

2019

Prosecuting Dark Net Drug Marketplace Operators Under the Federal Crack House Statute

Thomas J. Nugent

Fordham University School of Law

Recommended Citation

Thomas J. Nugent, *Prosecuting Dark Net Drug Marketplace Operators Under the Federal Crack House Statute*, 88 Fordham L. Rev. 345 (2019).

Available at: <https://ir.lawnet.fordham.edu/flr/vol88/iss1/9>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

PROSECUTING DARK NET DRUG MARKETPLACE OPERATORS UNDER THE FEDERAL CRACK HOUSE STATUTE

*Thomas J. Nugent**

Over 70,000 Americans died as the result of a drug overdose in 2017, a record year following a record year. Amidst this crisis, the popularity of drug marketplaces on what has been called the “dark net” has exploded. Illicit substances are sold freely on such marketplaces, and the anonymity these marketplaces provide has proved troublesome for law enforcement. Law enforcement has responded by taking down several of these marketplaces and prosecuting their creators, such as Ross Ulbricht of the former Silk Road. Prosecutors have typically leveled conspiracy charges against the operators of these marketplaces—in Ulbricht’s case, alleging a single drug conspiracy comprising Ulbricht and the thousands of vendors on the Silk Road. This Note argues that the conspiracy to distribute narcotics charge is a poor conceptual fit for the behavior of operators of typical dark net drug marketplaces, and that the federal “crack house” statute provides a better charge. Though charging these operators under the crack house statute would be a novel approach, justice is best served when the crime accurately describes the behavior, as the crack house statute does in proscribing what dark net drug marketplace operators like Ulbricht do.

INTRODUCTION.....	346
I. THE OPIOID CRISIS, THE DARK NET, AND MODERN DRUG ENFORCEMENT	348
A. <i>The Opioid Crisis and Dark Net Drug Marketplaces</i>	349
B. <i>Conspiracy Law</i>	351
C. <i>The Ross Ulbricht Prosecution</i>	353
D. <i>The Crack House Statute</i>	356
II. USING CONSPIRACY LAW TO PROSECUTE TYPICAL DARK NET DRUG MARKETPLACE OPERATORS	359

* J.D. Candidate, 2020, Fordham University School of Law; B.A., 2013, State University of New York at Geneseo. The author thanks his family and friends for their support, Professor Youngjae Lee for his helpful feedback on this Note, and the *Fordham Law Review* editors and staff for their guidance and assistance.

A. <i>The Typical Dark Net Drug Marketplace</i>	359
B. <i>Critiques of Charging the Typical Dark Net Drug Marketplace Operator with Conspiracy to Distribute Narcotics</i>	361
1. The “Rimless Hub-and-Spoke” Problem	361
2. The “Agreement” Element.....	363
3. The “eBay Problem”	364
4. The Policy Goals of the Standalone Conspiracy Law May Not Apply	368
III. THE “CRACK HOUSE” STATUTE—TAILORED FOR ONLINE DRUG MARKETS.....	369
A. <i>A Realistic Solution</i>	370
B. <i>A Plain Text Reading Permits Prosecutions of This Type</i>	371
C. <i>Why Push for This Reading At All?</i>	375
D. <i>Addressing Counterarguments</i>	376
CONCLUSION.....	378

INTRODUCTION

America is in the midst of an opioid epidemic. In 2016, approximately 64,000 people in the United States died of a drug overdose, up roughly 22 percent from the year before.¹ Of these deaths, 20,100 involved fentanyl and fentanyl analogs; 15,400 involved heroin; 14,400 involved prescription opioids; 10,600 involved cocaine; and 7,660 involved methamphetamine.² Overdose deaths rose to over 70,000 in 2017,³ and provisional data suggest that the number slightly shrunk to over 69,000 in 2018.⁴

Concurrently, technological advances have enabled online drug marketplaces like Silk Road, Silk Road 2.0, AlphaBay, and Hansa, where

1. Josh Katz, *The First Count of Fentanyl Deaths in 2016: Up 540% in Three Years*, N.Y. TIMES: UPSHOT (Sept. 2, 2017), <https://www.nytimes.com/interactive/2017/09/02/upshot/fentanyl-drug-overdose-deaths.html> [<https://perma.cc/4T74-7MTK>].

2. *Id.*

3. Josh Katz & Margot Sanger-Katz, *‘The Numbers Are So Staggering.’ Overdose Deaths Set a Record Last Year*, N.Y. TIMES: UPSHOT (Nov. 29, 2018), <https://www.nytimes.com/interactive/2018/11/29/upshot/fentanyl-drug-overdose-deaths.html> [<https://perma.cc/M78X-WA6E>].

4. Jon Kamp, *Overdose Deaths Likely to Fall for First Time Since 1990*, WALL ST. J. (June 26, 2019), <https://www.wsj.com/articles/overdose-deaths-likely-to-fall-for-first-time-since-1990-11561541406> [<https://perma.cc/AY42-EHSX>].

drugs are widely available.⁵ These marketplaces, located on the “dark net,”⁶ a subset of websites that exist on an encrypted network, offer buyers and sellers a near-anonymous transactional space.⁷ Law enforcement, given limited resources, has an incentive to shut down these marketplaces rather than prosecute individual users. Recently, one of the tools law enforcement has used to take down dark net drug marketplaces is the “conspiracy to distribute narcotics” charge.⁸

While prosecutions of dark net marketplace operators with narcotics conspiracy charges have yielded success,⁹ this Note will argue that the conspiracy to distribute narcotics charge typically will be a poor conceptual fit for prosecuting dark net drug marketplace operators. Criminal justice is best carried out when the crime charged accurately tracks the criminal behavior engaged in. The further the charge is from the behavior, the less justifiable a conviction, while the closer the charge to the behavior, the more justifiable a conviction. Typical dark net marketplace structures tend not to resemble conspiracies between the operator and the users, so while such

5. See, e.g., Nicolas Christin, *Traveling the Silk Road: A Measurement Analysis of a Large Anonymous Online Marketplace*, 22D INT’L WORLD WIDE WEB CONF. 222 (May 2013), <https://dl.acm.org/citation.cfm?id=2488408> [<https://perma.cc/3GT5-AJS8>] (“We were able to determine that Silk Road indeed mostly caters drugs”); Nathaniel Popper, *Opioid Dealers Embrace the Dark Web to Send Deadly Drugs by Mail*, N.Y. TIMES: DEALBOOK (June 10, 2017), <https://www.nytimes.com/2017/06/10/business/dealbook/opioid-dark-web-drug-overdose.html> [<https://perma.cc/UPJ7-9T2M>]; Kyle Soska & Nicolas Christin, *Measuring the Longitudinal Evolution of the Online Anonymous Marketplace Ecosystem*, 24TH USENIX CONF. ON SECURITY SYMP. 40–42 (Aug. 2015), <https://www.usenix.org/system/files/conference/usenixsecurity15/sec15-paper-soska-updated.pdf> [<https://perma.cc/JVW6-W44W>] (highlighting the lifespan of select marketplaces and product types).

6. This Note will use the term “dark net” to refer to the place where these marketplaces are found, but many media outlets often refer to the same place as the “dark web.”

7. See, e.g., *United States v. McLamb*, 880 F.3d 685, 687 (4th Cir. 2018) (“The dark web is a collection of encrypted networks providing strong privacy protections to its users.”); Di Ma & Gregory D. Kaufmann, *War on Drugs 2.1: Setting the Terms of Engagement*, 28 ALB. L.J. SCI. & TECH. 94, 95–96 (2017) (“The Dark Web comprises of anonymously hosted web pages that are only accessible through software that masks user IP addresses, such as The Onion Router The main benefit of the Dark Web is anonymity.”).

8. See, e.g., Press Release, Fed. Bureau of Investigation, Operator of Silk Road 2.0 Website Charged in Manhattan Federal Court (Nov. 6, 2014), <https://www.fbi.gov/contact-us/field-offices/newyork/news/press-releases/operator-of-silk-road-2.0-website-charged-in-manhattan-federal-court> [<https://perma.cc/2SA4-8F74>] [hereinafter November 2014 Press Release]; Press Release, Fed. Bureau of Investigation, Ross Ulbricht, aka Dread Pirate Roberts, Sentenced in Manhattan Federal Court to Life in Prison (May 29, 2015), <https://www.fbi.gov/contact-us/field-offices/newyork/news/press-releases/ross-ulbricht-aka-dread-pirate-roberts-sentenced-in-manhattan-federal-court-to-life-in-prison> [<https://perma.cc/XG56-AS7C>] [hereinafter May 2015 Press Release]; Press Release, U.S. Dep’t of Justice, AlphaBay, the Largest Online ‘Dark Market,’ Shut Down (July 20, 2017), <https://www.justice.gov/opa/pr/alphabay-largest-online-dark-market-shut-down> [<https://perma.cc/43H4-Z9J9>].

9. See, e.g., Joseph Cox, *Silk Road 2.0 Right-Hand Man Pleads Guilty*, VICE: MOTHERBOARD (Mar. 22, 2016, 11:40 AM), https://www.vice.com/en_us/article/jpg59g/silk-road-20-right-hand-man-pleads-guilty [<https://perma.cc/75UD-NU7N>]; Sam Thielman, *Silk Road Operator Ross Ulbricht Sentenced to Life in Prison*, GUARDIAN (May 29, 2015), <https://www.theguardian.com/technology/2015/may/29/silk-road-ross-ulbricht-sentenced> [<https://perma.cc/2ZJU-WJMY>].

operators should be held accountable for their actions, doing so through the conspiracy charge poses serious concerns for justice.

