

Supervised Consumption Facilities: Legal and Policy Considerations

Harm Reduction Commission

January 9, 2019

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Overview

1. Public health, innovation, and the law
2. Legal and policy considerations in SCFs
3. SCF part of a harm reduction approach

Public Health Innovation in Massachusetts

- Bottom-up change: local solutions lead, the law follows (e.g. seat belts, needle exchange, naloxone)
- Federalist structure designed to encourage local and state experimentation (“laboratories”)
- Public health emergency declaration adds urgency, flexibility, and legal weight to efforts to innovate (Mass. G. L. Ch. 17, § 2A)
 - Commissioner can take action and incur liability necessary to maintain public health

Conceptual Precedent: Syringe Exchange

- Grass-roots innovation in response to a public health crisis
- Civil disobedience (1988-2006)
- Litigation (most recently in 2017)
- Building the research base
- Reform proceeded through legislation (M.G.L. c.111 s.215)
- In many cases, non-action by prosecutors and law enforcement (including federal)



(1990-1991)

Conceptual Precedent: Cannabis

- Grass-roots innovation starting at local level
- Civil disobedience (1980s)
- Litigation
- Reform proceeded through ballot measure
- In many cases, non-action by prosecutors and law enforcement (including federal)

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NEWS: [Local](#) National Politics Crime Marijuana Animals Trending Business Jobs

When will cannabis cafes open in Massachusetts and what will they look like?

Bay Staters will soon be able to buy marijuana, but they still will have to take it home to consume it. Regulators say that will change; it's just going to be a bit of a wait.

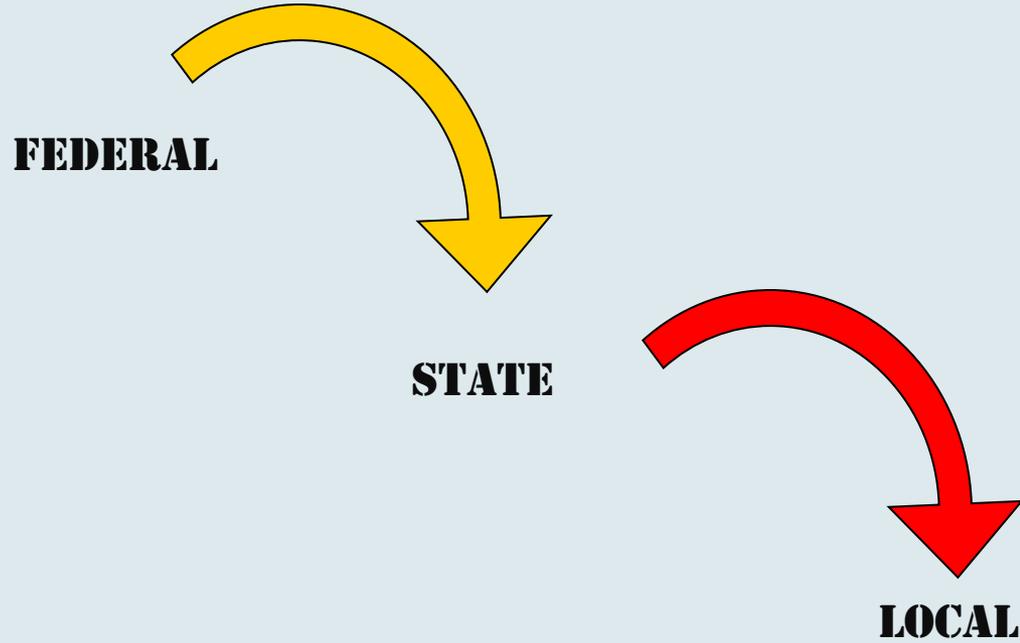


Michael Leonor hits a bong in the smoking lounge at Barbary Coast Dispensary in San Francisco. *—Jeff Chiu / AP*

By [Nik DeCosta-Klipa](#) June 11, 2018

Imagine if alcohol was legal, but bars were not.

Federalism: Laboratories of Innovation



SCFs Reform on State Level

1. Creation of safe harbor provisions/carveouts from state criminal law, in line with Good Samaritan law
2. Creation of indemnification for professionals, property operators, and volunteers, possibly by expanding naloxone or Good Samaritan provisions
3. Creation of technical elements, standards, licensing requirements, funding, etc.

