

Pure Consumption Cases under the Federal “Crackhouse” Statute

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INTRODUCTION

The federal “crackhouse” statute, 21 USC § 856, makes it a felony to “knowingly open, lease, rent, use, or maintain any place . . . for the purpose of manufacturing, distributing, or using any controlled substance.”¹ This Comment focuses on what it means for a defendant to open or maintain a place “for the purpose of . . . using” a controlled substance² under § 856(a)(1).

In cases involving the manufacture or distribution of drugs (or both), circuit courts have struggled to determine exactly what kind of “purpose” is sufficient for criminal liability under the statute. These circuit courts agree that the statute covers more than just those who open or maintain facilities *solely* for the purpose of drug activities³ (as is often the case with a traditional “crackhouse”). They have also assumed, in dicta, that the statute does not apply to drug activities that are merely an “incidental” purpose of the place⁴ (such as a high school student smoking the occasional gram of marijuana in his parents’ house).

However, between these two poles, circuit courts are split over the proper test for determining whether a defendant’s purpose for opening or maintaining a place is sufficiently related to his particular use, manufacture, or distribution of drugs to qualify him for criminal liability. The Tenth and Fifth Circuits have approached the issue by broadly defining “purpose” in terms of the importance of the drug activities to the defendant but have disagreed on whether the manufacture, distribution, or use must be either: (1) at least one of the “primary purpos-

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¹ 21 USC § 856(a)(1) (2000 & Supp 2004).

² 21 USC § 802(6) (2000 & Supp 2004) defines “controlled substance” as “a drug or other substance, or immediate precursor,” included in the statutory schedules provided in 21 USC § 812(c) (2000). The term includes marijuana and cocaine, which are Schedule I(c)(10) and Schedule II(a)(4) controlled substances, respectively. The term does not include distilled spirits, wine, malt beverages, or tobacco. 21 USC § 802(6). This Comment uses the terms “drug” and “controlled substance” interchangeably.

³ See, for example, *United States v Roberts*, 913 F2d 211, 220 (5th Cir 1990) (reasoning that a contrary interpretation would “eviscerate the statute”).

⁴ See, for example, *United States v Lancaster*, 968 F2d 1250, 1253 (DC Cir 1992).

es” of the place;⁵ or (2) at least a “significant purpose” of the place.⁶ The Seventh Circuit has defined “purpose” in terms of more specific kinds of activity, such as “significant commercial sales” or acting like a “supervisor, manager, or entrepreneur” as opposed to a mere “underling” or “landlord.”⁸

Although circuit courts have developed several tests for interpreting § 856(a)(1), no circuit court has applied the statute to a case of “pure consumption,” meaning a case involving consumption of drugs in the absence of any manufacture or distribution of drugs. This Comment addresses the unique problems raised by pure consumption cases and draws two novel conclusions.

First, because of the plain language of the statute—particularly the presence of the words “using” and “or”—§ 856(a)(1) must cover some pure consumption cases. The word “using” must be interpreted to mean consumption in order to give the word a meaning apart from the words “manufacturing” and “distributing.” Furthermore, the presence of the word “or” in the statute means that a defendant can be convicted even if his purpose for opening or maintaining the place is *only* to consume drugs without manufacturing or distributing any drugs.

Second, pure consumption cases require a different standard from the tests provided by the circuit courts in manufacturing and distribution cases.⁹ These tests provide too low and too vague a threshold for pure consumption cases. The legislative intent of the statute—to target drug activity to which the defendant’s property meaningfully *contributes* in some way—suggests that “using” was intended to capture a narrower range of conduct than manufacturing and distributing. Thus, a stricter and more specific standard is necessary to draw a line between pure consumption covered by the statute and pure consumption

⁵ *United States v Verners*, 53 F3d 291, 296 (10th Cir 1995).

⁶ *United States v Soto-Silva*, 129 F3d 340, 346 n 4 (5th Cir 1997).

⁷ *United States v Church*, 970 F2d 401, 406 (7th Cir 1992).

⁸ *United States v Banks*, 987 F2d 463, 466–67 (7th Cir 1993) (noting that if a defendant is merely an “underling” or “landlord,” he should be prosecuted under § 856(a)(2) rather than § 856(a)(1)). For a discussion of the distinction between § 856(a)(1) and § 856(a)(2), see Part I.B.

⁹ An inappropriate standard would be especially problematic because crack usage is widespread, so the statute potentially affects many people. According to the 2006 National Survey on Drug Use and Health, approximately 8.6 million Americans aged twelve or older reported trying crack cocaine at least once during their lifetimes, representing 3.5 percent of that population. US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Results from the 2006 National Survey on Drug Use and Health: National Findings* 228–29 tables G.1–G.2 (Sept 2007), online at <http://www.oas.samhsa.gov/nsduh/2k6nsduh/2k6Results.pdf> (visited Aug 29, 2008). Furthermore, in 2006, approximately 1.5 million Americans aged twelve or older (0.6 percent of the population aged twelve or older) reported that they had used crack cocaine in the past year, and 702,000 (0.3 percent) reported use in the past month. *Id.* at 230–33 tables G.3–G.6.

left to other drug possession statutes with lower penalties¹⁰—stricter in the sense that the standard actually requires courts to find that the defendant's place contributed meaningfully to his drug consumption and more specific in the sense that it directs courts to particular kinds of evidence establishing a link between the place and the consumption.

This Comment proposes a new test involving three factors for determining whether a defendant has opened or maintained a place for the purpose of pure consumption of drugs: (1) the direct contribution of the place to the drug consumption; (2) the importance of the drug consumption to the defendant; and (3) whether the defendant is also using the place for other purposes.

This Comment proceeds in four parts. Part I provides general background information on the language, purposes, and elements of the statute. Part II discusses the major cases interpreting the "purpose" prong of § 856(a)(1) in general and explains how the courts are split on how it should be interpreted. Part III narrows the focus from § 856(a)(1) in general to § 856(a)(1) in the context of pure consumption cases and argues that pure consumption cases require a different kind of standard from the ones provided by the circuit courts. Part IV proposes a three-part test for pure consumption cases.

I. THE FEDERAL CRACKHOUSE STATUTE

A. Text and Purposes of the Statute

Congress enacted the federal "crackhouse" statute, 21 USC § 856, as part of the Anti-Drug Abuse Act of 1986,¹¹ which added to the Comprehensive Drug Abuse Prevention and Control Act of 1970.¹² The statute is divided into three parts. Section 856(a)(1), the focus of this Comment, makes it a crime to "knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance."¹³ Section 856(a)(2) makes it a crime to

manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mort-

¹⁰ Compare 21 USCA § 844(a) (2006) (making it a crime to "knowingly or intentionally [] possess a controlled substance," and providing "a term of imprisonment of not more than one year" and a minimum fine of \$1,000, or both), with 21 USC § 856(b) (providing prison sentences of up to twenty years and fines up to \$500,000).

¹¹ Anti-Drug Abuse Act of 1986, Pub L No 99-570 § 416, 100 Stat 3207-52, codified as amended at 21 USC § 856.

¹² Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub L No 91-513, 84 Stat 1236.

¹³ 21 USC § 856(a)(1).

gagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.¹⁴

Finally, the statute has a penalty provision. Section 856(b) provides that “[a]ny person who violates subsection (a) of this section shall be sentenced to a term of imprisonment of not more than 20 years or a fine of not more than \$500,000, or both.”¹⁵ This provision imposes higher penalties than other drug possession statutes,¹⁶ suggesting that Congress intended the statute to criminalize a unique kind of conduct.

The main purpose of enacting the “crackhouse” statute was to “[o]utlaw[] operation of houses or buildings, so-called ‘crack-houses,’ where ‘crack,’ cocaine and other drugs are manufactured or used.”¹⁷ In that sense, § 856 “goes beyond the proscriptions found in other statutes relating to possession and manufacture [and distribution] of controlled substances.”¹⁸ Unlike these other statutes, § 856 is aimed at a distinct offense: “the use of property for narcotics-related purposes.”¹⁹ In enacting the statute, Congress contemplated situations in which the property contributes to the use, manufacture, or distribution of the drugs.

