness to enact such

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2019/02/19/safe-injection-sites-denver-colorado/ [https://perma.cc/5EWL-NFWA].

74. *See* Kipp Robertson, *Safe Injection Site on Hold in Seattle Amid Growing Concerns*, KING 5 TV (Mar. 12, 2019), https://www.king5.com/article/news/concerns-of-federal-retribution-put-seattles-safe-injection-sites-on-hold/281-5b103ef2-f4c7-423a-b3c6-4ade74ab590b [https://perma.cc/5RBW-WY2L].

75. *See* German Lopez, *supra* note 69 (discussing how California's governor described SIFs as "enabling illegal drug use"); Anna Staver, *supra* note 73 (quoting Patrick Neville as saying that Denver's "concerned parents" are a possible hurdle).

76. N.Y. CITY HEALTH, EPI DATA BRIEF: UNINTENTIONAL DRUG POISONING (OVERDOSE) DEATHS IN NEW YORK CITY, 2000 TO 2017, at 1 (2018), https://www1.nyc.gov/assets/doh/downloads/pdf/epi/databrief104.pdf [https://perma.cc/8CEH-ELCT].

77. Goldberg, *supra* note 2; *cf.* Beletsky et al., *supra* note 21, at 231-37.

78. Charles Taylor, *The Benefits and Challenges of Needle Exchange Programs*, NAT'L ASS'N COUNTIES (Feb. 20, 2019), https://www.naco.org/articles/benefits-and-challenges-needle-exchange-programs [https://perma.cc/F3FW-RQQZ].

79. DeNeen L. Brown, *Canada's Drug Policy Gives 'Safe Injection Sites' a Shot,* CHI. TRIB. (Aug. 7, 2003), https://www.chicagotribune.com/news/ct-xpm-2003-08-07-0308070162-story.html [https://perma.cc/9C9A-YRUW].

80. *Id.*

measures demonstrate that the ground may be fertile for going a step further and enacting locally implemented SIFs and SEPs. And, the fact that many such attempts have since been abandoned or lost funding only highlights the pressing need for solutions.

1. Pre-Arrest Diversions and Mental Health Initiatives

Pre-Arrest diversion is one way some cities are tackling low-level drug crimes.[81] Law Enforcement Assisted Diversion ("LEAD") is a Seattle-based nonprofit organization aimed at harm reduction through the use of pre-arrest diversions.[82] In cities that have adopted programs with LEAD-like principles, low-level drug offenders are typically referred to case-management programs where they may receive support such as housing assistance and drug treatment.[83]

Indianapolis is one of a handful of cities across the United States that implemented a pre-arrest diversion program. Indiana cities and counties did not develop LEAD programs but instead something called Crisis Intervention Teams, which function to effectuate pre-arrest diversions with the stated goal of "support[ing] collaborative efforts to create and sustain . . . effective interactions among law enforcement, mental health care providers . . . and communities . . . to reduce the stigma of mental illness."[84] In Indianapolis, this mental health-based pre-arrest diversion program was called Mobile Crisis Assistance Team ("MCAT").[85] Indianapolis's MCAT program was established by Mayor Joe Hogsett.[86] Notably, Indiana law dealing with the means by which a court may conditionally defer prosecution for certain drug charges does *not* mandate that deferment *must* be issued by judicial proceedings.[87] As such, any challenge to MCAT's pre-arrest diversions would have to come from the State assessing that it had preempted such a program by *mandating* deferment by judicial proceedings. Of course, it has not. In the absence of preemptive legislation, pre-arrest diversions are valid exercises of local law-enforcement authority.[88]

During MCAT's pilot program, less than 2% of individuals who interacted

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81. NAT'L LEAGUE OF CITIES & NAT'L ASS'N OF CTYS, *supra* note 34.

82. *What Is LEAD?*, LEAD NAT'L SUPPORT BUREAU, https://www.leadbureau.org/about-lead [https://perma.cc/39WN-88ZB] (last visited Apr. 2, 2021).

83. *Id.*

84. *Crisis Intervention Teams*, NAT'L ALL. ON MENTAL ILLNESS IND., https://www.namiindiana.org/criminal-justice/cit-1 [https://perma.cc/GZ55-99GJ] (last visited Feb. 2, 2020).

85. KATIE BAILEY & BRAD RAY, EVALUATION OF THE INDIANAPOLIS MOBILE CRISIS ASSISTANCE TEAM: REPORT TO THE INDIANAPOLIS OFFICE OF PUBLIC HEALTH & SAFETY AND THE FAIRBANKS FOUNDATION 1 (2018), https://ppidb.iu.edu/Uploads/PublicationFiles/MCAT%20Pilot%20Evaluation%20Final%20Report.pdf [https://perma.cc/92NS-H4VK].

86. *Id.*

87. IND. CODE §§ 12-23-5-0.5 to -9 (2021).

88. *See infra* Section V (discussing Indiana's delegation of home rule authority to local units to govern their own affairs).

with MCAT responses were transported to jail.[89] Unfortunately, there were some barriers to MCAT's success, such as unclear policy guidelines leading to confusion by officers as to how the program should be carried out.[90] Indianapolis's MCAT program was eventually scaled back as the Indianapolis Emergency Medical Services pulled out of their partnership with officers.[91] In Mayor Hogsett's 2019 State of the City Address, however, he noted a renewed interest – by the State – in the MCAT program.[92]

2. Syringe Exchange Programs

SEPs have been proven to decrease the number of overdose incidents, lower the spread of disease, and provide an important connection point between users and harm reduction services and treatment.[93] In Indiana, a city or county's power to unilaterally declare a public health emergency is granted by statute.[94] Indiana's short history of its SEP has been met with varying degrees of acceptance and criticism.[95] The existence of such an enabling statute demonstrates that the Legislature is both aware of the local nature of the opioid crisis as well as willing to give cities the latitude to implement innovative solutions. And, that is a good start. But, as I explain in Section VII-B-2, the enabling statute faces a sunset date, which remains in effect at the time of writing this Note.[96] So, when it *does* sunset, the need for local action will become even more pressing as cities and counties look to implement possible solutions in the face of SEPs' uncertain future. Because a syringe can be considered drug paraphernalia and the possession of paraphernalia is expressly prohibited by Indiana law, opponents' first inclination might be to assert that Indiana's Home Rule Act would not enable Indiana cities to declare such an emergency.[97] Again, it is a matter of framing the issue – it is

89. BAILEY & RAY, *supra* note 85.

90. *Id.*

91. Ryan Martin, *Indianapolis EMS Pulls Out of MCAT Partnership with IMPD, Eskenazi*, INDYSTAR (Dec. 29, 2018), https://www.indystar.com/story/news/crime/2018/12/29/indianapolis-crime-ems-pulls-out-partnership-impd-eskenazi/2214721002/ [https://perma.cc/NR3N-4P4M].