Instead, what is needed is a statute that prohibits exactly the type of behavior the typical dark net drug marketplace operator engages in—maintaining a place for the purpose of the distribution of drugs. Fortunately, such a statute already exists—the federal “crack house” statute.¹⁰ Though prosecuting dark net drug marketplace operators with the crack house statute is a novel approach entailing its own set of challenges, charging a narcotics conspiracy where none exists threatens prosecutorial legitimacy.

Part I of this Note will review the opioid crisis and the widespread availability of illicit drugs through new dark net marketplaces; discuss the elements of the conspiracy to distribute narcotics charge; briefly review the prosecution of Ross Ulbricht, the operator of the Silk Road drug marketplace; and then end by taking a closer look at 21 U.S.C. § 856, the crack house statute. Part II will define the typical dark net drug marketplace before asking whether conspiracy law might be a poor conceptual fit for prosecuting the operator of such a marketplace, using the Ulbricht prosecution as a helpful example. Part III will argue that a better charge than conspiracy to distribute narcotics is needed to prosecute the operator of the typical dark net drug marketplace, that the ongoing opioid crisis demands a prosecutorial tool in the absence of the conspiracy charge, and that the crack house charge is a better fit than conspiracy law when applied to the typical operator case.

I. THE OPIOID CRISIS, THE DARK NET, AND MODERN DRUG ENFORCEMENT

Overdose deaths in America have rapidly increased over the past several years.¹¹ Fatal overdose data for 2017, and initial data for 2018, suggest that the crisis is nearing or has reached an apex.¹² At the same time, drug marketplaces on the dark net have grown in scope and revenue.¹³ U.S. prosecutors have responded by pursuing the operators of these marketplaces in a variety of ways, often by bringing the charge of conspiracy to distribute

10. 21 U.S.C. § 856 (2012).

11. Katz, *supra* note 1.

12. See Christopher Ingraham, *Fentanyl Use Drove Drug Overdose Deaths to a Record High in 2017, CDC Estimates*, WASH. POST (Aug. 15, 2018), <https://www.washingtonpost.com/business/2018/08/15/fentanyl-use-drove-drug-overdose-deaths-record-high-cdc-estimates/> [<https://perma.cc/LZX2-VBGQ>]; Kamp, *supra* note 4; German Lopez, *2017 Was the Worst Year Ever for Drug Overdose Deaths in America*, VOX (Aug. 16, 2018, 2:00 PM), <https://www.vox.com/science-and-health/2018/8/16/17698204/opioid-epidemic-overdose-deaths-2017> [<https://perma.cc/5DVY-SX4P>]; see also Katz & Sanger-Katz, *supra* note 3.

13. KRISTY KRUIHOF ET AL., RAND EUR., INTERNET-FACILITATED DRUGS TRADE: AN ANALYSIS OF THE SIZE, SCOPE AND THE ROLE OF THE NETHERLANDS 61 (2016), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1607/RAND_RR1607.pdf [<https://perma.cc/VNL2-2UQD>] (finding, as of 2016, “evidence of a substantial growth in cryptomarkets since the closure of the first major drug cryptomarket, Silk Road 1.0, in September 2013” and that “listings for drugs has seen a nearly six-fold increase; the numbers of vendors and transactions have nearly tripled; and revenue (aka ‘turnover’) has doubled over the period”).

narcotics.¹⁴ For example, Ross Ulbricht, creator and operator of the Silk Road dark net drug marketplace, was charged with and eventually convicted of conspiracy to distribute narcotics—the prosecution alleging a single, all-encompassing conspiracy between him and each of the sellers of the marketplace.¹⁵ While prosecutors were successful in bringing the conspiracy to distribute narcotics charge, among others,¹⁶ they failed to bring a charge under the crack house statute, 21 U.S.C. § 856, which makes it a federal crime to “knowingly . . . maintain any place, whether permanently or temporarily, for the purpose of . . . distributing . . . any controlled substance.”¹⁷ This Part will review the landscape of the opioid crisis, the dark net, the elements of conspiracy to distribute narcotics, the Ulbricht prosecution, and the history and current use of the crack house statute.

A. *The Opioid Crisis and Dark Net Drug Marketplaces*

Overdose deaths in America have reached crisis levels. Beginning in 1999, deaths from opioid pain relievers have risen steadily year after year¹⁸ and have increased in 2017.¹⁹ The economic cost of the crisis is staggering—the Council of Economic Advisers for the White House estimated the cost of the crisis at just over \$500 billion in 2015 alone, a year when 33,000 Americans died of overdoses.²⁰ The U.S. Congress,²¹ the Office of the

14. See *supra* note 8 and accompanying text.

15. Memorandum of Law in Opposition to Defendant’s Motion to Dismiss the Indictment at 9, *United States v. Ulbricht*, 31 F. Supp. 3d 540 (S.D.N.Y. 2014) (No. 14-cr-68 (KBF)), 2014 WL 7151214 (“Count One charges that he conspired with others to distribute drugs, a charge that readily encompasses Ulbricht’s operation of the Silk Road website. In that role, Ulbricht entered into a joint venture with thousands of drug dealers around the world to distribute drugs online.”).

16. Benjamin Weiser, *Man Behind Silk Road Website Is Convicted on All Counts*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/05/nyregion/man-behind-silk-road-website-is-convicted-on-all-counts.html> [<https://perma.cc/5H46-BT8W>].

17. 21 U.S.C. § 856(a)(1) (2012).

18. Andrew Kolodny et al., *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction*, 36 ANN. REV. PUB. HEALTH 559, 560 (2015) (“Over the past 15 years, the rate of opioid pain reliever (OPR) use in the United States has soared. From 1999 to 2011, consumption of hydrocodone more than doubled and consumption of oxycodone increased by nearly 500%. During the same time frame, the OPR-related overdose death rate nearly quadrupled.”).

19. See Lopez, *supra* note 12.

20. COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, THE UNDERESTIMATED COST OF THE OPIOID CRISIS 1 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf> [<https://perma.cc/6U9C-VQCX>].

21. Colby Itkowitz, *Senate Passes Sweeping Opioids Package*, WASH. POST (Sept. 17, 2018), <https://www.washingtonpost.com/politics/2018/09/17/senate-set-pass-sweeping-opioids-package/> [<https://perma.cc/FDT7-D26S>]. This package was ultimately enacted into law as the SUPPORT for Patients and Communities Act, Pub. L. No. 115-271, 132 Stat. 3894 (2018).

President,²² and individual states and state agencies have responded to the crisis.²³

As the opioid epidemic has accelerated, new technologies have helped to create a variety of online dark net drug marketplaces. The dark net refers to a subset of the internet characterized in large part by anonymity—dark net spaces are primarily inaccessible to regular internet browsers, instead requiring software like The Onion Router (Tor) to mask users' Internet Protocol (IP) addresses and identities.²⁴ Networks allowing totally anonymous and encrypted communications create difficulties for law enforcement and opportunities for criminals.²⁵ Typical dark net marketplaces, like the Silk Road, Evolution, and AlphaBay, host primarily drug transactions.²⁶

U.S. prosecutors have successfully taken down several of these drug marketplaces by targeting their operators.²⁷ In each of these takedowns,

22. *President Donald J. Trump's Initiative to Stop Opioid Abuse and Reduce Drug Supply and Demand*, WHITE HOUSE (Mar. 19, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-initiative-stop-opioid-abuse-reduce-drug-supply-demand/> [https://perma.cc/STX3-YHG9].

23. *See, e.g.*, WASH. STATE DEP'T OF HEALTH, 2018 WASHINGTON STATE OPIOID RESPONSE PLAN (2018), <https://www.doh.wa.gov/Portals/1/Documents/1000/140-182-StateOpioidResponsePlan.pdf> [https://perma.cc/5JAX-79GK]; *Addressing the Opioid Epidemic in New York State*, N.Y. ST.: DEP'T OF HEALTH, https://www.health.ny.gov/community/opioid_epidemic/ [https://perma.cc/UU7P-5FJS] (last updated Mar. 2018); *Treating Heroin and Opioid Use Disorder*, COMMONWEALTH OF PA., <https://www.pa.gov/guides/opioid-epidemic/> [https://perma.cc/S7ZS-YGXC] (last visited Aug. 22, 2019).

24. *See* Ma & Kaufmann, *supra* note 7, at 95; Jessica A. Wood, *The Darknet: A Digital Copyright Revolution*, 16 RICH. J.L. & TECH. 14, 30–33 (2010); Amanda Haasz, Note, *Underneath It All: Policing International Child Pornography on the Dark Web*, 43 SYRACUSE J. INT'L L. & COM. 353, 354–58 (2016); A. Dominick Romeo, Comment, *Hidden Threat: The Dark Web Surrounding Cyber Security*, 43 N. KY. L. REV. 73, 74–77 (2016).

25. *See generally* *Going Dark: Encryption, Technology, and the Balance Between Public Safety and Privacy: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (joint statement of James B. Comey, Director, Federal Bureau of Investigation and Sally Yates, Deputy Att'y Gen., Department of Justice) (explaining the obstacles posed to law enforcement); Kaleigh E. Aucoin, Note, *The Spider's Parlor: Government Malware on the Dark Web*, 69 HASTINGS L.J. 1433, 1438–41 (2018).