B. Elements of § 856(a)(1)

Section 856(a)(1) is the key provision at issue in this Comment, but in order to understand the limited class of defendants that § 856(a)(1) was intended to target, it is necessary to compare this provision to § 856(a)(2). The two provisions were enacted for two different purposes in order to punish two different kinds of offenders, and only one of the two sections can apply to any given offender. The main distinction between the two provisions is that whereas § 856(a)(1) targets defendants who open or maintain a place for their *own* purpose of

¹⁴ 21 USC § 856(a)(2).

¹⁵ 21 USC § 856(b).

¹⁶ See note 10.

¹⁷ H 5484, 99th Cong, 2d Sess (Sept 8, 1986), in 132 Cong Rec S 26473, 26474 (Sept 26, 1986). Although the legislative history behind § 856 refers mostly to actual crackhouses, that is not all the statute covers. See *United States v Tamez*, 941 F2d 770, 773 (9th Cir 1991). Courts have extended the statute’s application to premises that do not possess the trappings of a crackhouse. See, for example, *id* at 773–74 (applying § 856(a)(2) to a used car dealership); *United States v Chen*, 913 F2d 183, 185–87 (5th Cir 1990) (applying the statute to a motel). Nevertheless, most of the cases dealing with the statute have dealt with “literal crack houses.” See Michael V. Sachdev, *The Party’s Over: Why the Illicit Drug Anti-proliferation Act Abridges Economic Liberties*, 37 Colum J L & Soc Probs 585, 588–89 (2004) (arguing that § 856(a)(2) was not meant to apply to legitimate businesses).

¹⁸ *United States v Sturmoski*, 971 F2d 452, 461–62 (10th Cir 1992).

¹⁹ *Id* at 462.

manufacturing, distributing, or using drugs, § 856(a)(2) targets defendants who knowingly allow others to use their property for these others' purpose of manufacturing, distributing, or using drugs.²⁰ To clarify the distinction between § 856(a)(1) and § 856(a)(2), this Comment at times refers to § 856(a)(1) as the "Actor Statute" (the focus of this Comment) and to § 856(a)(2) as the "Operator Statute."²¹

In general, courts have held that in order to convict a defendant under the Actor Statute, the jury must find that the "defendant (1) knowingly (2) opened or maintained a place (3) for the purpose of manufacturing[,] . . . distributing, or using any controlled substance."²²

1. "Knowingly."

Knowledge of the presence of drugs in a house can be imputed to a defendant based on the fact that he lived in the house, and would therefore have come across the drugs in the house.²³ But because under the Actor Statute the defendant's purpose must be to partake in the drug activity, a defendant cannot be convicted under the Actor Statute based merely on deliberate ignorance of drug activity.²⁴ In contrast, under the Operator Statute a defendant can be convicted even if he does not have actual knowledge of the illegal activity occurring on his property but is only "deliberately ignorant of others' purpose to engage in drug activity."²⁵

2. "Opened or maintained a place."

Whether a person "maintained" the premises in question is a "fact-intensive issue that must be determined on a case-by-case basis."²⁶ When the defendant lives in the place, this element is normally easily proven.²⁷ But when the defendant does not reside where the drug activity takes place, this question becomes more complicated.

²⁰ This distinction will be explained in more detail in Part I.B.3. For a case providing a good illustration of the distinction, see notes 53–64 and accompanying text.

²¹ The reason for this terminology is that § 856(a)(1) targets defendants who personally have the purpose of committing one of the "acts" of manufacturing, distributing, or using drugs, whereas § 856(a)(2) targets defendants who only "operate" a place where others have the purpose of committing one of the acts.

²² *United States v Onick*, 889 F2d 1425, 1431 (5th Cir 1989).

²³ See, for example, *id.*

²⁴ See, for example, *United States v Soto-Silva*, 129 F3d 340, 344 (5th Cir 1997); *Chen*, 913 F2d at 191.

²⁵ *Chen*, 913 F2d at 191.

²⁶ *Soto-Silva*, 129 F3d at 346 (emphasis omitted).

²⁷ See *United States v Verners*, 53 F3d 291, 296 (10th Cir 1995), citing *Onick*, 889 F2d at 1431.

In *United States v Verners*,²⁸ the Tenth Circuit held that “where the ‘place’ in question is a residence, the defendant must have a ‘substantial connection’ to the home and must be more than a ‘casual visitor’ in order to satisfy this element” of the Actor Statute.²⁹ Some of the factors relevant to the inquiry are set forth in *United States v Clavis*,³⁰ where the Eleventh Circuit noted that acts evidencing knowingly maintaining a place include “control, duration, acquisition of the site, renting or furnishing the site, repairing the site, supervising, protecting, supplying food to those at the site, and continuity.”³¹

3. “For the purpose of.”

There are two main issues with regard to the “for the purpose of” element: (1) to whom it applies; and (2) what it means. Courts are in agreement that as to the first issue, the term “purpose” refers to different individuals under each of the two statutes, because the statutes must be given a separate meaning.³² The “purpose” requirement in the Actor Statute applies to the defendant himself—“the person who opens or maintains the place for the illegal activity.”³³ Thus, “the defendant must maintain the place for his own goal of manufacturing, distributing, or using drugs”;³⁴ he must *personally* have the purpose of engaging in one of these activities. The “purpose” element in the Operator Statute refers not to the defendant managing or controlling the place where the drug activity occurs, but rather only to the people for whom the defendant makes the building available³⁵ (and the defendant must either know or remain deliberately ignorant of the illegal activity³⁶).

²⁸ 53 F3d 291 (10th Cir 1995).

²⁹ Id at 296 (finding that the defendant maintained a bedroom in a house even though he did not live in the house, because he formerly lived there, used the bedroom to store many of his personal belongings and business-related items, had a key to the house, and came and went as he pleased, thus exercising “dominion and control” over the bedroom far beyond that of a “casual visitor”).

³⁰ 956 F2d 1079 (11th Cir 1992).

³¹ Id at 1091. See also *United States v Roberts*, 913 F2d 211, 221 (5th Cir 1990) (finding that the defendant maintained a condominium even though he did not reside there because he exercised “*dominion and control*” over it by, among other things, paying most of the rent, attempting to swap it with another person, and cutting cocaine there) (emphasis added).

³² See, for example, *Tamez*, 941 F2d at 774 (observing that if the defendant’s “illegal purpose” was taken to be “a requirement of 856(a)(2), the section would overlap entirely with 856(a)(1) and have no separate meaning”). See also *Sosa v Alvarez-Machain*, 542 US 692, 710 n 9 (2004) (noting the “usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended”).

³³ *Chen*, 913 F2d at 190.

³⁴ *United States v Banks*, 987 F2d 463, 466 (7th Cir 1993), citing *Chen*, 913 F2d at 190.

³⁵ *Chen*, 913 F2d at 189–90. See also *Tamez*, 941 F2d at 774.

³⁶ See *Banks*, 987 F2d at 466.

Although courts agree about whom "for the purpose of" refers to in the Actor Statute, the question of what exactly "for the purpose of" means has split the circuits. This split is addressed in Part II.

II. THE CIRCUIT TESTS

Four circuit courts have addressed the issue of whether a defendant's purpose for opening or maintaining a place is sufficiently related to his drug activity to qualify him for criminal liability under the Actor Statute, § 856(a)(1).³⁷ These cases involved only the manufacture or distribution of drugs (or both), so the courts said little about pure consumption beyond vague statements that the statute does not target "casual" drug users or "simple consumption of drugs in one's home."³⁸ However, these cases demonstrate two principal points about § 856(a)(1) in general that are important to the pure consumption issue: (1) § 856(a)(1) does not cover all cases in which a defendant engages in drug activities within a place he has opened or maintained, but rather at least some of these cases are left to other drug statutes; and (2) the circuit courts have formulated three tests for drawing a line between those cases covered by § 856(a)(1) and those left to other statutes. Thus, this Part will describe how the circuit courts have interpreted § 856(a)(1) in general to provide a context for resolving pure consumption cases in particular.³⁹

A. "Sole" Purpose Is Not Necessary, but "Incidental" Purpose Is Not Sufficient

Circuit courts are generally in agreement that the statute covers more than just those defendants who open or maintain facilities *solely* for the purpose of drug activities, and that the statute does not apply to drug activity that is merely an "incidental" or a "collateral" purpose of the place.