92. Drew Daudelin, *In State of the City Address, Hogsett Pitches Overhaul for Infrastructure Funding*, WFYI INDIANAPOLIS (May 29, 2019), https://www.wfyi.org/news/articles/in-state-of-the-city-address-hogsett-pitches-overhaul-for-infrastructure-funding [https://perma.cc/7ZN5-R8MB].

93. *See generally Do Needle Exchanges Lead to Higher Rates of Drug Abuse?*, *supra* note 40; *see also* NAT'L RESEARCH COUNCIL & INST. OF MED., *supra* note 40.

94. IND. CODE § 16-41-7.5-5(2) (2021).

95. *Compare* Hill, *supra* note 35 (criticizing SEPs in Indiana), *with* Erika L. Chapman, *Syringe Services Programs in Indiana*, RICHARD M. FAIRBANKS SCH. PUB. HEALTH, https://fsph.iupui.edu/doc/research-centers/20180427-ii-syringe-services-programs.pdf [https://perma.cc/KV7V-MX7B] (last visited Apr. 2, 2021) (detailing how, in 2017, Governor Holcomb signed Indiana's syringe exchange bill into law); *see also* § 16-41-7.5-5(2) (giving cities the power to unilaterally declare public health emergencies necessitating SEPs).

96. IND. CODE § 16-41-7.5-14 (2021).

97. *See* IND. CODE § 35-48-4-8.3 (2021).

only a criminal issue if it is framed as such.[98]

3. Opposition to Consider

Between SEPs and SIFs, SIFs are probably the most unsettled of OUD-fighting solutions. While the Indiana legislature *could* expressly grant a municipality the authority to operate such a site, at present it is extraordinarily unlikely that the State will take such a bold action; not only because of the Indiana Attorney General's position but also due to recent and continued threats by the United States government to shut down such a site.[99] Moreover, Indiana case law is all but silent about the boundaries of cities and counties to act unilaterally: in a slimline of cases, the Indiana Supreme Court has held that there are a variety of things that *are* permissible pursuant to home rule authority, but none of them are health-and-safety measures.[100] So, local governments have two options: to expend the energy getting a bill passed by the General Assembly (and being subject to the restrictions of such a bill if one *is* passed) or get "local consensus" and "shift[] the burden of legal action to [a SIF's or SEP's] *opponents*."[101] In the long run, shifting attitudes, continued studies regarding the efficacy of such facilities, and increased visibility "will probably lead to legislation throughout the nation clarifying [their] legal status."[102] Local governments have an opportunity to be a part of this important "clarifying" process on the ground level – by leveraging data-driven statistics and state law to frame SIFs and SEPs as life-saving measures.

Framing the issue as one of health and safety, for instance, can be effective: consider Philadelphia's Safehouse – who framed the issue of OUD and the opioid crisis as one of public health rather than a criminal concern.[103] Of course, Safehouse is a private nonprofit organization and does not seek to open a facility that is government-run – the district court judge in *Safehouse* expressly noted such.[104] In cases where local government is pitted against state or federal

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98. *See, e.g.*, *The Legal Strategies Used in Operating Syringe Exchange Programs in the United States*, *supra* note 16 (outlining several successful local attempts at implementing SEPs despite the lack of legal authority).

99. *See, e.g.*, Allyn, *supra* note 64.

100. *See, e.g.*, City of North Vernon v. Jennings Northwest Reg'l Utils., 829 N.E.2d 1 (Ind. 2005) (addressing the city's right to provide sewer services to a school within corporate limits); City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1225 (Ind. 2003) (addressing the city's right to bring a nuisance action against a handgun manufacturer); City of Crown Point v. Lake County, 510 N.E.2d 684 (Ind. 1987) (addressing the city's ability to exercise zoning authority over county government property); Dvorak v. City of Bloomington, 796 N.E.2d 236 (Ind. 2003) (addressing the city's ability to limit the number of single adults in a dwelling).

101. *See The Legal Strategies Used in Operating Syringe Exchange Programs in the United States*, *supra* note 16, at 1165 (emphasis added).

102. *Id.* (commenting on government officials using local consensus to justify SEPs).

103. *See* United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019).

104. *Who We Are*, SAFEHOUSE, https://www.safehousephilly.org/who-we-are [https://perma.

government, however, preemption issues will undoubtedly be raised.[105]

And, indeed, the Legislature can be a daunting consideration. In Indiana, the State General Assembly's "determination of public policy [is] afforded wide discretion."[106] And, local policy determinations are subject to express preemption by state action.[107] So, understood, it does not seem too big a leap to imagine that Indiana city and county action could take a backseat to legislative determinations – especially in dealing with measures such as SIFs and SEPs. To be sure, there is a good indication that when a locality does something that is not palatable to the General Assembly, legislation can be passed in an attempt to stop local efforts in their tracks.[108] Local government, then, can expect vigorous State challenges to SIFs.

Local efforts in Indiana are illustrative of this push and pull between local units and the state legislature. For instance, Marion County elected prosecutor Ryan Mears recently announced his Office's intentions not to file charges in certain marijuana cases.[109] But the General Assembly responded with a bill that would allow the Attorney General to appoint a special prosecutor to prosecute crimes in cases where the local prosecutor "refuses as a matter of public policy to prosecute those crimes."[110]

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cc/JW5B-TCKJ] (last visited Apr. 2, 2021).

105. *See, e.g.*, Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 348 Ore. 159 (Or. 2010) (discussing how a state statute that authorized the use of medical marijuana was preempted by CSA); People v. Crouse, 388 P.3d 39 (Colo. 2017) (discussing how a state provision for the return of a defendant's medical marijuana after acquittal was preempted by CSA); *but see* Ter Beek v. City of Wyoming, 846 N.W.2d 531 (2014) (holding that a state statute authorizing the use of medical marijuana was not preempted by CSA and citing anti-commandeering principles).

106. Hoagland v. Franklin Township Cmty. Sch. Corp., 27 N.E.3d 737, 749 (Ind. 2015) (citing Walton v. State, 398 N.E.2d 667, 670–71 (Ind.1980)).

107. *See, e.g.*, City of Gary v. Indiana Bell Tel. Co., 732 N.E.2d 149 (2000) (holding that even though the city's ordinance was permissible under the Home Rule Act, it became impermissible when the Indiana legislature passed legislation expressly preempting the city's ordinance).

108. *See generally* Holcomb v. City of Bloomington, 158 N.E.3d 1250 (Ind. 2020) (addressing the city's action for declaratory judgment against the governor, which challenged a "statute that stopped [the] city's proposed annexation of several areas of land").

109. Crystal Hill & Ryan Martin, *Marion County Will No Longer Prosecute Simple Marijuana Possession, Officials Say,* INDYSTAR (Sept. 30, 2019), https://www.indystar.com/story/news/2019/09/30/marion-county-no-longer-prosecute-marijuana-possession-officials-say/3818748002/ [https://perma.cc/CK3B-NU4B].