26. *See, e.g.*, Julian Broséus et al., *A Geographical Analysis of Trafficking on a Popular Darknet Market*, 277 FORENSIC SCI. INT'L 88, 92–96 (2017) (discussing Evolution sales); Nicolas Christin, *An EU-Focused Analysis of Drug Supply on the AlphaBay Marketplace*, EUR. MONITORING CTR. FOR DRUGS & DRUG ADDICTION 12–13 (2017), <http://www.emcdda.europa.eu/system/files/attachments/6622/AlphaBay-final-paper.pdf> [https://perma.cc/M54P-YRQ6] (discussing AlphaBay transactions); Christin, *supra* note 5, at 7–9 (discussing Silk Road sales).

27. Andy Greenberg, *End of the Silk Road: FBI Says It's Busted the Web's Biggest Anonymous Drug Black Market*, FORBES (Oct. 2, 2013), <https://www.forbes.com/sites/andygreenberg/2013/10/02/end-of-the-silk-road-fbi-busts-the-webs-biggest-anonymous-drug-black-market> [https://perma.cc/2JAU-6E8S]; Donna Leinwand Leger, *Feds Shut Down Silk Road 2.0, Arrest San Francisco Man*, USA TODAY (Nov. 6, 2014, 4:04 PM), <https://www.usatoday.com/story/news/nation/2014/11/06/feds-shut-down-silk-road-copycat/18591155/> [https://perma.cc/56C5-KLXL]; Nathaniel Popper & Rebecca R. Ruiz, *2 Leading Online Black Markets Are Shut Down by Authorities*, N.Y. TIMES: DEALBOOK (July 20, 2017), <https://www.nytimes.com/2017/07/20/business/dealbook/alphabay-dark-web-opioids.html> [https://perma.cc/9T3Z-JL89].

prosecutors leveled a charge of conspiracy to distribute narcotics at the operators, among others.²⁸

B. Conspiracy Law

It is a federal crime to “knowingly or intentionally . . . distribute . . . a controlled substance.”²⁹ Under 21 U.S.C. § 846, it is also a federal crime to conspire to do so.³⁰ The crime of conspiracy exists as a separate offense primarily to guard against the danger of concerted action—the theory being that individuals working together to achieve criminal goals are capable of more harm than they would be on their own.³¹ Conspiracy typically has four elements: first, an agreement between two or more parties; second, that the agreement be to achieve an illegal goal; third, that the parties have knowledge of and participate in the conspiracy; and fourth, at least one party committed at least one overt act in furtherance of the conspiracy.³²

What constitutes an agreement differs between courts—an explicit agreement will suffice, but so too might a willingness to work together, mutual promises, or a meeting of the minds.³³ What is clear about the agreement element is that, due to the often-secretive nature of conspiracies, a formal agreement is not necessary—jurors may infer that an agreement exists even when it is implicit.³⁴

The illegal goal element means that the government must establish that the purpose of the conspiracy was to either defraud the United States or violate a federal law.³⁵ 21 U.S.C. § 846 requires that the conspiracy’s goal be to violate any offense listed within § 846, including its prohibitions on drug possession and distribution.³⁶

28. See *supra* note 8 and accompanying text. This Note primarily focuses on the Silk Road prosecution because it was the only dark net drug marketplace enforcement taken all the way through trial.

29. 21 U.S.C. § 841(a)(1) (2012).

30. *Id.* § 846.

31. See, e.g., Callanan v. United States, 364 U.S. 587, 593–94 (1961) (noting that “[c]oncerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality” and that “[g]roup association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish”).

32. Damon Porter, *Federal Criminal Conspiracy*, 54 AM. CRIM. L. REV. 1307, 1310–14 (2017). However, drug conspiracy under 21 U.S.C. § 846 does not require the showing of an overt act. *United States v. Shabani*, 513 U.S. 10, 11 (1994).

33. Laurent Sacharoff, *Conspiracy as Contract*, 50 U.C. DAVIS L. REV. 405, 414–24 (2016).

34. See, e.g., *United States v. Gardiner*, 463 F.3d 445, 457 (6th Cir. 2006) (finding a formal agreement unnecessary in a RICO conspiracy because “[a] defendant’s agreement to participate in the RICO conspiracy may be inferred from his acts”); *United States v. Mickelson*, 378 F.3d 810, 821 (8th Cir. 2004) (“Because the details of a conspiracy often are shrouded in secrecy, circumstantial evidence and inferences from the parties’ actions may be used to establish the conspiracy’s existence.”).

35. 18 U.S.C. § 371 (2012).

36. 21 U.S.C. § 846 (2012).

The knowledge element requires evidence that the defendant had the specific intent to engage in the behavior that constituted the criminal object.³⁷ Though knowledge may be shown with circumstantial evidence,³⁸ without proof of voluntary participation by the defendant, the conspiracy charge will necessarily fail.³⁹

Conspiracy law offers prosecutors several advantages. Wayne LeFave, a leading scholar on criminal substantive law and procedure, identified five distinct benefits: (1) the inherent vagueness in the crime of conspiracy itself;⁴⁰ (2) that the trial venue may be proper in any jurisdiction in which an overt act took place;⁴¹ (3) the coconspirator exception to the hearsay rule;⁴² (4) the wide latitude afforded prosecutors in admitting circumstantial evidence;⁴³ and (5) the joint trial.⁴⁴

Yet courts and scholars alike have criticized these advantages as unfair. In particular, while the inherent vagueness of the crime allows prosecutors to attack what may be truly secretive and kaleidoscopic conspiracy structures, that same vagueness is often maligned.⁴⁵ Another concern of scholars is the shifting nature of the agreement element,⁴⁶ which has important implications

37. See, e.g., *United States v. Hassan*, 578 F.3d 108, 123 (2d Cir. 2008) (“A conspiracy conviction cannot be sustained unless the government established beyond a reasonable doubt that the defendant had the *specific intent* to violate the substantive statute.”); *United States v. Morgan*, 385 F.3d 196, 206 (2d Cir. 2004) (“Conspiracy is a specific intent crime ‘Proof that the defendant knew that *some* crime would be committed is not enough.’” (quoting *United States v. Friedman*, 300 F.3d 111, 124 (2d Cir. 2002))).

38. See, e.g., *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Gardner*, 488 F.3d 700, 711 (6th Cir. 2007); *United States v. Fuchs*, 467 F.3d 889, 908 (5th Cir. 2006).

39. *United States v. Falcone*, 311 U.S. 205, 210 (1940) (“The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy Those having no knowledge of the conspiracy are not conspirators”); *United States v. Nguyen*, 493 F.3d 613, 618 (5th Cir. 2007) (“[T]he Government must prove the defendants knew of the conspiracy’s unlawful objective”); *United States v. Ndiaye*, 434 F.3d 1270, 1294 (11th Cir. 2006) (“The knowledge requirement is satisfied when the Government shows a defendant’s awareness of the essential nature of the conspiracy.”).

40. 2 WAYNE R. LEFAVE, *SUBSTANTIVE CRIMINAL LAW* § 12.1(b)(1) (3d ed. 2018).

41. *Id.* § 12.1(b)(2).

42. *Id.* § 12.1(b)(3).

43. *Id.* § 12.1(b)(4).

44. *Id.* § 12.1(b)(5).

45. See, e.g., *Krulewitch v. United States*, 336 U.S. 440, 445–46 (1949) (criticizing the conspiracy crime as an “elastic, sprawling and pervasive offense,” and stating, “[t]he modern crime of conspiracy is so vague that it almost defies definition”); Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 624 (1941) (“In the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy.”); Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922) (“A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought.”).

46. See, e.g., Benjamin E. Rosenberg, *Several Problems in Criminal Conspiracy Laws and Some Proposals for Reform*, 43 CRIM. L. BULL. 427, 441 (2007) (“Courts have further expanded the crime of conspiracy by reifying the conspiratorial agreement, treating it as if it were something more than the mere agreement between or among people or entities The language used evokes a metaphor [I]f a jury is directed in a way that encourages it to use the metaphor, then the defendant may be prejudiced.”); Sacharoff, *supra* note 33, at 414 (“In

in the context of alleged agreements between dark net drug marketplace operators and their users.⁴⁷ Scholars have also criticized the hearsay exception for coconspirator statements on various grounds,⁴⁸ as well as the broad venue provision for conspiracy cases,⁴⁹ but these concerns will not be addressed in this Note.

C. *The Ross Ulbricht Prosecution*

The Silk Road was an online drug marketplace located on the dark net that linked buyers and sellers.⁵⁰ Started in 2011, the Silk Road rapidly expanded as a marketplace until 2013.⁵¹ Users could list or purchase a variety of items on the Silk Road, but the most common items transacted for were drugs, including marijuana, prescription pills, cocaine, ecstasy, heroin, and other controlled substances.⁵² One defining feature of the Silk Road was the strong anonymity it offered users. Accessible only through the Tor browser, and through the use of Bitcoin as an electronic payment system, the Silk Road allowed users to transact mostly free of anchors to their true identities, such as IP addresses or bank records.⁵³ As of July 2013, there were allegedly 957,079 registered user accounts on the Silk Road.⁵⁴ Between February 2011 and July 2013, over 1.2 million transactions allegedly took place on the website.⁵⁵ Revenue for sales totaled roughly 600,000 bitcoins, for the 2013 equivalent of roughly \$1.2 billion, and the Silk Road earned the equivalent of roughly \$79.8 million in commissions.⁵⁶

The Silk Road was shut down by U.S. law enforcement in 2013, and its creator, Ross Ulbricht, was arrested.⁵⁷ After a jury trial, Ulbricht was convicted in 2015 on all seven counts he faced: distributing narcotics; distributing narcotics by means of the internet; conspiring to distribute

assessing how legislatures or courts define ‘agreement’ in conspiracy, we run headlong into a threshold problem: they don’t.”).