The Fifth Circuit was the first court of appeals to hold that it is unnecessary for a defendant to maintain the place solely for the purpose

³⁷ In these cases, the defendants challenged the sufficiency of the evidence on which their convictions were based. See, for example, *United States v Church*, 970 F2d 401, 406 (7th Cir 1992) (noting that the defendant argued that he did not open or maintain houses "for the purpose of distributing crack" because "the dominate [sic] or primary purpose of the residences was . . . to live there") (emphasis omitted). In assessing a claim of insufficiency of evidence, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v Virginia*, 443 US 307, 319 (1979).

³⁸ *United States v Lancaster*, 968 F2d 1250, 1253 (DC Cir 1992).

³⁹ Part III then narrows the analysis to pure consumption cases and presents this Comment's argument that in these cases, courts should account for factors in addition to those they have discussed in manufacturing and distribution cases.

of drug activity. In *United States v Roberts*,⁴⁰ the defendants leased a condominium and used it to convert cocaine into crack.⁴¹ After being convicted under § 856(a)(1), the defendants appealed their convictions, contending that the primary purpose of the condominium was as a residence, and that “Congress intended § 856 to apply only to facilities for which drug trafficking is the sole purpose and not one of several purposes.”⁴² The court rejected this argument, reasoning that limiting § 856(a)(1) “to those who open or maintain facilities having cocaine manufacturing and distributing as their sole purpose . . . would eviscerate the statute, since it is highly unlikely that anyone would openly maintain a place for the purpose of manufacturing cocaine without some sort of ‘legitimate’ cover.”⁴³

*United States v Lancaster*⁴⁴ states the prevailing position of the circuit courts regarding cases on the other end of the “purpose” spectrum. There, a defendant that was convicted for running a crackhouse in his residence argued that § 856(a)(1) is unconstitutionally vague because “it can be construed to prohibit simple possession and personal consumption of drugs in one’s residence, although it does not give fair notice that it does.”⁴⁵ The court found no such ambiguity in the statutory language, reasoning (but without actually defining the terms “simple” and “casual”) that the “casual” drug user is not implicated under the statute “because he does not maintain his house for the purpose of using drugs but rather for the purpose of residence, the consumption of drugs therein being merely *incidental* to that purpose. Thus, subsection (a)(1) cannot reasonably be construed . . . to criminalize simple consumption of drugs in one’s home.”⁴⁶ Although the *Lancaster* court made this statement about “incidental” purposes being insufficient in the context of a discussion of consumption, other courts have held that this basic principle applies to manufacturing and distribution cases as well.⁴⁷

In spite of the circuit courts’ general agreement that the statute covers more than just a “sole” purpose of drug activity and less than an “incidental” or “collateral” purpose, the Seventh, Tenth, and Fifth Circuits have formulated different tests to decide cases that fall between these two poles.

⁴⁰ 913 F2d 211 (5th Cir 1990).

⁴¹ *Id.* at 219.

⁴² *Id.* at 220.

⁴³ *Id.*

⁴⁴ 968 F2d 1250 (DC Cir 1992).

⁴⁵ *Id.* at 1253.

⁴⁶ *Id.* (emphasis added).

⁴⁷ See, for example, *Verners*, 53 F3d at 296.

B. The Seventh Circuit's Pragmatic Approach

The Seventh Circuit has taken a pragmatic approach to deciding § 856(a)(1) cases, defining "purpose" in terms of specific kinds of activities. In *United States v Church*,⁴⁸ the court emphasized evidence of "significant commercial sales" in addressing the question of whether proof of crack distribution in a residence, without more, is sufficient to convict a defendant under § 856(a)(1).⁴⁹ The defendant argued that he did not open or maintain his houses for the purpose of distributing crack, but that rather the "primary purpose of the residences was for [him] to live there." Thus, sweeping the defendant under the statute would mean that all casual drug users could be convicted under § 856(a)(1) for drug use in their own homes.⁵⁰ The court stated that it did not need to accept the defendant's argument about casual drug users because the defendant himself was not a casual drug user.⁵¹ Rather, the evidence in this case of "significant commercial sales" satisfied the statute's "purpose" element.⁵²

In *United States v Banks*,⁵³ the Seventh Circuit defined "purpose" with reference to even more specific business characteristics, emphasizing that the defendant acted like a "supervisor, manager, or entrepreneur" as opposed to a mere "underling" or "landlord."⁵⁴ In *Banks*, Walter Shoulders sold crack in a house owned by the defendant, Kenneth Banks.⁵⁵ Two men known as "J.R." and "Nuke" cooked the crack in Banks's kitchen and handled all the money from the sales.⁵⁶ Banks allowed the sale and manufacture of crack to take place in his house, and assisted the sale by opening the door and identifying customers for Shoulders, obtaining food for Shoulders, picking up and cooking some of the crack, and making some deliveries to his friends.⁵⁷ J.R. paid Banks for his help and for the use of his house, and Banks also benefited by "instituting a kind of 'cover charge'—those who wanted to smoke crack in his house had to buy some for him as well."⁵⁸ Banks was convicted under the Actor Statute, and argued on appeal that the government had only proven a violation of the Operator Statute.⁵⁹

⁴⁸ 970 F2d 401 (7th Cir 1992).

⁴⁹ *Id.* at 406.

⁵⁰ *Id.*

⁵¹ See *id.*

⁵² *United States v Church*, 970 F2d at 406.

⁵³ 987 F2d 463 (7th Cir 1993).

⁵⁴ *Id.* at 466–67.

⁵⁵ See *id.* at 464–65.

⁵⁶ *Id.*

⁵⁷ *United States v Banks*, 987 F2d at 465.

⁵⁸ *Id.*

⁵⁹ *Id.*

Noting that the term “for the purpose of” has a different meaning in the Actor Statute than it does in the Operator Statute,⁶⁰ the court stated that “one way to tell whether a defendant had the requisite mental purpose under (a)(1) is to decide whether he acted as a *supervisor, manager, or entrepreneur*” (which would place him under the Actor Statute) as opposed to a mere “underling” or “landlord” (which would place him under the Operator Statute).⁶¹ The court concluded Banks was “more than a mere landlord.”⁶² Banks manufactured and used drugs in the house, made occasional deliveries, identified customers, and “managed the use of the house by means of his ‘cover charge’ for those who smoked crack there.”⁶³ “That confluence of activities—maintaining a crack house and using it to personally perform the acts proscribed by (a)(1)—could support an inference that he maintained the house ‘for the purpose’ of violating [the Actor Statute].”⁶⁴

C. “Significant” versus “Primary”: The Tenth and Fifth Circuits’ Approaches

Rather than defining “purpose” with reference to specific kinds of activities, the Tenth and Fifth Circuits have established broadly worded tests that focus on the level of importance of the drug activities to the defendant, leaving courts with a great degree of discretion to determine what kinds of evidence to emphasize in gauging this level of importance. The Tenth and Fifth Circuits are split over whether § 856(a)(1) is satisfied only if the manufacture, distribution, or use of drugs is one of the “primary purposes” of the place,⁶⁵ or if it is enough that the manufacture, distribution, or use of drugs is a “significant purpose” of the place.⁶⁶

In *Verners*, the Tenth Circuit heard a case involving two defendants: Loroan Verners and his mother, Guessinia Verners.⁶⁷ Loroan regularly visited Guessinia’s residence (where he formerly lived) and used his former bedroom to store cocaine and drug paraphernalia.⁶⁸ Evidence from the kitchen showed “that powder cocaine was being converted in the microwave to cocaine base, then weighed and bagged for

⁶⁰ See Part I.B.3.

⁶¹ *Banks*, 987 F2d at 466–67 (emphasis added).

⁶² *Id.* at 466.

⁶³ *Id.* at 466–67.

⁶⁴ *Id.* at 467.

⁶⁵ See *Verners*, 53 F3d at 297.

⁶⁶ See *United States v Soto-Silva*, 129 F3d 340, 346 n 4 (5th Cir 1997). See also *United States v Gilbert*, 496 F Supp 2d 1001, 1009 n 9 (ND Iowa 2007) (noting that the Tenth and Fifth Circuits disagree about this issue).