110. *See* S.B. 436, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2020) (proposing to allow the Attorney General to appoint a special prosecutor to prosecute certain crimes if the prosecuting attorney "refuses as a matter of policy to prosecute those crimes"); *see also* Rich Van Wyk, *Republican Senator's Bill Targets Prosecutor for Not Enforcing Marijuana Law*, WTHR (Jan. 24, 2020), https://www.wthr.com/article/republican-senators-bill-targets-prosecutor-not-enforcing-marijuana-law [https://perma.cc/2PNE-QUSC] (noting that the proposed legislation is likely aimed at the Marion County Prosecutor's decision to withhold prosecution for possession of less than one ounce of marijuana).

So, there is a lot for localities to consider when working under the eye of the State – especially on hot-button issues like drug abuse and prevention. But there is at least a starting point for acting unilaterally: Indiana's Home Rule Act.

V. INDIANA'S HOME RULE ACT OFFERS A LEGAL BASIS FOR MUNICIPAL SUPERVISED INJECTION FACILITIES AND SYRINGE EXCHANGE PROGRAMS

In 1868, in *City of Clinton v. Cedar Rapids and Missouri River Railroad Company*, the Iowa Supreme Court held that a local government may engage in activity *only* if it is expressly sanctioned by the state government.[111] This doctrine – that local units only had powers that were expressly given to them by the state – came to be known as Dillon's Rule, after *City of Clinton*'s author, Justice John Dillon.[112] It was reinforced by the United States Supreme Court in *Hunter v. City of Pittsburgh*.[113] Under Dillon's Rule, local government was relegated to lobbying the state legislature to get express authority for *anything* the city wished to accomplish.[114] Essentially, Dillon's Rule is a rule of statutory construction whereby any question as to whether a municipality is able to act is resolved with the strong presumption that the legislature intended on reserving that power exclusively for the state.[115]

On the other end of the spectrum was Justice Dillon's contemporary, Justice Thomas Cooley of the Supreme Court of Michigan.[116] Justice Cooley's views on municipal autonomy stood in stark contrast with Justice Dillon's dismissive view of local government as simply an administrative appendage of the state.[117] Justice Cooley wrote in 1871 that "[t]he state may [mold] local institutions according to its views of policy or expediency; but *local government is [a] matter of absolute right*; and the state cannot take it away."[118]

The inflexibility of Dillon's Rule would eventually lead to many states adopting their own home rule statutes.[119] Inspired by Cooley, the home rule movement really kicked off when Missouri enacted a constitutional home rule

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111. *See* City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455 (1868).

112. *See* Mun. Tech. Advisory Serv., *Dillon's Rule – Relationship of Municipalities to the State*, U. TENN. (Nov. 18, 2019), https://www.mtas.tennessee.edu/reference/dillons-rule [https://perma.cc/U8KP-9JAL].

113. Hunter v. City of Pittsburg, 207 U.S. 161, 178 (1907) (asserting that "[t]he state . . . at its pleasure, may modify or withdraw all such [municipal] powers" and that this "[a]ll . . . may be done . . . without the consent of the citizens").

114. *See Cities 101 – Delegation of Power*, NAT'L LEAGUE CITIES (Dec. 13, 2016), https://www.nlc.org/resource/cities-101-delegation-of-power [https://perma.cc/YC2M-Z25R].

115. *See generally* Richardson, *supra* note 20, at 662 (going to great lengths to emphasize that Dillon's Rule is a form of interpreting legislative intent whereas Home Rule tends to be less of an abstract doctrine and is usually a constitutional provision or statute).

116. *See id.* at 669.

117. *See id.*

118. People *ex rel.* Leroy v. Hurlbut, 24 Mich. 44, 108 (1871) (emphasis added).

119. *See Cities 101 – Delegation of Power*, *supra* note 114.

provision.[120] Indiana is one of many states that have since adopted such a provision, the Home Rule Act.[121]

Rejecting the operative theme of Dillon's Rule, the Home Rule Act provides that the notion that a unit of municipal government has only "powers expressly granted by statute . . . is abrogated."[122] Indiana's Home Rule Act gives localities "all . . . powers necessary or desirable in the conduct of its affairs, even though not granted by statute."[123]

Since Indiana's Home Rule Act gives broad leeway to local government,[124] Indiana cities and counties do not necessarily have to rely on specifically enumerated statutory provisions in combatting OUD. Indiana cities are granted both express statutory authority as well as allowed to act on their own pursuant to Indiana's Home Rule Act in the arena of OUD.

VI. HOW LOCAL SUPERVISED INJECTION FACILITIES AND NON-STATUTORY SYRINGE EXCHANGE PROGRAMS COULD WORK IN INDIANA

Judicial attitudes in the state are generally open to dialogue as it pertains to the opioid crisis: Indiana Supreme Court Chief Justice Rush has expressed her concern over a crisis "that is getting worse by the day."[125] Others have echoed these sentiments: Marion County Superior Court Judge William Nelson has urged his colleagues to "make it easier for those who suffer from substance use disorder to get the help they so desperately need."[126] But judicial acknowledgment of the problem does not mean local government could (or should) rely on the judiciary. Local consensus is critical.[127]

Locally, Indianapolis's City-County Council and Mayor Hogsett have been generally amenable to innovative solutions in combatting OUD.[128] And, as previously discussed, the elected Marion County Prosecutor has expressed concern over the application of state drug law. Indianapolis, at the time of writing

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120. JESSE J. RICHARDSON ET AL., IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT 10 (2003), https://www.brookings.edu/wp-content/uploads/2016/06/dillonsrule.pdf, [https://perma.cc/2PGD-NEDY].

121. SAMUEL B. STONE, HOME RULE IN THE MIDWEST 2 (2010), http://ppidb.iu.edu/Uploads/PublicationFiles/PC_HmRules_Web.pdf [https://perma.cc/FHQ8-YTEJ].

122. IND. CODE § 36-1-3-4(a) (2021).

123. IND. CODE § 36-1-3-4(b) (2021).

124. *Id*. (granting "all . . . powers necessary or desirable in the conduct of its affairs, even though not granted by statute").

125. *See* Katie Stancombe, *Opioid Summit Focuses on Treatment, Best Judicial Practices,* IND. LAW. (July 25, 2018) https://www.theindianalawyer.com/articles/47673-opioid-summit-focuses-on-treatment-best-judicial-practices [https://perma.cc/UY3M-BD3X].

126. *Id.*

127. *See generally The Legal Strategies Used in Operating Syringe Exchange Programs in the United States*, *supra* note 16.