47. See *infra* Part II.A.

48. See, e.g., Ben Trachtenberg, *Coconspirators, “Coventurers,” and the Exception Swallowing the Hearsay Rule*, 61 HASTINGS L.J. 581, 637–48 (2009); Patrick J. Sullivan, Note, *Bootstrapping of Hearsay Under Federal Rule of Evidence 801(d)(2)(E): Further Erosion of the Coconspirator Exemption*, 74 IOWA L. REV. 467, 469–70 (1989).

49. See, e.g., Robert L. Ullmann, *One Hundred Years After Hyde: Time to Expand Venue Safeguards in Federal Criminal Conspiracy Cases?*, 52 SANTA CLARA L. REV. 1003, 1024–28 (2012).

50. See Alice Huang, Note, *Reaching Within Silk Road: The Need for a New Subpoena Power That Targets Illegal Bitcoin Transactions*, 56 B.C. L. REV. 2093, 2104 (2015).

51. Carmine DePiero, Note, *Deciphering Cryptocurrency: Shining a Light on the Deep Dark Web*, 2017 U. ILL. L. REV. 1267, 1274–75.

52. Christin, *supra* note 5, at 8–9.

53. Soska & Christin, *supra* note 5, at 33.

54. Sealed Complaint at 14, *United States v. Ulbricht*, 31 F. Supp. 3d 540 (S.D.N.Y. 2014) (No. 14-cr-68 (KBF)) [hereinafter *Ulbricht Complaint*].

55. *Id.* at 15. At trial, the government provided evidence showing that the Silk Road generated revenues of more than \$213 million. See Weiser, *supra* note 16.

56. *Ulbricht Complaint*, *supra* note 54, at 15.

57. James Ball et al., *FBI Claims Largest Bitcoin Seizure After Arrest of Alleged Silk Road Founder*, GUARDIAN (Oct. 2, 2013), <https://www.theguardian.com/technology/2013/oct/02/alleged-silk-road-website-founder-arrested-bitcoin> [https://perma.cc/HAS4-PB29].

narcotics; engaging in a continuing criminal enterprise; conspiring to commit computer hacking; conspiring to traffic in false identity documents; and conspiring to commit money laundering.⁵⁸ He was sentenced to life in prison in 2015.⁵⁹ This Note only focuses on one charge the prosecution brought—conspiracy to distribute narcotics⁶⁰—and one that it did not—maintaining a place for the purpose of the distribution of drugs under the crack house statute.⁶¹ This Note will argue that the former fails to accurately describe the behavior engaged in and the latter describes it nearly perfectly.

The government's theory behind the narcotics conspiracy charge was that Ulbricht entered into a joint agreement with thousands of drug dealers around the world—the sellers on the Silk Road—to distribute drugs online.⁶² In furtherance of this conspiracy, he created and maintained the Silk Road to facilitate drug deals and evade law enforcement.⁶³ In return, he would earn a commission on every transaction.⁶⁴ The elements of the conspiracy, thus, were as follows: first, the “agreement,” made between Ulbricht and each other seller on the Silk Road, was to distribute drugs; second, the “criminal object” of the conspiracy was to violate federal narcotics law;⁶⁵ and third, Ulbricht had knowledge of this conspiracy involving him and the sellers on the Silk Road, and the sellers had knowledge of this conspiracy between Ulbricht and themselves.

Before trial, the court denied Ulbricht's motion to dismiss the indictment, including the narcotics conspiracy count.⁶⁶ In doing so, the court carefully considered the intricacies of the alleged conspiracy before deciding that the indictment sufficiently alleged a narcotics conspiracy.⁶⁷ Because the court's breakdown of conspiracy law in the context of Ulbricht's creation of the Silk Road is illuminating, its discussion will be briefly reviewed.

First, the court asked whether there could be a legally cognizable agreement between Ulbricht and each of the users of the site to engage in narcotics trafficking, and if so, what the difference was between Ulbricht's conduct and the conduct of a person who designed a legitimate online marketplace like, for example, eBay.⁶⁸ It answered yes and determined that the *intent* of the creator distinguishes the two.⁶⁹ The court stated that what was alleged in the indictment was that Ulbricht “purposefully and intentionally designed, created, and operated Silk Road to facilitate unlawful

58. May 2015 Press Release, *supra* note 8.

59. *Id.*

60. Superseding Indictment at 4–7, United States v. Ulbricht, 31 F. Supp. 3d 540 (S.D.N.Y. 2014) (No. 14-cr-68 (KBF)).

61. 21 U.S.C. § 856 (2012).

62. Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Indictment, *supra* note 15, at 9.

63. *Id.*

64. *Id.*

65. 21 U.S.C. § 846.

66. *Ulbricht*, 31 F. Supp. 3d at 570.

67. *Id.* at 562.

68. *Id.* at 555.

69. *Id.* at 555–57.

transactions.”⁷⁰ Ensuing sales on the site could then amount to circumstantial evidence of a conspiracy, as could evidence of facts alleged in the indictment, including that Ulbricht benefitted monetarily from the site and that he used violence to protect the site and its proceeds.⁷¹ In distinguishing the Silk Road from a legitimate marketplace, the court held, “Ulbricht is alleged to have knowingly and intentionally constructed and operated an expansive black market for selling and purchasing narcotics This separates Ulbricht’s conduct from the mass of others whose websites may—without their planning or expectation—be used for unlawful purposes.”⁷²

Second, the court asked who the alleged coconspirators could be, and what form the alleged conspiracy could take.⁷³ It pointed to the indictment, which alleged a single conspiracy consisting of “several thousand drug dealers and other unlawful vendors,” and then discussed two typical conspiracy structures: the “chain” conspiracy and the “hub-and-spoke” conspiracy.⁷⁴ The court stated that “the form of the conspiracy is not as important as a determination that at least one other person joined in the alleged conspiratorial agreement with Ulbricht” and that, while complex, the questions as to the form of the indictment were “issues for trial and not for this stage.”⁷⁵

Third, the court asked when any agreement could have occurred between Ulbricht and the alleged coconspirators, whether each coconspirator’s mind could have met Ulbricht’s, and whether Ulbricht, by designing the Silk Road, made an enduring show of intent to join the conspiracy.⁷⁶ It answered each of these questions by analogy and suggested that by creating and maintaining the Silk Road, Ulbricht could have constructed a perpetual offer to join into a conspiracy with any future users of the platform.⁷⁷ According to the court, it was as though Ulbricht posted “a sign on a (worldwide) bulletin board that said: ‘I have created an anonymous, untraceable way to traffic narcotics [U]se the platform as much as you would like, provided you pay me a percentage of your profits and adhere to my other terms of service.’”⁷⁸ It was therefore possible that each time someone signed up on the site, the sign-up could function as an acceptance of Ulbricht’s offer, and “as a matter of law, he or she may become a coconspirator.”⁷⁹

Finally, the court asked whether it was necessary or even possible “to pinpoint *how* the agreement between Ulbricht and his coconspirators was made” and whether an agreement could be made by an end user, such as a Silk Road seller, interacting with computer software.⁸⁰ It held that such an

70. *Id.* at 556.

71. *Id.*

72. *Id.*

73. *Id.* at 557.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 557–58.

78. *Id.* at 558.

79. *Id.*

80. *Id.*

agreement via software was possible and cited case law holding that an agreement within the conspiracy context need not involve words exchanged in person, and that all that was necessary was some evidence introduced at trial showing that the conspirators “have taken knowing and intentional actions to work together in some mutually dependent way to achieve the unlawful object.”⁸¹

D. *The Crack House Statute*

Ulbricht was not charged under the crack house statute, but because it might apply to the behavior he engaged in, it requires a closer look. The federal crack house statute was enacted as part of the Anti-Drug Abuse Act of 1986.⁸² Section 856(a)(1) 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.”⁸³ 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 mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.⁸⁴

Section 856(b) provides for punishment—for violating either subsection of 856(a), “a term of imprisonment of not more than 20 years or a fine of not more than \$500,000, or both, or a fine of \$2,000,000 for a person other than an individual.”⁸⁵

Importantly, “place” is not currently defined in the statute. It would therefore be helpful to look at the statute’s history for guidance. The original statute was narrower. Section 856(a)(1), as passed in 1986, only made it a crime to “knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance.”⁸⁶ The Illicit Drug Anti-Proliferation Act of 2003⁸⁷ supplemented this language and replaced “open or maintain any place” with “open, lease, rent, use, or maintain any place, whether permanently or temporarily.”⁸⁸

Similarly, § 856(a)(2), as passed in 1986, only made it unlawful to

manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the

81. *Id.* at 558–59.

82. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

83. 21 U.S.C. § 856(a)(1) (2012).

84. *Id.* § 856(a)(2).

85. *Id.* § 856(b).

86. Anti-Drug Abuse Act of 1986 § 1841.

87. Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of the U.S.C.).