⁶⁷ *Verners*, 53 F3d at 293.

⁶⁸ *Id.*

distribution.”⁶⁹ The court announced the rule that in order for the “purpose” element of the Actor Statute to be satisfied, “at least in the residential context, [] the manufacture (or distribution or use) of drugs must be at least one of the primary or principal uses to which the house is put.”⁷⁰ The court concluded that because Loroan was not sleeping at the house, and because most of the equipment, drugs, and money associated with the drug enterprise were found in the room under his control, it appeared that “one of his *primary purposes* in maintaining his place in the home was as a base of operations to run a drug manufacturing and distributing business.”⁷¹ In contrast, the evidence showed that Guessinia’s primary purpose in maintaining the house was “as a home for herself and her two daughters”; the government offered no evidence that she “occupied more than a minor role in the home-based drug business of her son.”⁷² Thus, the court noted that she should probably have been prosecuted under the Operator Statute.⁷³

The Fifth Circuit established a different test for the statute’s “purpose” element in *United States v Soto-Silva*.⁷⁴ In that case, the defendant and her children moved into her parents’ house to care for her ailing mother.⁷⁵ The defendant’s mother soon passed away, and her father moved out; and around that time, the defendant became involved with a drug organization.⁷⁶ She handled money for the organization’s marijuana trafficking activity and provided the premises where the marijuana was packaged for distribution.⁷⁷ Hearing a challenge to her § 856(a)(1) conviction based on sufficiency of evidence, the court noted that § 856(a)(1) “does not require that drug distribution be the *primary* purpose [of the place], but only a *significant* purpose.”⁷⁸ The court concluded that the jury could reasonably convict the defendant based on the presence of marijuana and packaging supplies in the house, as well as the defendant’s membership in the drug organization.⁷⁹ Although taking care of her mother may have been the defendant’s primary purpose for maintaining the house, the court found that “the

⁶⁹ Id at 294.

⁷⁰ Id at 296.

⁷¹ *Verners*, 53 F3d at 297.

⁷² Id.

⁷³ Id at 297 n 4.

⁷⁴ 129 F3d 340 (5th Cir 1997).

⁷⁵ Id at 342.

⁷⁶ Id.

⁷⁷ Id at 342–43.

⁷⁸ *United States v Soto-Silva*, 129 F3d at 346 n 4 (second emphasis added).

⁷⁹ Id at 346.

evidence indicate[d] that drug distribution was or became at least a significant purpose of [defendant's] for maintaining the house.”⁸⁰

III. PURE CONSUMPTION UNDER 21 USC § 856(A)(1)

This Part shifts the analysis from how the circuit courts have interpreted § 856(a)(1) in general to the particular context of pure consumption cases. In addressing manufacturing and distribution cases, the circuit courts have said little about pure consumption cases beyond the vague dicta that “casual” drug users and “simple consumption of drugs in one’s home” are not covered by the statute.⁸¹ Thus, the circuit courts have left open three questions regarding pure consumption cases: If “casual” users and “simple consumption” are not covered by the statute, are any pure consumption cases covered? If the first question is answered in the affirmative, then what exactly is meant by words like “casual” and “simple”—in other words, what kinds of pure consumption cases are *not* covered by the statute? Assuming a line must be drawn in pure consumption cases, should courts use the standards from Part II to draw it?

This Part addresses all three of these questions. First, it argues that the presence of the words “using” and “or” in the statute indicates that § 856(a)(1) must cover at least some cases of pure consumption of drugs. Second, this Part analyzes the legislative intent of the statute in order to determine what kinds of cases are not covered by the statute. Finally, this Part argues that the circuit court tests discussed in Part II should not be used to draw a line between pure consumption cases covered by § 856(a)(1) and those left to other drug possession statutes. The circuit court tests provide both too low and too vague a threshold for pure consumption cases because the legislative intent and the circuit court opinions interpreting it suggest that “using” captures a narrower range of conduct than “manufacturing” and “distributing.” Thus,

⁸⁰ Id at 347.

⁸¹ Any statements about pure consumption were dicta because none of the circuit courts have actually dealt with a pure consumption case. See, for example, *Soto-Silva*, 129 F3d at 346 (“The evidence sufficiently showed that Soto was a member of the conspiracy which has as one of its objects the distribution of marihuana from the house.”); *Verners*, 53 F3d at 297 (“[I]t appears that one of [defendant’s] primary purposes in maintaining his place in the home was as a base of operations to run a drug manufacturing and distributing business.”); *Banks*, 987 F2d at 467 (finding that the defendant had “manufactured, distributed, and used drugs” in the house); *Church*, 970 F2d at 406 (noting that the evidence established “significant commercial sales,” so the court did not need to accept the defendant’s assertion that all casual drug users risk violating § 856(a)(1)); *Lancaster*, 968 F2d at 1253 (pointing out that even if § 856(a)(1) could be construed to criminalize simple consumption of drugs in one’s home, “it would not avail [the defendant] whose conduct went far beyond personal consumption”); *Roberts*, 913 F2d at 220 (noting that the defendant “was scarcely a ‘casual’ user of cocaine,” but that rather a primary purpose of renting the place “was to manufacture and distribute cocaine”).

a stricter and more specific standard is necessary for pure consumption cases.

A. The Statute Must Cover Some Pure Consumption

There is no case law verifying that § 856(a)(1) applies to pure consumption cases,⁸² but the plain language of the statute covers defendants who open or maintain a place for the purpose of pure consumption of drugs.

Section 856(a)(1) prohibits maintaining a place "for the purpose of manufacturing, distributing, or using any controlled substance." The words "or" and "using" are key to understanding the statute's application in the pure consumption context. First, the presence of the word "or" in the statute (as opposed to "and") means that a defendant can be convicted for having *any one* of the three following purposes for opening or maintaining the place in question: (1) manufacturing any controlled substance; (2) distributing any controlled substance; or (3) using any controlled substance. In other words, a defendant can be convicted for a purpose of "using" a controlled substance without a purpose of manufacturing or distributing.

Thus, the main question is what exactly "using" means. Courts must interpret § 856(a)(1) to give "using" a meaning separate from "manufacturing" and "distributing." Otherwise, the word "using" would be rendered superfluous, in violation of the "well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect."⁸³ There are only three meaningful things that a person can do with drugs: he can create them ("manufacturing"), he can give them to someone else or sell them ("distributing"), or he can consume them.⁸⁴ So if "using" must be interpreted to mean something different from manufacturing or distributing, it must refer to consumption.

Combining this Comment's conclusion about "using" with its conclusion about "or," if the defendant's purpose for opening or maintaining a place is to consume drugs, he is subject to liability under the

⁸² One possible explanation for the lack of case law is that the circuit courts' broadly worded dicta about "casual users" and "simple consumption" have discouraged prosecutors from charging pure consumption cases under § 856(a)(1).

⁸³ *Weinberger v Hynson, Wescott and Dunning, Inc.*, 412 US 609, 633 (1973) (refusing to read the Federal Food, Drug, and Cosmetic Act in such a manner as would render one of the Act's clauses superfluous). See also *Ratzlaf v United States*, 510 US 135, 140–41 (1994) ("Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense."); *Jarecki v G.D. Searle & Co.*, 367 US 303, 307–08 (1961) (refusing to adopt a reading of a statute that "renders one part a mere redundancy").

⁸⁴ This assumes that "using" does not have an absurd meaning, like using drugs to decorate a house or bait a fishing hook.

plain language of § 856(a)(1) regardless of any purpose to manufacture or to distribute drugs. In other words, the plain language of the statute must cover at least some cases involving pure consumption of controlled substances.

B. What Kinds of Pure Consumption Are Not Covered by the Statute?

The circuit courts have pointed out in dicta that “casual” drug use and “simple consumption of drugs in one’s home” are not subject to § 856(a)(1) prosecution. Part III.A argued that these statements cannot be interpreted to exclude all pure consumption cases. Therefore, the question is what kinds of consumption the words “casual” and “simple” refer to—in other words, what sorts of pure consumption cases are excluded from the statute?