128. *See, e.g.*, Sheridan, *supra* note 36; BAILEY & RAY, *supra* note 85.

this Note, has mobile syringe exchanges.[129] This is especially relevant since the United States Department of Justice ("DOJ") has explicitly conceded that a SIF, if executed through mobile vans, would not run afoul of the Controlled Substances Act ("CSA").[130] While Judge Gerald McHugh in his Safehouse memo called this position "myopic textualism,"[131] this concession carries considerable weight in a county like Marion where mobile harm reduction has been implemented. All these considerations make Marion County the most viable candidate for testing the viability of a SIF in Indiana. Of course, there is the matter of framing the issue, but the hurdles should be considered first – the CSA and state law. And, in order to reach the concerns under the CSA, state hurdles must first be cleared. The starting point to clearing any state hurdle is Indiana's Home Rule Act – since that is where the authority would come from – and any relevant portion of the Indiana Code that may be in conflict: a municipality would have to first analyze relevant Indiana law to search for possible preemption.

A. County-Run SIFs and Possible Hurdles

The Indiana Home Rule Act's preemption provision prohibits local regulation of "conduct that is regulated by a state agency, except as expressly granted by statute."[132] So the question in the context of SIFs and SEPs becomes: does the State already regulate this? A possible hurdle that Marion County could face is Indiana Code Section 12-23-18-0.5, which outlines requirements for opioid treatment programs in Indiana[133] – that is, if the State decided that a SIF was an opioid treatment program rather than a preventative harm reduction measure and that there was no significant difference between the two.[134] But that interpretation would be inapposite: the language of the statute *explicitly* refers to overdose reversal and Medicated-Assisted Treatment, and it makes no mention of overdose *prevention*.[135] Indeed, Indiana Code Section 12-7-2-135.6 defines an "opioid

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129. *Safe Syringe Access and Support Program*, MARION COUNTY PUB. HEALTH DEP'T, http://marionhealth.org/safesyringe/ [https://perma.cc/A6J2-KLBS] (last visited Apr. 2, 2021).

130. United States v. Safehouse, 408 F. Supp. 3d 583, 614 (E.D. Pa. 2019).

131. *Id.*

132. IND. CODE § 36-1-3-8 (2021).

133. IND. CODE § 12-23-18-0.5 (2021).

134. *See Principles of Harm Reduction*, NAT'L HARM REDUCTION COALITION, https://harmreduction.org/about-us/principles-of-harm-reduction/ [https://perma.cc/2HP7-S449] (last visited Apr. 2, 2021). The National Harm Reduction Coalition outlines harm reduction as accepting that drug use is "part of our world" and choosing "to minimize its harmful effects rather than ignore or condemn them." *Id.* Among the methods listed on the organization's website are syringe exchanges, SIFs, and overdose prevention. *Id.; but see Effective Treatments for Opioid Addiction*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/publications/effective-treatments-opioid-addiction/effective-treatments-opioid-addiction [https://perma.cc/L6G9-REMT] (last updated Nov. 2016) (associating treatment for OUD with MAT rather than preventive or harm reduction measures such as syringe exchanges and SIFs).

135. *See* § 12-23-18-0.5.

treatment program" as a program "through which opioid agonist *medication* is dispensed to an individual in the *treatment* of opiate addiction."[136]

In Indiana, the "primary rule of statutory construction is to ascertain and give effect to the intent of the legislature."[137] The best way to do this is through "the language of the statute itself."[138] Here, Section 12-7-2-135.6 makes clear that an opioid treatment program is a program whereby *drugs are dispensed*.[139] A SIF would not be primarily providing treatment; it would be primarily providing *harm reduction* – or, in other words, "accept[ing] . . . illicit drug use [a]s part of our world and choos[ing] to . . . minimize its harmful effects."[140]

Further, Section 12-7-2-135.6 defines a treatment program as dispensing medication,[141] so even if the State wanted to characterize a SIF as a "treatment" program, it would not make any meaningful difference because a SIF – or a SEP for that matter – would not be dispensing medication at all.[142] It is difficult to see how a local government-run SIF would be preempted by Section 12-23-18-0.5 since the operation of a SIF, and that of the facility contemplated by Section 12-23-18-0.5 (as defined by Section 12-7-2-135.6), would be completely different facilities: one, which the statute contemplates, a facility where medication is given to patients; the other, a SIF, where patients are supervised while they consume their *own* substances.

A. Non-Statutory Syringe Exchange Programs: Statutory Authority May Not Be All It Is Cracked Up to Be

The Home Rule Act's preemption provision also directly implicates SIFs and SEPs because possession of drug paraphernalia is in the purview of the State.[143] SEP enabling statutes are often seen as an "important step" in harm reduction and avoiding the criminalization of syringes obtained through these programs.[144] True, Indiana law makes it a Level 6 felony to possess a hypodermic syringe "for the use of a controlled substance . . . by injection."[145] So, it would seem that without a statute expressly exempting SEPs from the reach of Section 16-42-19-18, SEPs are preempted by state law. But, as far back as the 1990s, there have been several instances of local governments "reject[ing] the common assumption that drug

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136. IND. CODE § 12-7-2-135.6 (2021) (emphasis added).

137. Hendrix v. State, 759 N.E.2d 1045, 1047 (Ind. 2001).

138. *Id.* (quoting Chambliss v. State, 746 N.E.2d 73, 77 (Ind. 2001)).

139. § 12-7-2-135.6.

140. *Principles of Harm Reduction*, *supra* note 134.

141. § 12-7-2-135.6.

142. *Supervised Consumption Services*, *supra* note 55 (describing how staff members of SIFs "do not directly assist in consumption or handle any drugs brought in by clients").

143. IND. CODE § 35-48-4-8.3 (2020).

144. Nicholas J. Golding, *The Needle and the Damage Done: Indiana's Response to the 2015 HIV Epidemic and the Need to Change State and Federal Policies Regarding Needle Exchanges and Intravenous Drug Users*, 14 IND. HEALTH L. REV. 173, 201 (2017).

145. IND. CODE § 16-42-19-18 (2020).

laws govern the legal analysis of [SEPs]."[146] Indeed, there is really no meaningful immunity to syringe possession law conferred upon participants of SEPs by Indiana's enabling statute. In *Leatherman v. State*, the Indiana Court of Appeals held that the Indiana SEP statute "was not intended to – and does not – confer upon its participants immunity from prosecution for possession of paraphernalia."[147] The statute functions, the court reasoned, to "prohibit[] mere possession of a needle obtained through [a SEP] . . . as the bas[i]s for arrest or prosecution."[148]

So, while a would-be defendant cannot be prosecuted simply for *obtaining* the syringe through a SEP, a person could, nevertheless, "be found guilty of possession of paraphernalia if there was evidence that he intended to use those syringes for unlawful ends."[149] This "distinction" does not offer any actual protection for the end-user. There does not appear to be any meaningful immunity conferred on the end-user of statutorily authorized SEPs at all. To be sure, the statute at least functions as immunity for the *operators* of SEPs: "qualified entities" are expressly permitted to administer such programs.[150] But this presents the question: in the absence of the enabling statute, just what exactly would SEP operators be doing that is criminally actionable? Surely, the operators of the SEP would not be in possession of a syringe with the intent to use the syringes for "unlawful ends" – as *Leatherman* would have it – they would be in possession of syringes with the intent to curb the outbreak of a disease or mitigate harm in cases of OUD. And, the operators would not be in possession of a syringe to *use* the syringe at all.