88. *Id.* § 608.

building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.⁸⁹

The Illicit Drug Anti-Proliferation Act of 2003 struck much of this language and widened the statute’s reach by making it a crime to

manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.⁹⁰

Importantly, the amendment removed the “enclosure” requirement of § 856(a)(2) and replaced the more-specific “building, room, or enclosure”⁹¹ with the current “place” language and criminalized knowingly and intentionally “profit[ing] from” such a place.⁹²

Though sections 856(a)(1) and 856(a)(2) appear to be similar, courts have interpreted them as doing different work. Courts typically construe § 856(a)(1) as requiring a specific intent to knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance; that is, to be convicted under § 856(a)(1), the defendant must have the specific intent to use the place in order to manufacture, distribute, or use a controlled substance.⁹³ On the other hand, courts typically construe § 856(a)(2) as requiring a lesser degree of knowledge or intent on the part of

89. Anti-Drug Abuse Act of 1986 § 1841.

90. 21 U.S.C. § 856(a)(2) (2012).

91. Illicit Drug Anti-Proliferation Act of 2003 § 608.

92. 21 U.S.C. § 856(a)(2).

93. *See, e.g.,* United States v. Shetler, 665 F.3d 1150, 1162 (9th Cir. 2011) (“[I]n 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.’ Restricting the application of § 856(a)(1) to those individuals whose manufacture, distribution, or use of drugs in their residence constitutes,” the Court stated, “one of the primary or principal’ purposes of their occupancy of that residence ensures that the statute does not extend beyond its intended coverage so as to encompass ‘incidental’ drug use.” (citation omitted) (quoting United States v. Verners, 53 F.3d 291, 296 (10th Cir. 1995)); United States v. Russell, 595 F.3d 633, 643 (6th Cir. 2010) (“[T]he definition of ‘purpose’ adopted by the district judge—that the government need only prove that the defendant’s drug-related purpose for maintaining a premises be ‘significant or important’—is the proper definition of ‘purpose’ in this circuit in the context of § 856 prosecutions.”); United States v. Becerra, 97 F.3d 669, 672 (2d Cir. 1996) (“To convict a defendant as a principal under 21 U.S.C. § 856(a)(1), the government was required to establish beyond a reasonable doubt that the defendant (1) opened or maintained a place; (2) for the purpose of distributing or packaging controlled substances; and (3) did so knowingly.”); United States v. Verners, 53 F.3d 291, 296–97 (10th Cir. 1995) (“We agree that the ‘crack-house’ statute 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).”); United States v. Lancaster, 968 F.2d 1250, 1254 (D.C. Cir. 1992) (finding that a jury instruction accurately set out “the elements of a subsection 856(a)(1) violation, namely, that the defendant open or maintain a place with the purpose that drugs be manufactured, distributed or used there”); United States v. Mei-Fen Chen, 913 F.2d 183, 190 (5th Cir. 1990) (“In examining the plain language of the statute, we find that the statute is unambiguous; the phrase *for the purpose of* applies to the person who opens or maintains the place for the illegal activity. . . . [A]ny other interpretation would render § 856(a)(2) essentially superfluous.”).

the owner, lessee, agent, employee, or mortgagee.⁹⁴ Section 856(a)(1), then, prohibits individuals from maintaining a place for the explicit purpose of distributing drugs, while § 856(a)(2) prohibits individuals from maintaining a place with the knowledge that it is being used to distribute drugs.

In practice, the crack house statute is used primarily to prosecute private individuals, whether owners or renters, who use their residences to distribute controlled substances.⁹⁵ But the statute has been used in more expansive ways as well. The statute is sometimes used to prosecute owners of marijuana dispensaries⁹⁶ and has been used to prosecute landowners who allowed their land to be used for weekend music festivals wherein drug activity took place.⁹⁷ It has been used to prosecute the owner of a car dealership who used the company's property to conduct drug sales.⁹⁸ It has also been used to prosecute the owner of a farm on which marijuana was grown.⁹⁹ Recently, scholars and commentators have raised concerns that the statute could be used to prosecute operators and users at "supervised injection

94. See, e.g., *United States v. Tebeau*, 713 F.3d 955, 960 (8th Cir. 2013) ("[T]he 'bare meaning' of the purpose requirement in § 856(a)(2) indicates that the government was not required to prove that [defendant] had the intent to manufacture, distribute, or use a controlled substance to convict him under the statute. [Defendant's] reading of § 856(a)(2) to require proof of specific intent to manufacture, distribute or use controlled substances would render it redundant with § 856(a)(1)."); *United States v. Wilson*, 503 F.3d 195, 197–98 (2d Cir. 2007) ("The phrase 'for the purpose,' as used in [§ 856(a)(2)], references the purpose and design *not* of the person with the premises, but rather of those who are permitted to engage in drug-related activities there."); *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993) ("In (a)(2) the 'purpose' may be that of others; the defendant is liable if he manages or controls a building that others use for an illicit purpose, and he either knows of the illegal activity or remains deliberately ignorant of it."); *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991) ("[I]t is clear that (a)(1) was intended to apply to deliberate maintenance of a place for a proscribed purpose, whereas (a)(2) was intended to prohibit an owner from providing a place for illegal conduct, and yet to escape liability on the basis either of lack of illegal purpose, or of deliberate ignorance."); *Mei-Fen Chen*, 913 F.2d at 190 (holding that "§ 856(a)(2) is designed to apply to the person who may not have actually opened or maintained the place for the purpose of drug activity, but who has knowingly allowed others to engage in those activities by making the place 'available for use . . . for the purpose of unlawfully' engaging in such activity" and that, "under § 856(a)(2), the person who manages or controls the building and then rents to others, need not have the express purpose in doing so that drug related activity take place; rather such activity is engaged in by others").

95. A brief Westlaw search of recent cases citing to the statute supports this. See, e.g., *United States v. O'Brien*, 926 F.3d 57, 63–65 (2d Cir. 2019) (residence); *United States v. Chaney*, 921 F.3d 572, 577–78 (6th Cir. 2019) (medical clinic); *United States v. Johnson*, 768 F. App'x 920, 921–22 (11th Cir. 2019) (residence); *United States v. Congo*, No. 2:18-cr-00193-JDL, 2019 WL 2527090, at *1 (D. Me. June 19, 2019) (residence); *United States v. Spiva*, No. 3:15-cr-169(2), 2019 WL 2330064, at *1–2 (S.D. Ohio May 30, 2019) (residence); *United States v. Davis*, No. 5:17-CR-256-1H, 2019 WL 2202890, at *1–2 (E.D.N.C. Apr. 9, 2019) (residence); *United States v. Rice*, Crim. No. 17-338, 2019 WL 1449744, at *1–3 (W.D. Pa. Apr. 2, 2019) (residence).

96. See, e.g., *United States v. Lynch*, 903 F.3d 1061, 1066–68 (9th Cir. 2018); *United States v. Rosenthal*, 454 F.3d 943, 947–48 (9th Cir. 2006).

97. *Tebeau*, 713 F.3d at 957–59.

98. *Tamez*, 941 F.2d at 772–73.

99. *United States v. Molina-Perez*, 595 F.3d 854, 858–59 (8th Cir. 2010).

facilities,”¹⁰⁰ a harm reduction approach to the nation’s ongoing opioid crisis.¹⁰¹ Neither § 856(a)(1) nor § 856(a)(2) have yet been used to prosecute owners of online spaces, such as the operators or creators of dark net drug marketplaces.

II. USING CONSPIRACY LAW TO PROSECUTE TYPICAL DARK NET DRUG MARKETPLACE OPERATORS

Having laid out the bare bones of conspiracy law in the context of narcotics laws,¹⁰² this Part will first briefly walk through the typical dark net drug marketplace¹⁰³ and then will take a closer look at the challenges of using conspiracy law to prosecute the operators of these marketplaces.¹⁰⁴ It will ask whether conspiracy law, for a number of reasons, might make for a poor conceptual fit in the prosecution of these operators. It will suggest that such a poor fit could pose problems to the criminal justice system, especially where a “better” statute might exist.

A. The Typical Dark Net Drug Marketplace

Dark net drug marketplaces are characterized in large part by the anonymity they provide their users, buyers and sellers alike.¹⁰⁵ While a wide variety of products are available on these marketplaces, drugs are the main products bought and sold.¹⁰⁶ Because users are essentially anonymous, these markets rely heavily on trust, typically built on feedback systems like user reviews.¹⁰⁷ Dark net drug marketplaces are far less hierarchical than normal

100. See generally, e.g., 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 (2009); Alex Kreit, *Safe Injection Sites and the Federal “Crack House” Statute*, 60 B.C. L. REV. 413 (2019); Amber A. Leary, Note, *A Safe Harbor in the Opioid Crisis: How the Federal Government Should Allow States to Legislate for Safe Injection Facilities in Light of the Opioid Public Health Emergency*, 84 BROOK. L. REV. 635 (2019); Cylas Martell-Crawford, Note, *Safe Injection Facilities: A Path to Legitimacy*, 11 ALB. GOV’T L. REV. 124 (2017); Melissa Vallejo, Note, *Safer Bathrooms in Syringe Exchange Programs: Injecting Progress into the Harm Reduction Movement*, 118 COLUM. L. REV. 1185 (2018).

101. German Lopez, *Why Some U.S. Cities Are Opening Safe Spaces for Injecting Heroin*, VOX (Feb. 6, 2019, 4:40 PM), <https://www.vox.com/science-and-health/2018/1/25/16928144/safe-injection-sites-heroin-opioid-epidemic> [<https://perma.cc/D857-SRR2>].