Neither the circuit court opinions nor the plain text of the statute provides a clear answer to this question. Thus, this Comment analyzes the statute’s legislative intent for guidance on what kinds of consumption the circuit courts must have meant to exclude through words like “casual” and “simple.”⁸⁵ Part III.B explains how the legislative intent rules out at least the most “casual” kinds of drug consumption (such as smoking a single gram of marijuana at home). The same logic applies to rule out the most “casual” kinds of drug manufacturing and distribution (such as a defendant who sells a single gram of marijuana to his friend in the defendant’s house). However, Part III.C.1 then takes this analysis a step further, arguing that the legislative intent indicates the exclusion of a greater proportion of pure consumption cases than of manufacturing or distribution cases.

In enacting § 856(a)(1), the intent of Congress was to punish drug activities that go beyond (and thus deserve a greater penalty than) “the proscriptions found in other statutes relating to possession and manufacture [and distribution] of controlled substances.”⁸⁶ Otherwise, there would be no reason to enact a separate statute. The distinguishing feature of § 856(a)(1) is that it “actually criminalizes a particular defendant’s *use of property*.”⁸⁷

In satisfying the requirement that the defendant make a “use of property,” it is not sufficient that the drug activity merely take place inside the premises and thus help the defendant to avoid detection by the police (as would be the case for a defendant who smokes or sells a

⁸⁵ Consider *Concrete Pipe and Prods of Cal, Inc v Construction Laborers Pension Trust for Southern Cal*, 508 US 602, 627 (1993) (noting that “in the usual case of textual ambiguity,” the Supreme Court turns to the “legislative purpose” of the statute).

⁸⁶ *United States v Sturmoski*, 971 F2d 452, 461–62 (10th Cir 1992).

⁸⁷ *Id* at 462 (emphasis added).

single gram of marijuana in his house). Rather, the premises must contribute to the drug activity in some meaningful way beyond simply providing a safe place to manufacture, distribute, or use drugs (a "meaningful contribution"). There are two main reasons for this conclusion.

First, if it were enough for the property simply to provide cover for the defendant's drug activities, this would mean that just about any drug activity by a defendant in a place he has opened or maintained would be covered by the statute. After all, such premises would almost always provide at least some cover for the defendant's drug activity. The problem is that this conclusion would mean that the prosecution would only have to prove the first two elements of § 856(a)(1): (1) "knowingly"; and (2) "opened or maintained a place."⁸⁸ The "for the purpose of" language in § 856(a)(1) would be rendered meaningless, because there would never be a need to prove any intent on the part of the defendant—it would always be assumed that the defendant's intent was to use the premises as a cover for his drug activities. The statute could simply have made it a crime to "manufacture, distribute, or use any controlled substance in a place that one has knowingly opened or maintained." Thus, opening or maintaining a place and manufacturing, distributing, or using drugs in that place is not sufficient—the place must serve a further meaningful function in the drug activity.

Second, the mere fact that the place helps the defendant to avoid detection by the authorities could not have been the kind of "use of property" that Congress envisioned in enacting § 856(a)(1). Instead, contribution Congress was targeting was the type provided by "crackhouses,"⁸⁹ drug *establishments* set up to facilitate a significant amount of drug activity. Although the statute certainly covers more than just "literal crack houses,"⁹⁰ the explicit reference to crackhouses in the legislative history indicates that Congress must have had in mind establishments bearing at least some similarity to crackhouses even if not possessing the normal characteristics of a crackhouse. How close the similarity must be is the very question at issue, but a single gram of marijuana in one's home cannot be close enough.

C. Pure Consumption Cases Require a Different Standard

Having shown that "using" must cover certain pure consumption cases but that the legislative intent rules out some such cases, this Comment makes two basic arguments for why the circuit court tests developed in manufacturing and distribution cases should not be applied to

⁸⁸ For a detailed discussion of the elements of the statute, see Part I.B.

⁸⁹ 132 Cong Rec S at 26474 (cited in note 17).

⁹⁰ See note 17.

draw a line between pure consumption criminalized by § 856(a)(1) and pure consumption left to other statutes. First, the legislative intent and the circuit court opinions interpreting § 856(a)(1) suggest that it captures a narrower range of pure consumption activity than manufacturing and distribution activity. Second, the circuit court tests provide thresholds that are both too low and too vague for pure consumption cases.

1. “Using” captures a narrower range of conduct than “manufacturing” and “distributing.”

The legislative intent and circuit court opinions interpreting that intent provide two main indications that the “using” language in § 856(a)(1) sweeps in a narrower range of conduct than the “manufacturing” and “distributing” language. First, as discussed in Part III.B, the legislative history of the statute suggests that Congress’s main purpose in enacting § 856(a)(1) was to target crackhouses—or at least drug establishments bearing some similarity to crackhouses. The definitions of “crackhouse” provided by most circuit courts have indicated that either the manufacture or distribution of drugs is a key feature of a crackhouse; these definitions do not appear to include places where only drug consumption occurs.⁹¹ Although this does not mean that no pure consumption cases are covered by § 856(a)(1),⁹² it does mean that places where pure consumption of drugs is occurring will by definition lack a key element of a “crackhouse” as defined by the circuit courts: the manufacture or distribution of drugs. Thus, fewer pure consumption cases will involve places that are similar to crackhouses.

Second, as discussed in Part III.B, the intent of Congress in enacting § 856(a)(1) was to provide an enhanced penalty for drug activities to which a place contributes in some meaningful way. For the reasons that follow, this will include a lower proportion of pure consumption cases than of manufacturing and distribution cases.

When a defendant distributes drugs in a particular place, that property often serves as his “place of business”: (1) a place where potential consumers know they can usually find the defendant when they are in need of drugs; (2) a base of operations where the defendant can

⁹¹ See, for example, *United States v Johnson*, 474 F3d 1044, 1046 (8th Cir 2007) (defining a “crack house” as a “drug distribution center”); *United States v Peters*, 283 F3d 300, 306 n 3 (5th Cir 2002) (“A crack house has been defined as a house or apartment where crack cocaine is sold to addicts.”); *United States v Castaneda*, 9 F3d 761, 766–67 (9th Cir 1993) (“A crack house is a fixed-location retail operation, selling small daily amounts of drugs to dozens of unstable, volatile, desperate street junkies.”); *Roberts*, 913 F2d at 213 n 1 (defining “crackhouse” as “a place where crack cocaine is manufactured, distributed, or sold”).

⁹² Courts have been clear that the statute covers more than just “literal crack houses.” See note 17.

package and stockpile drugs for distribution or store money from the sales; and/or (3) a centralized location where the defendant can closely supervise any underlings he might have.⁹³ In these ways, the house itself facilitates the business beyond simply providing a safe place for it to occur.⁹⁴ A specific standard is not necessary because courts can simply compare the characteristics of the defendant’s drug activities to the characteristics of a normal business, such as significant commercial sales, management, and so forth. (as the Seventh Circuit did in *Banks* and *Church*). The more the defendant’s distribution activities look like running a drug business out of a place, the closer the relationship between the place and the drug activity.

Similarly, when a defendant manufactures drugs in a particular place, he often makes direct use of the facilities or of household tools in order to manufacture these drugs—such as the use of a kitchen stove to convert cocaine into crack; a sunlit, heated area in the house to grow marijuana; or a fully equipped methamphetamine lab complete with various chemicals, hoses, and clamps.⁹⁵ Thus, the place itself serves a function in the drug manufacture beyond merely providing a safe area in which it may occur.

Pure consumption cases are different. These cases involve only the recreational use of drugs, and in most cases the only contribution the property will make to the consumption is as a secluded location for the consumption to occur without detection by the police. As discussed in Part III.B, this alone is insufficient to subject a defendant to liability under § 856(a)(1). Thus, most pure consumption cases will lack the key element that the place contributes meaningfully to the drug consumption. A stricter and more specific standard is necessary: one that *requires* courts to find a meaningful contribution and that directs courts toward particular kinds of evidence that could establish this contribution.

2. The circuit court tests should not be applied to pure consumption cases.

a) *The “primary purposes” and “significant purpose” tests.* The Tenth and Fifth Circuits disagree on whether § 856(a)(1) is satisfied only if the manufacture, distribution, or use of drugs is one of the defendant’s “primary purposes” of opening or maintaining the place,⁹⁶ or if

⁹³ See, for example, *Soto-Silva*, 129 F3d at 342–43; *Verners*, 53 F3d at 297.