This is precisely the point at which the defense of a county-run SIF and the defense of a county-run SEP would merge: the primary purpose (or *intent* in the case of Indiana's syringe possession law) for both would *not* be in contravention with the CSA's proscription of unlawfully using drugs, nor the intent to commit an offense as outlined in Indiana Code Section 35-48-4. The purpose and intent of a local SIFs or SEPs would be exclusively to provide "lifesaving medical care to those at risk of drug overdose."[151]

B. Consensus and Prosecutorial Discretion

One of the most important tools for Indiana cities and counties looking toward a locally sanctioned SIF or SEP is consensus.[152] Building local consensus

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146. *The Legal Strategies Used in Operating Syringe Exchange Programs in the United States*, *supra* note 16, at 1164.

147. Leatherman v. State, 101 N.E.3d 879, 886 (Ind. Ct. App. 2018).

148. *Id.*

149. *Id.*

150. IND. CODE §§ 16-41-7.5-3, -4, -6 (2021).

151. Defendant Safehouse's Answer, Affirmative Defenses, Counterclaims to Plaintiff's Complaint, and Third-Party Complaint at 5, United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (No. 2:19-cv-00519), 2019 WL 8723727.

152. *See The Legal Strategies Used in Operating Syringe Exchange Programs in the United*

is often easier than convincing the General Assembly.[153] Getting a bill passed by the General Assembly requires a "considerable" expenditure of energy and funds and requires building a cohesive coalition of legislators *across the state*.[154] And, the process can entail exhaustive and often unproductive efforts in lobbying "indifferent or hostile" legislators not attuned to local needs.[155] Local consensus-building has the critical effect of "shifting the burden of legal action to opponents" – and there is not even a guarantee that opponents *would* take action.[156]

Building local consensus means including everyone in the conversation. Local government is not just the mayors and city council people, but the "network[] of local leaders and institutions" that provide the "architecture of localism."[157] That includes local law enforcement.

Consensus between local law enforcement groups and public officials can be beneficial in allaying the negative effects of substance-abuse laws: Indianapolis Mayor Hogsett, commenting about Marion County Prosecutor Ryan Mears's decision to not prosecute low-level marijuana possession, said that he "want[s] to be supportive of anything [the] community needs to do to make [the] criminal justice process equitable and fair."[158] Marion County Sheriff Kerry Forestal welcomed the decision.[159]

The negative reactions to Mears's decision are a telling roadmap for what a municipality could expect if it were to unilaterally enable a SEP. The decision was described as "abrupt" and the Indianapolis Fraternal Order of Police commented that the policy raised "significant concerns" about an official "unilaterally" refusing to enforce state law.[160] Mears's policy also faced opposition from Indiana's Legislature; Senate Republican Mike Young authored Senate Bill 436, which would allow the Attorney General to appoint a special prosecutor if a local prosecutor "has announced as a matter of policy that the prosecuting attorney will not enforce all or part of a criminal statute enacted by

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States, *supra* note 16, at 1165.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (noting that "the experience of [SEPs] to date suggests that not every public official who would refuse to support [a SEP] would undertake to act affirmatively against it).

157. Michael Hendricks, *The Case for Local Government*, REAL CLEAR POL'Y (Mar. 4, 2019), https://www.realclearpolicy.com/articles/2019/03/04/the_case_for_local_government_111089.html [https://perma.cc/B9HN-B5YQ].

158. Kelly Reinke, *IMPD, Mayor Hogsett React to Prosecutor's Announcement to Not Pursue Minor Marijuana Cases*, FOX 59 (Oct. 1, 2019), https://fox59.com/news/impd-mayor-hogsett-react-to-prosecutors-announcement-to-not-pursue-minor-marijuana-cases/ [https://perma.cc/N3QC-HE92].

159. Olivia Covington, *Halt of Simple Pot Prosecution Gets Mixed Reaction*, IND. LAW. (Oct. 16, 2019), https://www.theindianalawyer.com/articles/halt-of-simple-pot-prosecutions-gets-mixed-reaction [https://perma.cc/3DK4-Z4ML].

160. *Id.*

the [G]eneral [A]ssembly."[161] The bill died when no action was taken before a critical deadline.[162] Ostensibly, Mears's policy will remain in effect for now. But, his detractors' accusations of "abruptness" and criticism regarding the unilateral nature of his actions suggest that a little more discussion toward a broader consensus could have insulated him from some of these attacks.

So, in addition to "reject[ing] the common assumption that drug laws govern the legal analysis" of SEPs or SIFs, local cooperation with the prosecuting authority is vital.[163] One could imagine a situation where, in the absence of an enabling statute, the Marion County Prosecutor's Office decided it would not enforce prohibitions on syringe possession *if* the syringes were obtained through a locally authorized SEP – and the Marion County Prosecutor's Office would work collaboratively with local police and City-County Council members. And, since the State's commandeering of prosecutorial authority from locally-elected officials is a move that carries "a good deal of baggage," there is a distinct possibility that the situation could turn out like the General Assembly's now-defunct challenge to Mears: a controversial and disagreed-with decision that ultimately remains unscathed.[164]

Of course, cooperation only gets a local government so far. A spokesperson for the current United States Drug Enforcement Administration claimed that "[SIFs], so-called safe injection sites, violate federal law."[165] So, any locality attempting to open a SIF will be subject to the looming threat of federal law enforcement action.

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161. S.B. 436, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2020); *see also* Olivia Covington, *Social Justice Prosecuting Bill Advances Despite Opposition*, IND. LAW. (Feb. 5, 2020), https://www.theindianalawyer.com/articles/social-justice-prosecuting-bill-advances-despite-opposition [https://perma.cc/R7QS-RYKS].

162. Associated Press & IL Staff, *Senator Drops Push to Force Indiana Marijuana Prosecutions*, IND. LAW. (Feb. 5, 2020), https://www.theindianalawyer.com/articles/senator-drops-push-to-force-indiana-marijuana-prosecutions [https://perma.cc/B5NY-V3UA].

163. *The Legal Strategies Used in Operating Syringe Exchange Programs in the United States*, *supra* note 16, at 1164.

164. *See* Associated Press & IL Staff, *supra* note 162 (quoting Republican House Speaker Brian Bosma on the matter of the State intervening in local prosecutions).