SCFs: Expanding Existing Public Health Laws

- Building on/expanding existing laws to advance public health and save lives
- Less dramatic than actions already taken, e.g. legalizing cannabis
- Solid scientific evidence (contrast with syringe exchange and cannabis)
- **Feasibility: Not pre-empted on federal level: law would be on sound legal footing**

SCFs and Federal Law: Feasibility?

- Criminal
 - Controlled Substances Act
 - Individual possession, conspiracy, and intent provisions
 - “Crackhouse” statute (§856) applies to operators
- Civil
 - Property forfeiture
- Professional
 - Loss of DEA license

Cannabis and Federal Law: Feasibility?

- Criminal
 - Controlled Substances Act
 - Individual possession, **distribution**, conspiracy and intent provisions
 - “Crackhouse” statute (§856) applies to operators
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Crack House Statute Considerations

- Legal arguments include
 - Crack House Statute was never intended to apply to a *bona fide* public health/medical facility
 - Regulation of public health is a core state power which is granted great deference
 - Locally authorized SCF is not pre-empted by the Crack House Statute (no “positive conflict”)
 - “Purpose” requirement is not met
 - Necessity defence bolstered by public health emergency
- May depends on who is running the facility
- Never been tested

Feasibility: Enforcement Discretion

1. Historically, possession, distribution charges rarely pursued by federal law enforcement
2. State and local law enforcement do not enforce federal law
3. Litigation (injunctive relief) could allow innovation to proceed
 - This is exactly how Insite was allowed to remain open

Feasibility: Federal Pathways

1. Research mechanisms:
 - exemptions
 - funding
2. Funding rider (e.g. Rohrabacher–Farr)
3. Court injunction pending litigation
4. Longer term: Controlled Substances Act reform

Feasibility: Politics

1. Threatening statements made by federal law enforcement w/r/t SCFs
 - Almost identical to threatening statements made by federal law enforcement w/r/t cannabis
2. Regulatory process for establishing regulations, licensing, etc. takes substantial time, whereas politics of enforcement discretion can shift quickly
 - Cannabis and syringe exchange: 1-2 years
3. Formal federal drug law reform for “hard drugs” is unlikely in the near future, but OD crisis continues

What is Harm Reduction?

Harm reduction incorporates a **spectrum of strategies** from safer use, to managed use, to abstinence - to meet drug users “where they’re at,” addressing conditions of use along with the use itself. Because harm reduction demands that interventions and policies designed to serve drug users reflect specific individual and community needs, there is no universal definition of or formula for implementing harm reduction.

The defining features (of harm reduction) are the **focus on the prevention of harm**, rather than on **singular focus on stopping drug use per se**, and the focus on people who continue to use drugs.

<https://harmreduction.org/about-us/principles-of-harm-reduction/>

<https://www.hri.global/what-is-harm-reduction>

Beyond SCFs: Comprehensive Approach to Prevent Drug-Related Harms

Intervention	State of Evidence	Existing MA Capacity
Low threshold OAT	Strong	Moderate (but uneven)
Naloxone distribution	Strong	Moderate (but uneven)
Syringe exchange	Strong	Low → Moderate
Supervised Consumption	Strong	None
Injectable OAT	Strong	None
Harm reduction in CJ settings	Strong	None
Safe disposal (syringes)	Moderate	Low
Good Samaritan Policies	Moderate	Moderate (limited scope)
Drug checking	Emerging	Low
Cannabis replacement	Emerging	None
CJ Deflection	Emerging	Low

Conclusion

- Change is already happening
- States or localities with the will to advance evidence-based public health have reasonable claim to legality
- State legislation puts SCFs on strongest footing
- Federal level is unpredictable, and politics (if not policies) can change quickly
- Imperative: to prevent harm with best evidence

Acknowledgements

- This presentation is based, in part, on:
 - “The Law (and Politics) of Safe Injection Facilities in the United States” *American Journal of Public Health* (2008) 98(2): 231-7
 - “Federalism, Policy Learning and Local Innovation in Public Health: The Case of the Supervised Injection Facility” *St. Louis Law Journal* (2009)
- Thanks to MMS, Corey Davis, Evan Anderson, Scott Burris

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