⁹⁴ On the other hand, if the defendant sells only one gram of marijuana to one customer, the house could not be considered his “place of business” such that the house is meaningfully facilitating the defendant’s drug sale.

⁹⁵ See, for example, *Verners*, 53 F3d at 294; *Banks*, 987 F2d at 464–65.

⁹⁶ *Verners*, 53 F3d at 296.

it is enough that drug activity is a “significant purpose.”⁹⁷ Although these tests are worded broadly enough to sweep in pure consumption cases, they provide both too *vague* and too *low* a threshold for these cases—vague in the sense that they do not direct courts to specific kinds of evidence establishing a link between the place and the consumption, and low in the sense that they do not directly require courts to find that the defendant’s place contributed meaningfully to his drug consumption.

First, these tests are too vaguely worded. In manufacturing and distribution cases, terms like “significant purpose” and “primary purposes” are sufficiently specific because, as discussed in Part III.C.1, in most of these cases there will be a meaningful link between the place and the distribution or manufacture. In the distribution context, the defendant will usually be running a business out of the place. Thus, words like “significant” or “primary” imply that the more the defendant’s drug activities look like a drug business—that is, the more the place contributes to the distribution—the better the case for § 856(a)(1) liability. This point is supported by the fact that the *Verners* court, which formulated the “primary purposes” test, agreed with the *Banks* court that § 856(a)(1) “was designed to punish those who use their property to run drug businesses—hence, the more characteristics of a business that are present, the more likely it is that the property is being used ‘for the purpose of’ those drug activities prohibited by § 856(a)(1).”⁹⁸ This is the precise inference that should be drawn given Congress’s intent to criminalize drug activities to which the place meaningfully contributes.

The same reasoning applies to drug manufacture cases. Because the defendant usually makes direct use of the facilities or of household tools in order to manufacture the drugs, words like “significant” and “primary” imply that the greater the defendant’s use of these tools or facilities—that is, the closer the connection of the place to the manufacture—the stronger the argument for § 856(a)(1) liability.

⁹⁷ *Soto-Silva*, 129 F3d at 346 n 4. This Comment does not make a serious attempt to resolve this circuit split because neither of the tests should be applied to pure consumption cases, which is the main concern of this Comment. It is worth noting, however, that the difference between the two tests is probably not particularly meaningful. The split is only meaningful if there are “significant” purposes for maintaining a house that are not among the “primary purposes” of maintaining it. The situation would be different if the *Verners* court had held that the drug activity must be *the* primary purpose to which the house is put, but because the court suggested that there could be several primary purposes to maintaining the house, it is difficult to distinguish its test from *Soto-Silva*’s.

⁹⁸ *Verners*, 53 F3d at 296–97. See also *Soto-Silva*, 129 F3d at 346 (holding that the jury could reasonably find that distribution of drugs was at least a significant purpose for the defendant’s maintenance of the house based in part on the defendant’s membership in a drug business and the presence of packaging supplies in the house).

However, in the pure consumption context, because the recreational use of drugs will not usually be meaningfully linked to the place, adjectives like "significant" or "primary" provide little guidance. "Significant purpose" or "primary purposes" do not indicate the kinds of factors establishing a meaningful contribution of the place to the drug consumption. Thus, the use of these tests could easily lead to applications of § 856(a)(1) that violate the legislative intent, and a standard should be adopted that specifies particular kinds of conduct.

In addition to providing too little guidance for pure consumption cases, the Tenth and Fifth Circuits' tests provide too low of a threshold for these cases. As discussed above, the "using" language in § 856(a)(1) captures a narrower range of conduct than "manufacturing" and "distributing," so courts must be *required* to consider the issue of whether the pure consumption case before them falls into the narrow class in which the place contributes meaningfully enough to the consumption. The "significant purpose" and "primary purposes" tests do not require courts to confront this issue directly; these tests measure the importance of the drug consumption to the defendant (which, as will be explained in Part IV.B, is indeed a key element of a pure consumption case), but they do not necessarily require that the place serve a meaningful function in the consumption. For example, imagine a typical pure consumption case in which a defendant consumes large quantities of drugs in his house but does not make any other use of the house to facilitate his drug consumption. A court might conclude that drug consumption is so important to the defendant that in deciding to buy the house, he had in mind the establishment of a secluded area in which to consume drugs. Thus, the court might hold that a "significant purpose" of buying the house was to consume drugs. Such an outcome would violate Congress's intent because, as discussed in Part III.B, the place-consumption link must go beyond the mere fact that the place provides a safe area for the drug consumption to occur. On the other hand, this concern is not particularly significant in manufacturing and distribution cases, because in these cases the place will usually contribute meaningfully enough to the drug activity.

b) *The "significant commercial sales" and "supervisor, manager, or entrepreneur" tests.* The Seventh Circuit has defined "purpose" in § 856(a)(1) in terms of evidence of "significant commercial sales"⁹⁹ and whether the defendant "acted as a supervisor, manager, or entrepreneur."¹⁰⁰ The *Banks* court justified its use of a specific evidentiary standard by citing an earlier Seventh Circuit case, which noted that "[t]he

⁹⁹ *Church*, 970 F2d at 406.

¹⁰⁰ *Banks*, 987 F2d at 466.

drug-house statute is broadly worded but appears to be aimed . . . at persons who occupy a supervisory, managerial, or entrepreneurial role in the drug enterprise.”¹⁰¹ Thus, the court correctly acknowledged but did not explicitly state that although § 856(a)(1) uses broad language, it targets something more specific than its language would indicate: those cases in which the place in question contributes meaningfully to the drug activity. By defining “purpose” in terms of specific kinds of activities, the Seventh Circuit identified the correct *general* principle to be applied to pure consumption cases.

However, there are two main reasons why pure consumption cases require a different standard from the tests provided by the Seventh Circuit. First, the precise tests provided by the Seventh Circuit simply do not leave room for pure consumption cases. In such cases, the defendant has not partaken in any “commercial sales,” because there is no sale of drugs in a pure consumption case. And such a defendant could not be considered a “supervisor, manager, or entrepreneur,” because there is no business to be run in a pure consumption case.

More fundamentally, the Seventh Circuit’s tests, although more specific than those provided by the Tenth and Fifth Circuits, are nevertheless insufficiently specific and strict for pure consumption cases. One could imagine a standard for pure consumption cases that is analogous to *Church*’s “significant commercial sales” standard, such as “significant drug consumption” or analogous to *Banks*’s “supervisor, manager, or entrepreneur” test, such as whether the defendant acted like a “drug addict.” However, the problem with the Seventh Circuit’s tests (and thus the problem with these analogous tests) is that they only measure the *level* of drug activity, not the contribution of the place to the drug activity.

Tests measuring the level of drug activity are sufficient in manufacturing and distribution cases because, in those cases, there is usually a meaningful connection between the place and the drug activity. Thus, a test that explicitly requires such a connection is not necessary. Moreover, a test that measures the level of manufacturing and distribution implicitly tests for this link. For example, the greater the level of “commercial sales” the defendant engages in, the more it looks like the defendant is running a drug business (and, for that matter, a crackhouse) out of the place, and thus the more meaningful the contribution of the place to the drug activity. This analogy is strengthened that much more if the defendant looks like a “supervisor, manager, or entrepreneur.”

¹⁰¹ *Id.* (emphasis omitted), quoting *United States v Thomas*, 956 F2d 165, 166 (7th Cir 1992). *Thomas* did not involve a defendant being charged under § 856(a)(1), but rather the case involved a sentencing departure where the district court had analogized to § 856(a)(1). See 956 F2d at 166.

On the other hand, in the pure consumption context a test directly requiring a meaningful contribution of the place to the drug activity is crucial in properly narrowing the statute to its intended scope. A test measuring the level of drug consumption—such as “significant drug consumption”—does not implicitly test for a link between the place and the drug activity. Even if the defendant is consuming a large quantity of drugs in his house, such evidence does not necessarily indicate that the house is facilitating the drug activity meaningfully.

In sum, although the Seventh Circuit’s tests are consistent with this Comment’s general principle that a pure consumption test should account for specific factors and evidence, they should not be applied to pure consumption cases. They are insufficiently strict because they do not require courts to consider whether the house meaningfully contributed to the drug consumption, and they are insufficiently specific because they only guide courts to evidence of the level of drug activity, rather than evidence establishing a place-consumption link. A new standard is necessary.