165. Dominic Holden, *The Trump Administration Says Proposed Heroin Injection Sites Could Face "Legal Action,"* BUZZFEED NEWS (Feb. 14, 2018), https://www.buzzfeednews.com/article/dominicholden/the-trump-administration-says-proposed-heroin-injection?bfsource=relatedmanual [https://perma.cc/J536-BPBM].

VII. THE "CRACK HOUSE STATUTE" PRESENTS A SIGNIFICANT HURDLE TO MUNICIPAL SUPERVISED INJECTION FACILITIES AND SYRINGE EXCHANGE PROGRAMS

A. The DOJ and the "Crack House" Challenge

The CSA presents the most imminent threat to the implementation of SIFs.[166] The current DOJ strategy, as evidenced by the Safehouse order, is that SIFs are prohibited by the CSA because they are used for the purpose of unlawfully *using* a controlled substance pursuant to 21 U.S.C. Section 856(a).[167] Section 856(a), also known as the "Crack House Statute" because of its enactment to fight the crack epidemic in the 1980s, is the most often advanced provision under the CSA for why SIFs violate federal law.[168] The Crack House Statute makes it unlawful to "open, lease, rent, use, or maintain any place . . . for the purpose of manufacturing, distributing, or using any controlled substance."[169] It also extends to anyone who "manage[s] or control[s] any place . . . or make[s] available for use . . . the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance."[170]

Although the statute appears broad-reaching on its face, in its early days, the Crack House Statute was used as a basis for the conviction of defendants who sold or manufactured drugs out of their homes.[171] Most cases tied the statutory "purpose" to a business-like context: in the Tenth Circuit, that meant having the "characteristics of a business"; the focus in the Seventh Circuit has been on "significant commercial sales"; and, in the Fifth Circuit, "manufacturing and distribution."[172] There is now at least some general agreeance among scholars and circuit courts that the Crack House Statute also covers premises maintained for the purpose of *consumption*.[173] This is currently where SIFs face their biggest

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166. United States v. Safehouse, 408 F. Supp. 3d 583, 614 (E.D. Pa. 2019).

167. *Id.*

168. *See generally id.*; *see also* Alex Kreit, *Safe Injection Sites and the Federal "Crack House" Statute,* 60 B.C. L. REV. 414 (2019).

169. 21 U.S.C. § 856 (a)(1) (2020).

170. 21 U.S.C. § 856(a)(2) (2020).

171. *See, e.g.*, United States. v. Morgan, 117 F.3d 849, 856 (5th Cir. 1997) (involving a defendant who was selling drugs out of a house "in the projects"); United States. v. Verners, 53 F.3d 291 (10th Cir. 1995) (describing how the primary purpose of maintaining a house was to manufacture crack-cocaine); United States v. Church, 970 F.2d 401, 406 (7th Cir. 1992) (broadening the Crack House Statute to include maintaining a house for "the purpose of" crack distribution).

172. *See Verners*, 53 F.3d at 296 (describing the characteristics of a business); *Church*, 970 F.2d at 406 (describing significant commercial sales); United States v. Roberts, 913 F.2d 211, 221 (5th Cir. 1990) (describing manufacturing and distribution).

173. *See, e.g.*, United States v. Shetler, 665 F.3d 1150, 1164 (9th Cir. 2011) (noting that the Crack House Statute could apply in some situations where there is evidence that "numbers of non-resident individuals" are actively involved in drug consumption); *see also* Michael E. Rayfield,

challenge. Yet there is disagreement about just what the Crack House Statute's "purpose" looks like.

B. The Primary Purpose Defense

Safehouse's success at the district court level hinged mainly on its "primary purpose" defense to the DOJ's application of the Crack House Statute.[174] Safehouse's primary purpose defense essentially stated that the primary purpose for which Safehouse would operate was not for the use, manufacture, or distribution of drugs but rather for the "exclusive purpose of providing urgent, lifesaving medical care to those at risk of drug overdose."[175] While in *Safehouse* the Eastern District of Pennsylvania used the "primary purpose" test in terms of *consumption*, other circuit courts are split on the issue of purpose. For example, the Fifth Circuit uses "significant purpose."[176] In *United States v. Soto-Silva*, the Fifth Circuit explained that, although there may be a different *primary* purpose for maintaining the premises, as long as drug distribution was "at least a significant purpose," the activity ran afoul of the Crack House Statute.[177] The Seventh Circuit, in contrast, does not explicitly require that the purpose be primary or significant but instead speaks in terms of the *character* of the purpose for which the premises are being maintained.[178] The problem in the context of SIFs, however, is that drugs are being neither distributed nor manufactured.[179] As of writing this Note, no circuit court has directly addressed how to properly assess whether premises are being used for "the purpose" of facilitating the use of controlled substances.

We do know, however, that *casual* drug use in one's *home* – where the person in control of the premises is the user – is generally considered by circuit courts to be outside of the scope of the Crack House Statute. This is the case in at least the Ninth, Sixth, and D.C. Circuits.[180] But, Judge McHugh's painstakingly analytical opinion in *Safehouse* suggests how difficult the *facilitation* of drug use

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Pure Consumption Cases Under the Federal "Crackhouse" Statute, 75 U. CHI. L. REV. 1805, 1817-18 (2008) (recognizing that the Crack House Statute applies to drug consumption).

174. *See* United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019).

175. Defendant Safehouse's Answer, Affirmative Defenses, Counterclaims to Plaintiff's Complaint, and Third-Party Complaint, *supra* note 151.

176. *See* United States v. Soto-Silva, 129 F.3d 340, 347 (5th Cir. 1997).

177. *Id.* at 347.

178. *Church*, 970 F.2d at 405-06; *but see* United States v. Flores-Olague, 717 F.3d 526, 531 (7th Cir. 2013) (hinting at turning towards the "primary purpose" requirement and relying on UNITED STATES sentencing guidelines that refer to the Crack House Statute as not requiring manufacturing or distribution as the sole purpose but as "one of the . . . primary purposes").

179. *Supervised Consumption Services*, *supra* note 55.

180. *See, e.g.*, United States v. Shetler, 665 F.3d 1150 (9th Cir. 2011) (describing how the Crack House Statute does not criminalize "simple consumption" in a person's own home); United States v. Russell, 595 F.3d 633 (6th Cir. 2010) (adopting a "casual" drug user exception); United States v. Lancaster, 968 F.2d 1250 (D.C. Cir. 1992).

becomes under the Crack House Statute as it might apply to SIFs.[181] Ultimately, Judge McHugh arrives at the conclusion that the proscribed purpose under the Crack House Statute – facilitating drug use – must be a "significant" or "one of the primary" purposes.[182] The government in *Safehouse* contended that Safehouse's primary purpose could *not* be to prevent or reduce drug use since individuals would be using drugs on the premises.[183] However, as the government acknowledged, and per Safehouse's own description, Safehouse would offer "peer specialists, recovery specialists, social workers, and case managers who will specifically encourage treatment."[184] This, the court concludes, is a program that seeks to *reduce* drug use rather than facilitate it.[185]

Although Safehouse is a private nonprofit corporation, the primary purpose defense could equally serve local government. The primary purpose of a SIF is to provide for the critical care of those at risk of drug overdose, the only difference would be that the critical care is being provided by the municipality.