102. See *supra* Part I.B.

103. See *infra* Part II.A.

104. See *infra* Part II.B.

105. See *supra* note 24 and accompanying text.

106. See *supra* note 26 and accompanying text.

107. See, e.g., Robert Augustus Hardy & Julia R. Norgaard, *Reputation in the Internet Black Market: An Empirical and Theoretical Analysis of the Deep Web*, 12 J. INSTITUTIONAL ECON. 515, 520 (2015) (“The codification of buyer and seller feedback makes up each party’s user profile. A user’s feedback profile in this marketplace is made up of the comments and ratings left on the Silk Road site as well as other feedback forums. . . . The collection of this user feedback on other users makes up the reputation of the trader in the marketplace. . . . Potential buyers utilize this feedback about sellers. They can read comments about previous buyer’s experiences, whether or not the buyer received the items, and view the seller’s 30-day and 60-day and overall rating score.” (citation omitted)); Yasmine Hassan, *The Illicit Drug Trade on the Dark Net: Analysing the Need for a New EU Framework* (2017) (unpublished

marketplaces.¹⁰⁸ Most drug transactions that take place through dark net drug marketplaces are purchases of small quantities of drugs for personal use, but a significant amount of purchases are made for distribution quantities as well.¹⁰⁹

Although marketplaces differ on whom they cater to, who operates them, how much commission they charge, where they are located, and what internal rules govern them, most will be similar in a few ways. Dark net drug marketplaces are typically created and maintained by a single person or a small staff.¹¹⁰ These marketplaces primarily serve as a way to connect buyers and sellers; marketplace operators themselves are not selling or buying drugs.¹¹¹ The operators of these marketplaces are typically compensated by a small commission from every transaction that occurs.¹¹² The design of these marketplaces offers significant anonymity to operators,

master's thesis, Universiteit Leiden) (on file with author) ("Thirdly, and maybe the most important characteristic concerns the high level of anonymity these cryptomarkets offer to their vendors and customers. . . . [T]rustworthiness is key in these cases and this is embodied in the significant role feedback systems play on cryptomarkets."); Toms Reksna, *Complex Network Analysis of Darknet Black Market Forum Structure* (Sept. 18, 2017) (unpublished M.Sc. thesis, Universiteit Leiden) (on file with author).

108. Julia R. Norgaard, Harold J. Walbert & Robert Augustus Hardy, *Shadow Markets and Hierarchies: Comparing and Modeling Networks in the Dark Net*, 14 J. INSTITUTIONAL ECON. 877, 894–95 (2018).

109. See, e.g., KRISTY KRUIHOF ET AL., *supra* note 13, at 101 ("Only 2 per cent of transactions analysed in this study exceeded \$1,000, a majority of which we conclude were likely to be wholesale purchases. This small share of wholesale transactions, however, did generate about a quarter of the total drugs revenues on the markets analysed. The lion's share of transactions on these cryptomarkets was generated by listings under \$100, most likely to be for personal use. But these retail transactions generated only 18 per cent of total revenues. Most revenues were generated by listings priced between \$100 and \$500 (41 per cent.); Christin, *supra* note 26, at 25 ("[W]hile vendors on these marketplaces primarily cater in the retail space, with individual item weights and volumes frequently corresponding to personal amounts, there is evidence of much larger (bulk-like) sales.").

110. See, e.g., Joshua Bearman, *The Untold Story of Silk Road, Part 1*, WIRED (May 2015), <https://www.wired.com/2015/04/silk-road-1/> [<https://perma.cc/Y2LF-M7MA>] (Silk Road); Andrea Bellemare, *The Secret Life of Alexandre Cazes, Alleged Dark Web Mastermind*, CBC NEWS (Aug. 16, 2017), <https://www.cbc.ca/news/canada/montreal/alexandre-cazes-millionaire-cars-property-alphabay-1.4215894> [<https://perma.cc/YQ35-MN3L>] (AlphaBay); Joseph Cox, *The Secret Life of a Silk Road 2.0 Mastermind*, VICE: MOTHERBOARD (Mar. 10, 2016, 9:30 AM), https://motherboard.vice.com/en_us/article/3dad83/the-secret-life-of-a-silk-road-20-mastermind [<https://perma.cc/HK89-GJXQ>] (Silk Road 2.0); *Details Emerge of the German Administrators of Hansa Market on the Darknet*, DEUTSCHE WELLE (July 22, 2017), <https://www.dw.com/en/details-emerge-of-the-german-administrators-of-hansa-market-on-the-darknet/a-39804272> [<https://perma.cc/6D2D-S5TX>] (Hansa).

111. See *supra* note 5 and accompanying text.

112. See, e.g., Anick Jesdanun, *AlphaBay: How Dark Web Marketplaces Operate Like eBay*, INDEPENDENT (July 21, 2017, 10:53 AM), <https://www.independent.co.uk/news/business/news/alphabay-dark-web-marketplace-ebay-online-us-justice-department-illegal-drugs-a7852486.html> [<https://perma.cc/MA7V-ZUPK>] ("AlphaBay took a 2 percent to 4 percent commission."); Donna Leinwand Leger, *How FBI Brought Down Cyber-Underworld Site Silk Road*, USA TODAY (May 15, 2014, 2:54 PM), <https://www.usatoday.com/story/news/nation/2013/10/21/fbi-cracks-silk-road/2984921/> [<https://perma.cc/5TQP-U3B6>] ("The FBI estimates that Silk Road's operator made \$80 million in commissions from the site's users . . .").

buyers, and sellers because they are accessible only through browsers like Tor and using payment methods like Bitcoin that do not require conventional banking.¹¹³ Buyers can leave feedback on sellers,¹¹⁴ but buyer-buyer communication, seller-seller communication, and buyer-seller communication outside of transactions are rare, as is communication between the operator and any user.¹¹⁵ The buyers' goal is typically to obtain drugs for personal use or for resale; the sellers' goal is typically monetary gain; and the operators' goal is typically to earn commission through transactions that take place on the marketplace, the vast majority of which are drug sales.¹¹⁶

B. Critiques of Charging the Typical Dark Net Drug Marketplace Operator with Conspiracy to Distribute Narcotics

This subsection will detail a variety of reasons why the conspiracy to distribute narcotics charge may not be a good fit for prosecuting the operator of the typical dark net drug marketplace described above. The first potential problem with the conspiracy charge is that the relationships between the alleged conspirators will typically resemble not a single conspiracy, as was alleged in the Ulbricht case, but a “rimless hub-and-spoke conspiracy,” which under U.S. Supreme Court jurisprudence will consist of many different conspiracies rather than a single one.¹¹⁷ Second, it is unclear whether users of the marketplace know about or intend to join the other users in a wide-ranging, single conspiracy.¹¹⁸ Third, there exists what this Note will term the “eBay problem,” which is that distinguishing dark net drug marketplaces from legitimate marketplaces, while seemingly easy at first glance, becomes a difficult problem as the facts change.¹¹⁹ Finally, the public policy goals that justify the conspiracy charge are not as apparent as applied to dark net drug marketplace cases.¹²⁰

1. The “Rimless Hub-and-Spoke” Problem

In *Kotteakos v. United States*,¹²¹ the Supreme Court considered the case of three defendants convicted of fraudulently obtaining loans under the National Housing Act.¹²² Brown, who pleaded guilty and was not a party to this case, was the central figure in the fraudulent scheme and provided fraudulent loans under the Act for others.¹²³ The defendants knowingly submitted fraudulent

113. See generally DePiero, *supra* note 51.

114. See *supra* note 107.

115. See, e.g., *United States v. Ulbricht*, 31 F. Supp. 3d 540, 547 (S.D.N.Y. 2014) (“As website administrator, Ulbricht may have had some direct contact with some users of the site, and none with most.”).

116. See *supra* note 26 and accompanying text.

117. See generally *Kotteakos v. United States*, 328 U.S. 750 (1946).

118. See *infra* Part II.B.2.

119. See *infra* Part II.B.3.

120. See *infra* Part II.B.4.

121. 328 U.S. 750 (1946).

122. *Id.* at 752.

123. *Id.* at 752–55.

loan applications prepared by Brown and were indicted for a single conspiracy amongst themselves, Brown, and twenty-eight other people.¹²⁴ On appeal, the *Kotteakos* defendants challenged the discrepancy between what was alleged in the indictment, a single conspiracy, and what they argued the government proved at trial, separate conspiracies between Brown and each of the individuals he prepared fraudulent loans applications for.¹²⁵

The Supreme Court held that this discrepancy was fatal to the indictment, reversed the convictions, and remanded for further proceedings.¹²⁶ The government stated that the relationship between Brown and the others in the conspiracy was “that of separate spokes meeting in a common center,”¹²⁷ to which the Court added, “without the rim of the wheel to enclose the spokes.”¹²⁸ In considering the relationships between Brown and the defendants in light of the conspiracy statute they were charged under, the Court stated that it did not think that “Congress . . . intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all.”¹²⁹

The parallels between the relationships between Brown and the *Kotteakos* defendants and dark net drug operators and their users are compelling. Brown acted as a central figure in the loan scheme and prepared the fraudulent loans for the other persons listed in the indictment. Drug marketplace operators, like Ulbricht, are the central figures in the typical marketplace, often creating the website and maintaining it.¹³⁰ Brown took a 5 percent commission,¹³¹ similar to the commissions taken by the operators of these marketplaces.¹³² Little connected the non-Brown members of the *Kotteakos* conspiracy to each other; little connects the assorted dealers on the typical dark net drug marketplace aside from their shared online location. In short, the relationship between the typical dark net drug marketplace operators and their users closely resembles the “rimless” hub-and-spoke structure that the *Kotteakos* Court condemned—many individual operator-user relationships but little connecting the individual users together to suggest a single, all-encompassing conspiracy.