IV. A THREE-PART TEST FOR PURE CONSUMPTION CASES

This Comment has made four main arguments. First, because of the presence of the words “using” and “or,” § 856(a)(1) must cover *some* cases of pure consumption of drugs. Second, because of the underlying legislative intent, § 856(a)(1) cannot cover *all* cases of pure consumption. Third, pure consumption cases require a stricter and more specific standard than manufacturing and distribution cases because the legislative intent and the circuit court opinions interpreting § 856(a)(1) have suggested that its “using” language captures a narrower range of conduct than “manufacturing” and “distributing.” Fourth, the tests adopted by the circuit courts for manufacturing and distribution cases are neither strict enough nor specific enough to account for the unique issues raised by pure consumption cases.

These four premises lead this Comment to propose a stricter and more specific standard for pure consumption cases. This Comment’s standard weighs the following three factors in determining whether a defendant has opened or maintained a place for the purpose of pure consumption of drugs: (1) the direct *contribution* of the place to the drug consumption, with particular attention paid to whether the defendant is storing drugs or drug paraphernalia at the place; (2) the *importance* of the drug consumption to the defendant, with particular attention paid to the frequency of the consumption; and (3) whether the de-

defendant is also using the place for *other purposes*, with particular attention paid to whether the defendant is using the place as a residence.¹⁰²

This standard provides clear guidance as to the kinds of tangible evidence that are important in subjecting a pure consumption defendant to § 856(a)(1)'s enhanced punishment. In other words, it follows the general principle underlying the Seventh Circuit opinions—that given Congress's intent to target a specific class of persons, "purpose" should be defined in terms of specific kinds of activities—but is even more specific than the Seventh Circuit's tests in order to tailor this principle to the unique characteristics of pure consumption cases. The standard is also stricter because it requires courts to consider certain issues relevant to the legislative intent, most importantly the contribution of the place to the consumption.

A. Contribution

The legislative intent requires that the defendant's place contribute meaningfully to the drug consumption. It is not enough that the place merely acts as a secluded location for the consumption to occur without detection by the police.¹⁰³ Rather, the place must serve a further function in facilitating the drug consumption.

A key piece of evidence in determining whether a place has meaningfully contributed to the drug consumption is whether the defendant is storing drugs or drug paraphernalia at the place.¹⁰⁴ If so, then the place enables the defendant to own significant quantities of drugs and paraphernalia at once. This capability gives the defendant greater flexibility in determining when and how often to consume drugs, and enables the defendant to buy large quantities of drugs and paraphernalia at a lower price per unit (at a "bulk rate") than if he could only purchase small quantities at once. In that sense, the place permits the defendant to consume more drugs than might otherwise be financially feasible. Finally, if a defendant is storing drugs and paraphernalia in a

¹⁰² The type of drug involved (such as how "hard" the drug is) is not a relevant factor to this inquiry because the use of this factor would be inconsistent with the text of the statute. Section 856(a)(1) criminalizes the manufacture, distribution, or use of "any" controlled substance. The insertion of the word "any" strongly implies that no particular form of drug is contemplated by the statute.

¹⁰³ See Part III.B.

¹⁰⁴ Of course, courts should also take into account any other relevant evidence linking the defendant's place to the drug consumption. This Comment highlights drug and paraphernalia storage only because in most pure consumption cases, this will likely provide the most salient link (if a meaningful link exists).

place, the place facilitates the drug consumption by preventing theft of these items.¹⁰⁵

Two key factors relevant to the strength of the place-consumption link are: (1) the quantity of drugs and paraphernalia being stored at the defendant's place; and (2) whether the drugs and paraphernalia being stored at the place are ever removed. First, the more drugs and paraphernalia the defendant is storing at the place, the more the place is contributing to the drug consumption by allowing the defendant to purchase drugs at a bulk rate, and the greater the importance of the place as a preventative measure against theft. For example, if a defendant is doing no more than smoking a single gram of marijuana in his house, it would not be particularly costly to him if the gram were somehow stolen before he had a chance to smoke it. Because the defendant would have no real reason to take significant and costly measures (like opening or maintaining a place) to prevent a single gram of marijuana from being stolen, it would be unreasonable to conclude that he has opened or maintained the place for that purpose. The greater the quantity of drugs and paraphernalia being stored in the defendant's place, the greater the cost to the defendant of these items being stolen, the greater the need for the defendant to use the place to prevent these items from being stolen, and therefore the more reasonable it is to conclude that the defendant is using the place for the purpose of drug consumption.

In addition to quantity of drugs and paraphernalia, courts should consider whether and how often the defendant removes the drugs and paraphernalia from the place in determining whether the place is meaningfully contributing to the drug consumption by allowing the defendant to store drugs there. Evidence that the drugs or paraphernalia travel with the defendant when he leaves the place would weaken the link between the place and the drug consumption. In such a case, it is less reasonable to conclude that the defendant is relying on the place to prevent the drugs and paraphernalia from being stolen, and there is also a weaker case to be made that the defendant is using the place to

¹⁰⁵ Although this Comment has argued that preventing detection by the police is not a meaningful enough contribution of the place to facilitating consumption, this argument does not apply to the prevention of theft. As discussed in Part III.B, if concealment from the police were sufficient, then liability could be established in any case where the defendant consumes drugs in a place he has opened or maintained (rendering the word "purpose" superfluous). This problem does not exist with regard to prevention against theft, because only in certain cases will a place meaningfully contribute to the consumption by preventing theft. If the defendant smokes only a single gram of marijuana, for example, there is no real danger of theft, so the defendant would have no reason to take steps to prevent theft by opening or maintaining a place. In such a case, it would be unreasonable to suggest that the defendant opened or maintained the place "for the purpose" of drug consumption.

make the drug consumption more convenient. Thus, the place is not really serving the defendant's drug activity any more than by providing a secluded location to consume drugs. As discussed in Part III.B, such a function is not sufficient for § 856(a)(1) liability.

B. Importance

Because § 856(a)(1) punishes opening or maintaining a place for the *purpose* of using drugs, the prosecution must show that the defendant had drug consumption in mind in deciding to open or maintain the place. The plausibility of this conclusion depends in large part on how important drug consumption is to the defendant—if drug consumption is unimportant to the defendant, he would have little reason to take the often significant and costly action of opening or maintaining a place for that purpose. The Tenth and Fifth Circuits' "primary purposes" and "significant purpose" tests recognize that the importance of the drug activities to the defendant is a key part of the inquiry, but (as discussed in Part III.C.2.a) these tests fall short in the pure consumption context. First, they do not direct courts to specific kinds of evidence relevant to the inquiry, which is crucial in the pure consumption context because of the narrow range of conduct that "using" covers. Second, these tests do not directly require a meaningful contribution of the place to the consumption. In manufacturing and distribution cases, the "importance" inquiry is sufficient because a meaningful contribution will usually exist; in pure consumption cases, the "importance" inquiry is necessary but not sufficient, which is why the first factor of this Comment's test is crucial.

The key piece of evidence to consider in determining the importance of the drug consumption to the defendant is the frequency of his drug consumption. The more often the defendant consumes drugs, the greater the likelihood that the defendant values drug consumption, and thus the stronger the argument that the defendant had a "purpose" of drug consumption in mind in deciding to open or maintain the place. Courts should consider not just how often the defendant consumes drugs in general, but how often the defendant consumes drugs in the particular place in question. Accounting for the frequency with which the defendant consumes drugs in the place helps ensure that § 856(a)(1) covers cases in which the place serves an important function in the consumption. This consideration is also important because a high frequency of drug consumption occurring at the defendant's place makes it more similar to actual crackhouses—drug establishments set up to facilitate continuous drug activity—which were Congress's main targets in enacting § 856(a)(1).