But what if local government took the primary purpose defense a step further? What if the Marion County Prosecutor's Office or the Health and Hospital Corporation of Marion County was engaged in the *enforcement* of this primary purpose – that, pursuant to a municipal ordinance, it required the city or a city agency to make the mitigation of OUD a matter of public safety? Well, at least one commentator would say there is a possibility that such enforcement could fall under the CSA's little if ever invoked "immunity" clause. But, for reasons outlined below, the immunity clause presents a tenable-at-best defense of a city or county-run SIF.

1. A Tempting Proposition: The Controlled Substances Act's "Immunity" Clause

Professor Alex Kreit of Thomas Jefferson School of Law writes of the "immunity" clause "buried within the [CSA]" at Section 885(d).[186] The provision provides in part that "no civil or criminal liability shall be imposed . . . upon any duly authorized [f]ederal officer . . . or . . . political subdivision thereof . . . who shall be lawfully engaged in the enforcement of any . . . municipal ordinance relating to controlled substances."[187] At a cursory glance, then, the plain language of the provision seems to support a government-run SIF: the local government would enact a law declaring OUD an emergency, and provide an ordinance that authorizes SIFs to counter that emergency. The employees at the SIF would be

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181. *See generally* United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (utilizing multiple canons of interpretation, including lengthy legislative history considerations).

182. *Id.* at 607-08 (describing how the government agreed that an "incidental purpose would be insufficient").

183. *Id.* at 614.

184. *Id.*

185. *Id.*

186. Kreit, *supra* note 168, at 442.

187. 21 U.S.C. § 885(d) (2020).

engaged in "enforcing" the local law. But a plain language analysis might only get us so far.

While the Crack House Statute has been somewhat litigated at the appellate level, there is little case law surrounding Section 885(d), and most cases involve undercover officers – or what Kreit calls "rogue" government officials.[188] Despite the limited legislative history regarding the clause, Kreit and others suggest that it was probably included to provide immunity for undercover officers who may, as part of their official duty, be tasked with handling illegal drugs.[189] That the provision applies to undercover officers certainly aligns with the word "enforcement" as it is commonly understood; *Black's Law Dictionary* defines enforcement as "the act or process of compelling compliance with a law."[190] But where is the *compulsion* in the case of SIFs? To be sure, government employees at county-run SIFs would not be compelling the compliance with the ordinance, they would simply be carrying out the provisions of that ordinance.

But Kreit ambitiously suggests a more expansive definition of "enforcement": that it may also mean, as the United States Supreme Court noted in *Merrill Lynch v. Manning*, to "give force [or] effect to."[191] True, some courts have accepted that "enforce" (rather than "enforcement") encompasses more than just the compulsory aspect. For instance, the Eighth Circuit has accepted the United States Supreme Court's definition.[192] Other courts, including at least the D.C. and Tenth Circuits, have similarly adopted this definition.[193] So, the "immunity" clause seems tempting: city or county workers at a SIF would be "enforcing" a health-and-safety directive under local law and therefore would be covered by Section 855(d).

But Section 855(d) does not enjoy the same breadth of legislative history nor the guidance of robustly litigated terms and provisions like the Crack House Statute. Judge McHugh was receptive to the "primary purpose" defense in part because it was not created out of the whole cloth; it was thoughtfully patterned using existing circuit precedent.[194] So, while it might be tempting to rely on

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188. Kreit, *supra* note 168, at 443; *see also* United States v. Wright, 634 F.3d 770 (5th Cir. 2011) (holding that the defendant deputy sheriff was not entitled to a Section 885(d) defense when attempting to possess cocaine); United States v. Fuller, 162 F.3d 256 (4th Cir. 1998) (rejecting the defendant mayor's "under-cover drug operations" via a Section 885(d) defense on the distribution of crack cocaine charges).

189. *See* Kreit, *supra* note 168, at 443.

190. *See Enforcement*, Black's Law Dictionary (11th ed. 2019).

191. Kreit, *supra* note 168, at 451 (quoting Merrill Lynch v. Manning, 136 S. Ct. 1562, 1569 (2016)).

192. McGhee v. Pottawattamie Cty., Iowa, 547 F.3d 922, 931 (8th Cir. 2008) (recognizing that "enforce . . . must mean something other than to 'prosecute'").

193. *See* Bellagio, L.L.C. v. NLRB, 863 F.3d 839, 848 (D.C. Cir. 2017); Greenbaum v. Bailey, 781 F.3d 1240, 1244 (10th Cir. 2015); K.P. v. LeBlanc, 627 F.3d 115, 127 (5th Cir. 2010) (Dennis, J., concurring) (asserting that a "conception of 'enforcement' as involving compulsion or constraint seems . . . unnecessarily restrictive").

194. United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (relying on the Fifth

Section 855(d) as a magic key – there is certainly more than one reasonable resolution of the word "enforcement" – a city or county acting unilaterally would be on extraordinarily weak footing considering the case law surrounding the provision. Anyone urging an expansive reading of Section 885(d) would face an uphill battle of dictionary definitions and unhelpful case law.

2. Time is a Safer Bet Than Section 885(d)

Of course, if there were a *state* law permitting "enforcement" of a local health-and-safety regulation that requires life-saving drug prevention resources, a SIF might start to look more like a police power health-and-safety "enforcement" action. That is certainly true in the case of SEPs: the Indiana SEP statute authorizes counties to unilaterally declare a public health emergency in order to implement a SEP.[195] But SEPs are, at least to some degree, now accepted at the federal level.[196] This is due, in large part, to the HIV/AIDS epidemic during the early to mid-1990s: the harm reduction research being done by private foundations eventually culminated in the Secretary of HHS acknowledging the efficacy of SEPs.[197]

The same is true of Indiana: it was the dual opioid/HIV epidemic in Scott County that led to SEPs being endorsed by the politicians that once found them objectionable.[198] But the future of SEPs in Indiana is uncertain.[199] Attempts to remove the sunset date were unsuccessful.[200] Yet, the behind-the-scenes action looks hopeful: although Senate Bill 207 (the bill that would eliminate the sunset provision) died, support continues to grow: Indiana Senator Michael Crider, a Republican from Greenfield, has said that he does not like SEPs but "based on what [he] know[s], there is no way [he could] vote against a bill like" Senate Bill 207.[201] This constantly mounting support for SEPs in Indiana is a stark contrast to the beliefs held previously by Indiana public officials: SEPs were banned in the State before the HIV outbreak in 2015.[202] Indeed, it was so morally difficult for

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Circuit's and Seventh Circuit's definitions of "purpose" as proscribed by statute).