In *United States v. Ulbricht*,¹³³ the court stated in its denial of the defendant’s motion to dismiss the indictment that “[o]f course, ultimately, the form of the conspiracy is not as important as a determination that at least one other person joined in the alleged conspiratorial agreement with Ulbricht.”¹³⁴ Additionally, it found that this “multiple conspiracy” issue did

124. *Id.*

125. *Id.* at 752–56.

126. *Id.* at 777.

127. *Id.* at 755.

128. *Id.*

129. *Id.* at 773.

130. *See supra* note 110 and accompanying text.

131. *Kotteakos*, 328 U.S. at 753.

132. *See supra* note 112 and accompanying text.

133. 31 F. Supp. 3d 540 (S.D.N.Y. 2014).

134. *Id.* at 557.

not prejudice the defendant where he, the “hub” of the conspiracy, was the sole defendant.¹³⁵ While the *Kotteakos* Court was concerned in part with the prejudice suffered by “non-hub” coconspirators like the defendants in that case,¹³⁶ and not “hub” conspirators like Brown, prosecutors invite risk by alleging a thousand-person conspiracy in the typical marketplace case, as the prosecution in the Ulbricht case did.¹³⁷

2. The “Agreement” Element

The court’s opinion in *Ulbricht* is similarly instructive in teasing out issues concerning the temporal scope of the typical dark net drug marketplace conspiracy. In denying the motion to dismiss the indictment, the court stated that it was possible that Ulbricht, by designing and operating the Silk Road, effectively posted a sign on a worldwide bulletin board, which advertised an anonymous, untraceable way to traffic narcotics.¹³⁸ As a matter of law, the court ruled, it is possible that each user of the website became a coconspirator at the moment he or she used the website.¹³⁹ Citing *United States v. Borelli*,¹⁴⁰ the court stated that courts have long recognized that members of a conspiracy may join the conspiracy at different times.¹⁴¹

This question of temporal proximity concerns all typical dark net drug marketplaces, which are created first by a single person or small group of people and then are later joined by users.¹⁴² But while the bulletin board in *Ulbricht* might suffice to join a later user to an operator, it fails to join later users to both prior users and later users—that is, even taken as a given that the typical drug seller on a dark net drug marketplace joins into a conspiracy with the operator at the moment the seller joins the site, nothing would seem to bind him or her to other users. There is reciprocity in the operator-seller relationship that lends itself to a conspiratorial understanding. Operators provide the anonymous platforms on which the untraceable transactions may occur, and buyers and sellers pay commission for the use of the platform. No such reciprocity exists at the seller-seller level.

This problem is closely related to the “rimless hub-and-spoke” problem¹⁴³ but compounded by the “pre-programmed,” asynchronous nature of the

135. *United States v. Ulbricht*, No. 14-cr-68 (KBF), 2015 WL 413426, at *1–2 (S.D.N.Y. 2015) (denying a request to instruct the jury on “multiple conspiracies” and citing to case law that held, “[e]ven if there were two conspiracies, . . . the fact that only a single conspiracy was charged did not and could not have prejudiced the defendant by spillover or otherwise” (quoting *United States v. Corey*, 566 F.2d 429, 431 n.3 (2d Cir. 1977))).

136. *Kotteakos*, 328 U.S. at 774 (“The dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place.”).

137. Superseding Indictment, *supra* note 60, at 4–7.

138. *Ulbricht*, 31 F. Supp. 3d at 558.

139. *Id.*

140. 336 F.2d 376 (2d Cir. 1964).

141. *Ulbricht*, 31 F. Supp. 3d at 558 (citing *Borelli*, 336 F.2d at 383–84).

142. *See supra* note 110 and accompanying text.

143. *See supra* Part II.B.1.

agreement posited by the court in *Ulbricht*.¹⁴⁴ The hypothetical agreement is made in two pieces: first by the operator at the creation of the marketplace and his continued maintenance of it, and then by the user at the moment of his or her use of the marketplace.¹⁴⁵ Such an agreement is premised at least in part on the reciprocal benefits each party earns, but no such reciprocity exists between the different sellers on the site. The *Ulbricht* indictment alleged a conspiracy including Ulbricht and thousands of other dealers¹⁴⁶—each seller on the site, then, must be proved to have intended to join such a conspiracy. While the bulletin board metaphor makes sense in the operator-seller relationship, it fails to establish a cognizable basis for the thousands of seller-seller relationships that the single conspiracy formation requires.

3. The “eBay Problem”

One problem inherent in the prosecution of dark net drug marketplace operators with the conspiracy charge is that typical drug marketplaces share a bevy of similarities with legitimate online marketplaces like eBay. eBay, like many dark net drug marketplaces, is an online marketplace on which buyers and vendors may buy or sell almost anything.¹⁴⁷ Both platforms charge commissions.¹⁴⁸ And both have a relatively nonhierarchical shape and are owned and operated by a person or group much smaller than their vast user populations.¹⁴⁹ A charge that prohibits the operation of an online drug marketplace while posing no threat to operators of legitimate marketplaces thus becomes very desirable.

It is instructive to illustrate what *differentiates* the two. Typical dark net drug marketplaces are found on the dark net, accessible only through software that provides a high level of anonymity, whereas eBay is located on the surface web, accessible by anyone with an internet connection.¹⁵⁰ The majority of products found on the typical dark net drug marketplace are controlled substances, whereas eBay features only a small amount of illicit sales, which are prohibited and policed.¹⁵¹ Dark net drug marketplaces offer even greater anonymity through the use of cryptocurrencies like Bitcoin,

144. *Ulbricht*, 31 F. Supp. 3d at 558–59.

145. See, e.g., *id.* at 558 (“On Day 1 . . . Ulbricht ‘offers’ to work with others to traffic illegal narcotics He makes this offer by creating and launching a website specifically designed and intended for such unlawful purposes. Ulbricht’s continued operation of the site evinces an enduring intent to be bound with those who ‘accept’ his offer and utilize the site for its intended purpose. . . . Each time someone ‘signs up’ and agrees to Ulbricht’s standing offer, it is possible that, as a matter of law, he or she may become a coconspirator.”).

146. Superseding Indictment, *supra* note 60, at 1–3.

147. *Our Company*, EBAY, <https://www.ebayinc.com/our-company/> [<https://perma.cc/ZJ3P-6WH9>] (last visited Aug. 22, 2019).

148. *Selling Fees*, EBAY, <https://www.ebay.com/help/selling/fees-credits-invoices/selling-fees?id=4364> [<https://perma.cc/UT8L-EKYT>] (last visited Aug. 22, 2019).

149. See eBay, Inc., *eBay Inc. Reports First Quarter 2018 Results*, PR NEWSWIRE (Apr. 25, 2018), <https://www.prnewswire.com/news-releases/ebay-inc-reports-first-quarter-2018-results-300636638.html> [<https://perma.cc/M6M6-K278>]; *supra* note 108 and accompanying text.

150. See *supra* note 24 and accompanying text.

151. See *supra* note 26 and accompanying text.

whereas eBay accepts only legal tender.¹⁵² Finally, the operator of a typical dark net drug marketplace intends to use his or her marketplace as a space for drug transactions, while legitimate marketplaces like eBay presumably intend to turn a profit and conform with the laws and regulations that apply to them. The first three differences—the anonymity provided by the dark net, the products bought and sold on the market, and the payment methods accepted—are mostly differences in degree, not kind. The fourth—the intent behind the operator’s design and maintenance of the market—is what truly differentiates legitimate marketplaces like eBay from illegitimate ones. The final difference-in-kind will offer useful insight as to how law enforcement might approach marketplace-level enforcement through the crack house statute.

First, dark net drug marketplaces, through their design and their location on the dark net, offer a high level of anonymity to their users.¹⁵³ That said, the anonymity is not absolute. Law enforcement is sometimes able to use conventional investigative techniques to identify buyers, sellers, and operators of such marketplaces.¹⁵⁴ Ross Ulbricht, for example, was identified in part by a Silk Road administrator’s cooperation with federal authorities after they had learned the administrator’s identity.¹⁵⁵ Servers for such marketplaces exist in the real world and, should they be discovered, law enforcement may be able to identify people who have connected with the server.¹⁵⁶ Similarly, while legitimate marketplaces like eBay offer little anonymity to users, they do not offer complete transparency. eBay users, like dark net users, use personalized usernames.¹⁵⁷ Users do not have to use their full name as their eBay ID.¹⁵⁸ For most purposes, eBay sellers are “anonymous” in that a casual browser would not be able to determine the

152. See *Accepted Payments Policy*, EBAY, <https://www.ebay.com/help/policies/payment-policies/accepted-payments-policy?id=4269> [<https://perma.cc/Q997-ZG2N>] (last visited Aug. 22, 2019).

153. See *supra* note 7 and accompanying text.

154. See, e.g., Sarah Volpenhein, *Dark Web Poses Challenges for Law Enforcement*, GOV’T TECH. (Aug. 10, 2015), <https://www.govtech.com/gov-experience/Dark-Web-Poses-Challenges-for-Law-Enforcement.html> [<https://perma.cc/YCD6-YEDX>] (“[A] misstep . . . led Homeland Security Investigations to a Portland, Ore., man, who has pending drug conspiracy charges against him in U.S. District Court in Grand Forks. . . . [That defendant’s] mistake was he allegedly used the same username . . . on a legitimate messaging service called KIK as he did on the illegitimate Dark Web site, Evolution, where he allegedly sold drugs [A]gents were able to subpoena KIK and ask for subscriber information, which had Hubbard’s IP address. Agents then used the IP address to find his identity from his Internet provider.”).