It is important to understand how the first two factors of the three-part test interact with each other. The first factor of the test re-

quires a contribution of the place to some kind of drug activity related to drug consumption—in most cases, the storage of drugs or paraphernalia—which is crucial because (unlike with manufacturing and distribution) normally the place will not *directly* contribute to the consumption itself beyond providing a safe place in which it may occur. But it is not enough to establish a link only between the place and the storage of drugs. Even if the defendant stores a large quantity of drugs or paraphernalia in a place, there must be a link between the place and the *use* of drugs because § 856(a)(1) punishes “using” controlled substances, not merely storing them. The most effective way of establishing this link is proof that the defendant consumes the drugs that he stores at the place, and consumes them frequently enough that it is reasonable to conclude that the defendant opened or maintained the place for the purpose of consuming drugs. In sum, the first factor links the place to some kind of activity related to drug consumption (such as drug storage), and the second factor extends that link to the actual consumption (use) of drugs.

C. Other Purposes

The final inquiry for pure consumption cases is whether the defendant is using the place for other purposes in addition to drug consumption, as well as the relative time spent and importance assigned to these other purposes.¹⁰⁶ If the defendant is using the place for other important purposes, this fact would weaken the argument that he had pure consumption of drugs in mind in deciding to open or maintain the place. The more importance the defendant assigns to the other purposes relative to drug consumption, and the more time the defendant devotes to these other purposes relative to drug consumption, the more likely it is that the defendant opened or maintained the place predominantly for purposes other than drug consumption. Furthermore, evidence that the defendant is assigning greater importance to the other purposes of the place than to the drug activity weakens the analogy between the place and traditional crackhouses, which are devoted mostly to drug activities.

¹⁰⁶ The Tenth and Fifth Circuits’ “primary purposes” and “significant purpose” tests might also implicitly make this inquiry. However, as discussed at the beginning of Part IV.B, these tests are insufficient because: (1) they do not direct courts to specific kinds of evidence relevant to the inquiry; and (2) they fail to test for a place-consumption link. A test laying out specific kinds of evidence is especially important to the “other purposes” inquiry because, for the reasons that will be provided in notes 109–12, the accompanying text, and the remainder of Part IV.C following note 112, whether the defendant is using the place as a residence is crucial in the pure consumption context (more so than in the manufacturing and distribution context).

Normally, the most important other purpose for which a pure consumption defendant would be using the place is as a residence. In the context of manufacturing and distribution cases, the circuit courts have considered this factor to be relevant,¹⁰⁷ but certainly not dispositive.¹⁰⁸ However, the circuit courts have suggested in dicta that in pure consumption cases, the use of the place as a residence would be an especially crucial piece of evidence in weakening the case for § 856(a)(1) liability.¹⁰⁹

Although circuit court cases like *Lancaster* do not mean that the use of the place as a residence would be *conclusive* as to whether the defendant could be subject to § 856(a)(1) liability,¹¹⁰ the residence factor will substantially limit the range of pure consumption cases swept under the statute, which is consistent with Congress's intent to subject a narrow range of pure consumption defendants to § 856(a)(1) liability. This is because in most pure consumption cases where a defendant meets the second element of § 856(a)(1)—“opened or maintained a place”—he will be using the place as a residence. After all, if the defendant is merely consuming drugs at the place without actually living there, it will be difficult for the prosecution to establish that the defendant had a “substantial connection”¹¹¹ or “dominion and control” over the place.¹¹² So in a pure consumption case, there is often a substantial inverse relationship between the strength of the “opened or maintained” element and the strength of the “purpose” element.

¹⁰⁷ See, for example, *Verners*, 53 F3d at 297 (reasoning that the fact that Mr. Verners “was apparently not sleeping at the house” suggested that one of his primary purposes for maintaining the place was to run a drug business, whereas the fact that Guessinia Verners’s “primary purpose in maintaining the house was as a home” weakened the case for § 856(a)(1) liability).

¹⁰⁸ See, for example, *Roberts*, 913 F2d at 220 (suggesting that the fact that a defendant lives at a particular place does not necessarily indicate the true purpose of the place, because “it is highly unlikely that anyone would openly maintain a place for the purpose of manufacturing and distributing cocaine without some sort of ‘legitimate’ cover—[such] as a residence”).

¹⁰⁹ See, for example, *Lancaster*, 968 F2d at 1253 (noting that § 856(a)(1) cannot be construed “to criminalize simple consumption of drugs in one’s home” because the “casual” drug user “does not maintain his house for the purpose of using drugs but rather for the purpose of residence”).

¹¹⁰ The *Lancaster* court referred not to all kinds of consumption in the home, but “simple” consumption, and not all kinds of drug use in the home, but “casual” drug use, leaving room for the possibility that some cases of pure consumption in a residence will be subject to the statute. For example, if a defendant is using his residence to store large quantities of drugs and frequently consumes them in his home, he could be liable despite the residence factor, because he would be more than a “casual” user of drugs.

¹¹¹ *Verners*, 53 F3d at 296.

¹¹² *Roberts*, 913 F3d at 221. On the other hand, as suggested in Part III.C.1, the defendant will often have a significant connection to the place in manufacturing and distribution cases even if he does not reside at the place. For a general discussion of the “opened or maintained a place” element of § 856(a)(1), see Part I.B.2.

On the other hand, if a defendant engages in pure consumption of drugs in a place that is not his residence and still manages to meet the "opened or maintained" element, this fact would be persuasive evidence that the defendant's purpose in opening or maintaining the place was drug consumption (assuming the place does not have some other important purpose). For example, one could imagine an extreme case in which a defendant rents an apartment for the sole purpose of consuming drugs, and in which every day drives to this apartment, consumes drugs, and then leaves. In such a case, the "other purposes" factor would weigh strongly in favor of § 856(a)(1) liability. Of course, it is important to keep in mind that although this would be an easy case for liability under a "significant purpose" or "primary purposes" test (given that drug consumption is the sole purpose of the place), under this Comment's three-part test the outcome is not so clear. The prosecution would still need to show that the place contributed meaningfully to the drug consumption beyond simply providing a secluded location for it to occur (for example, by allowing the defendant to store drugs there).

Pure consumption cases that satisfy both the "opened or maintained" element and the three-part "purpose" test will be rare, but a standard that subjects a narrow range of pure consumption defendants to liability is the inevitable result of the tension between the statutory text and the legislative intent. The plain language of the statute must cover some pure consumption cases, but the legislative intent of the statute establishes that Congress intended to target drug activities meaningfully facilitated by the place and bearing some similarity to crackhouses, which will sweep in only the rare pure consumption case.

CONCLUSION

The combination of the words "using" and "or" in § 856(a)(1) means that § 856(a)(1) must cover some cases of pure consumption of drugs. However, it would contradict the purpose of the statute—to impose an enhanced penalty in cases in which the use of the property meaningfully contributes to the drug activity—to conclude that all pure consumption cases are swept in by the statute. Thus, courts must draw a line between pure consumption covered by the statute and pure consumption left to other drug possession statutes. Courts should use a stricter and more specific standard to draw this line than they do in manufacture or distribution cases, because the legislative intent and the circuit court opinions interpreting that intent suggest that "using" captures a narrower range of conduct than "manufacturing" and "distributing."

The circuit courts have developed a variety of tests for applying § 856(a)(1) to manufacturing and distribution cases, but these tests are neither strict enough nor specific enough for pure consumption cases.

Thus, this Comment proposes a new three-part test tailored to the particular legislative intent behind pure consumption cases. The test is stricter than those provided by the circuit courts because it requires courts to make certain findings essential to the legislative intent—particularly that the place meaningfully contributes to the drug activity beyond simply providing a secluded location for it to occur. The test is more specific because it identifies (even more specifically than the Seventh Circuit’s tests) activities that help determine whether a defendant is subject to § 856(a)(1) liability, such as the use of the place as a residence, the frequency of the drug consumption, and the storage of drugs and paraphernalia.

It is possible that the circuit courts’ broadly worded dicta about “casual” drug users and “simple consumption” have discouraged prosecutors from charging pure consumption cases under § 856(a)(1). This Comment reveals to courts and prosecutors that § 856(a)(1) targets at least some pure consumption cases. At the same time, there is a troublesome possibility that if the courts heed this message, they will simply apply their old tests to pure consumption cases, thus frustrating the statute’s legislative intent. Therefore, it is crucial that if circuit courts do hear pure consumption cases under § 856(a)(1), they realize that the word “purpose” does not mean the same thing in all cases under the crackhouse statute.