195. IND. CODE § 16-41-7.5-4 (2021).

196. *See, e.g.,* 42 U.S.C. § 300ee-5 (2020) (authorizing, in limited instances, the use of federal funds for needle exchange programs that "would be effective in reducing drug abuse").

197. *See* Don C. Des Jarlais, *Harm Reduction in the USA: The Research Perspective and an Archive to David Purchase*, 14 HARM REDUCTION J. 51 (2020).

198. Victoria Knight, *Needle Exchanges Find New Champions Among Republicans*, KAISER HEALTH NEWS (May 9, 2019), https://khn.org/news/needle-exchanges-find-new-champions-among-republicans/, [https://perma.cc/269D-K6W8].

199. *See* IND. CODE § 16-41-7.5-14 (2021).

200. S.B. 207, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2020).

201. Whitney Downard, *Syringe Service Program Bill Dies in Indiana Senate*, IND. ECON. DIG. (Feb. 5, 2020), https://indianaeconomicdigest.net/Content/Default/Major-Indiana-News/Article/-span-style-font-weight-bold-Syringe-service-program-span-bill-dies-in-Indiana-Senate/-3/5308/98745?s=1 [https://perma.cc/N6Q2-CD6R].

202. *See* Jake Harper, *Indiana's HIV Outbreak Leads to Reversal on Needle Exchanges*, NPR

then-Governor Mike Pence to approve a SEP in Scott County in the midst of the HIV outbreak that he had to "pray on it."[203] And, of course, it is a difficult decision, balancing one's deeply held convictions against "ground-level reality."[204] But that is precisely what is hopeful about this scenario: changing sentiment regarding once-controversial harm reduction measures gives way in the face of such "ground-level realities" as the opioid epidemic. Time, as has been proven in Indiana's case, seems like a much more useful tool than a strained reading of Section 885(d). But do we have time? Indeed, "hurry up and wait" seems like cold comfort in the face of such a pressing problem. Of course, litigants would want to assert the "enforcement" defense, it is just likely not the winning option. But what would SIFs – and to some extent, continuing SEPs – look like in Indiana, *right now*? How would the judiciary react to the "primary purpose" defense?

C. Primary Purpose and Indiana's Home Rule Act

The primary purpose defense that served Safehouse well thus-far in its battle with the DOJ is well-outlined in its Memorandum.[205] It is a potentially valuable source of legal theory on how to develop a possible defense to a DOJ challenge to a city or county-run SIF. Further, the DOJ's Motion for Summary Judgment provides telling insight on how the DOJ might continue to prosecute such facilities.[206] Since the "primary purpose" defense, as it relates to the CSA, has been discussed previously in this Note, and because the case is on appeal, vigorous briefing by both sides is sure to follow.[207] As such, I will not belabor it much here.

More importantly though, for purposes of this Note, is the "primary purpose" defense in the context of Indiana's syringe possession law's intent requirement. Section 16-42-19-18 requires that the *defendant* have the specific intent to use an "instrument adapted [for the] use of narcotics" in an illegal manner.[208] Illegal manner means the "intent to violate the Indiana Legend Drug Act."[209] The Indiana

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(June 2, 2015), https://www.npr.org/sections/health-shots/2015/06/02/411231157/indianas-hiv-outbreak-leads-to-reversal-on-needle-exchanges [https://perma.cc/SL6Z-DD83].

203. Megan Twohey, *Mike Pence's Response to H.I.V. Outbreak: Prayer, Then a Change of Heart*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/us/politics/mike-pence-needle-exchanges-indiana.html [https://perma.cc/7YL7-8GKN].

204. *Id*.

205. *See* Safehouse's Memorandum of Law in Opposition to the Department of Justice's Motion for Judgment on the Pleadings at 1-6, United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (No. 2:19-cv-00519), 2019 WL 6704500.

206. United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019).

207. *See* The United States' Motion for Summary Judgment and Opposition to Safehouse's Motion for Declaratory Judgment at 1-2, United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (No. 19-0519), 2020 WL 562321.

208. *See* Cooper v. State, 357 N.E.2d 260, 265 (Ind. Ct. App. 1976).

209. *See id.* at 264.

Legend Drug Act ("ILDA") prohibits "possess[ion] or use [of] a legend drug."[210] If the enabling county or the facilitators of the SIF or SEP were charged under the syringe possession statute, they would not have the requisite intent under the syringe possession statute because neither the county nor the staff of the SIF or SEP would have the intent to use the syringe for the purpose of using a legend drug under the ILDA. Neither the county nor the facilitators would be using *any* drugs. So, enabling statute or not, the outcome is the same for both the county as well as the employees – they simply do not have the intent to possess or use a legend drug.

To be sure, it would almost certainly be the intent of a *participant* in the program to use a legend drug with a syringe obtained through a SEP. And, of course, a participant at a SIF would be in possession of a legend drug as proscribed by the ILDA and using the syringe to inject a legend drug at the facility itself. But, especially in the case of SEPs, there is no meaningful difference in the legality of the participant defendant's actions: under current Indiana case law, a defendant who participates in such programs *can still be charged and convicted under the statute*.[211] So, the outcome, in terms of criminality, theoretically, remains the same for both the participant and the operator, statutory authority or not. Unquestionably, though, the local enabling body would need to gain the consensus of both the community and law enforcement in order to give any meaningful effect to a city or county-run SIF or SEP.

VIII. CONCLUSION

While Indiana has made strides in combatting OUD, there exist fundamental differences between state and local interests. Moreover, as cities and counties are more uniquely positioned to address a problem such as OUD, they can more effectively implement harm reduction strategies. Although such entities are at the creation of the State, Indiana localities enjoy some level of local autonomy in providing for matters that are uniquely local in character. If Indiana cities and counties want to see a continued reduction in casualties by OUD, then they should use all the tools at their disposal. Two of these tools are SIFs and SEPs. Despite state and federal concerns, an Indiana city or county, under the Home Rule Act's authority – and a clever reframing of critical issues – may put forth a tenable legal claim to be able to operate a municipal SIF or SEP.

Although both the Indiana and federal governments have expressed increasing reluctance to accept the efficacy SIFs, and the future of SEPs in Indiana remains uncertain, the question remains: how will this reluctance look in practice and what can Indiana cities and counties do to prepare for the challenge?

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210. IND. CODE § 16-42-19-13 (2021).

211. Leatherman v. State, 101 N.E.3d 879, 886 (Ind. Ct. App. 2018).

The only way to know for sure is to build a local consensus and bolster the city or county for the legal challenges to come – or be hamstrung to waiting for a sea-change in public and political sentiment. So, perhaps a better question to ask is, as Kassandra Frederique of Drug Policy Alliance puts it, "why [do we] we keep asking . . . law enforcement officials what are appropriate interventions in a *health* crisis?"[212]

212. Gullapalli, *supra* note 72.