155. Ryan Mac & Runa Sandvik, *Meet the Silk Road Employee That the Dread Pirate Roberts Allegedly Tried to Murder*, FORBES (Nov. 8, 2013), <https://www.forbes.com/sites/ryanmac/2013/11/08/meet-the-silk-road-employee-that-the-dread-pirate-roberts-allegedly-tried-to-murder> [<https://perma.cc/2C2P-VQ8M>].

156. See, e.g., Andy Greenberg, *Operation Bayonet: Inside the Sting That Hijacked an Entire Dark Web Drug Market*, WIRED (Mar. 8, 2018, 11:30 AM), <https://www.wired.com/story/hansa-dutch-police-sting-operation/> [<https://perma.cc/2A8F-WYKV>].

157. *Username Policy*, EBAY, <https://www.ebay.com/help/policies/identity-policies/username-policy?id=4235> [<https://perma.cc/BP8D-T7KK>] (last visited Aug. 22, 2019).

158. See *id.*

identities of buyers or sellers. Law enforcement typically has to issue a subpoena to access the information eBay has stored on individual accounts.¹⁵⁹ The level of anonymity the dark net provides—strong, but not total—is higher than legitimate websites like eBay, which provide weak, but not zero, anonymity to users.

Second, while the majority of transactions on dark net drug marketplaces are drug sales,¹⁶⁰ some legitimate transactions do occur. For example, the popular marketplace AlphaBay hosted primarily digital goods and non-narcotics sales prior to the takedown of other dark net drug marketplaces.¹⁶¹ Even marketplaces like the Silk Road, while primarily used for drug transactions, hosted a large number of legitimate transactions.¹⁶² Legitimate marketplaces like eBay and Amazon, on the other hand, are no strangers to illicit transactions.¹⁶³ While illicit transactions on legitimate marketplaces may be the exception rather than the rule, it is beyond argument that they can and have occurred. The majority of transactions on dark net drug marketplaces involve narcotics, but legitimate transactions can and do occur.

Third, dark net drug marketplaces generally only accept cryptocurrencies like Bitcoin.¹⁶⁴ Cryptocurrencies enhance the anonymity these platforms provide, as they are not tied to traditional financial structures like banks, whose records can be subpoenaed by law enforcement.¹⁶⁵ While cryptocurrencies do typically grant a higher level of anonymity than traditional payment methods, they are not absolutely untraceable. The nature of the technology behind cryptocurrencies means that a single Bitcoin, for instance, can be tracked through the blockchain over time.¹⁶⁶ Additionally, the anonymity provided by cryptocurrencies is only as strong as their holder's

159. Currently eBay requires law enforcement to use its “Law Enforcement eRequest System,” which requires law enforcement to register to use the portal to submit legal requests. See *Law Enforcement eRequest System*, EBAY, <https://le.corp.ebay.com/leportal/communitieslogin> [<https://perma.cc/3T2H-H7VJ>] (last visited Aug. 22, 2019). Previously, eBay requested law enforcement to fill out and fax a records request. *Responding to Law Enforcement Record Requests*, EBAY, <https://info.publicintelligence.net/ebayrequests.pdf> [<https://perma.cc/4M3F-7HXY>] (last visited Aug. 22, 2019).

160. See *supra* note 26 and accompanying text.

161. Christin, *supra* note 26, at 12–13 (“AlphaBay did primarily start as a digital goods business, and then, when the (then-leading) Evolution marketplace went down in March 2015, started picking up narcotics traffic; after the Agora marketplace shut down in August 2015, the uptick in traffic is even more significant.”).

162. Christin, *supra* note 5, at 8–9.

163. *NHS Prescription Drugs Being Sold Illegally by Patients*, BBC NEWS (Jan. 16, 2017), <https://www.bbc.com/news/uk-england-birmingham-38560041> [<https://perma.cc/7AJG-JL5V>]; Ford Vox, *Amazon's Illegal Drug Dealing*, SLATE (May 29, 2014, 8:46 AM), http://www.slate.com/articles/health_and_science/medical_examiner/2014/05/amazon_illegal_drugs_muscle_relaxants_steroids_prescription_drugs_delivered.html [<https://perma.cc/YX6M-B44D>].

164. Soska & Christin, *supra* note 5, at 34 (“[M]odern online anonymous markets . . . use pseudonymous online currencies as payment systems (e.g., Bitcoin).”).

165. See *supra* note 113.

166. See, e.g., Andy Greenberg, *Follow the Bitcoins: How We Got Busted Buying Drugs on Silk Road's Black Market*, FORBES (Sept. 5, 2013), <https://www.forbes.com/sites/andygreenberg/2013/09/05/follow-the-bitcoins-how-we-got-busted-buying-drugs-on-silk-roads-black-market> [<https://perma.cc/NBG3-V23B>].

password, or “private key.”¹⁶⁷ Should that password be compromised, the security and anonymity granted by the cryptocurrency is similarly compromised.¹⁶⁸ eBay, on the other hand, does not yet take cryptocurrency, like Bitcoin, as a payment.¹⁶⁹ That said, eBay is contemplating adopting Bitcoin as a valid payment method,¹⁷⁰ and across platforms there has been an explosion in interest in permitting cryptocurrencies to be used as valid forms of payment.¹⁷¹

Aside from these differences in degree, the fourth difference between dark net drug marketplaces is one in kind—the operator’s intent. While the operators and owners of legitimate marketplaces intend to operate within the boundaries of applicable laws and regulations, the intent behind most dark net drug marketplaces is to operate a space for distribution of drugs.¹⁷² The *Ulbricht* indictment, for example, alleged such an intent,¹⁷³ and the court’s opinion denying the motion to dismiss the indictment described why the intent element was so important.¹⁷⁴ It is plausible that such an intent can be shown by the volume of drug sales on most dark net marketplaces and the commissions their operators are earning. The guidelines and policies that legitimate marketplaces typically put in place to prevent illicit transactions bolster this distinction.¹⁷⁵ Dark net drug marketplaces, as evidenced by the sheer volume of drug transactions they host,¹⁷⁶ obviously have no such policies or interest in enforcing them. This intent difference, then, offers the only real categorical distinction between the typical legitimate marketplace like eBay and the typical dark net drug marketplaces like the Silk Road, Hansa, or AlphaBay. A charge for which intent is at the forefront, then, may be preferable to one like conspiracy, which requires jurors to find intent

167. Adrienne Jeffries, *How to Steal Bitcoin in Three Easy Steps*, VERGE (Dec. 19, 2013, 1:10 PM), <https://www.theverge.com/2013/12/19/5183356/how-to-steal-bitcoin-in-three-easy-steps> [<https://perma.cc/24CQ-ABD7>].

168. *Id.*

169. *See supra* note 152 and accompanying text.

170. Jen Rogers, *eBay Is ‘Seriously Considering’ Accepting Bitcoin*, YAHOO FIN. (Dec. 12, 2017), <https://finance.yahoo.com/news/ebay-seriously-considering-accepting-bitcoin-164410989.html> [<https://perma.cc/9L8E-FV3S>].

171. *See, e.g.*, Joseph Young, *Retailer Adoption of Bitcoin Is Growing in the US and Canada, Despite Price Fall*, CCN (Apr. 7, 2018), <https://www.ccn.com/retailer-adoption-of-bitcoin-is-growing-in-the-us-and-canada-despite-price-fall/> [<https://perma.cc/D4F7-ZWG6>].

172. *See supra* Part II.A.

173. Superseding Indictment, *supra* note 60, at 2–3.

174. *United States v. Ulbricht*, 31 F. Supp. 3d 540, 556 (S.D.N.Y. 2014) (“Ulbricht is alleged to have knowingly and intentionally constructed and operated an expansive black market for selling and purchasing narcotics and malicious software and for laundering money. This separates Ulbricht’s alleged conduct from the mass of others whose websites may—without their planning or expectation—be used for unlawful purposes.”).

175. *See, e.g.*, *Prohibited and Restricted Items*, EBAY, <https://www.ebay.com/help/policies/prohibited-restricted-items/prohibited-restricted-items?id=4207> [<https://perma.cc/PZR9-Q7UK>] (last visited Aug. 22, 2019); *Restricted Products*, AMAZON SELLER CENT., https://sellercentral.amazon.com/gp/help/external/200164330?language=en-US&ref=mpbc_200277040_cont_200164330 [<https://perma.cc/J94Z-XJJK>] (last visited Aug. 22, 2019).

176. *See supra* note 26 and accompanying text.

amongst a host of other elements like agreement, illegal objective, the span and scope of the alleged conspiracy, and how many conspiracies in fact exist.

4. The Policy Goals of the Standalone Conspiracy Law May Not Apply

Finally, the policy reasons for a standalone conspiracy charge do not apply as forcefully in the dark net drug marketplace context as they do in the typical hierarchical narcotics conspiracy. The chief reason for the standalone conspiracy charge is that conspiracies pose greater dangers to the public than would be possible if individual actors simply acted alone.¹⁷⁷ This is true in the typical complex narcotics conspiracy, which might include a person who creates a controlled substance in a laboratory, who then delivers the pure product to a few wholesalers, who then distribute a diluted product to street sellers, who then employ lookouts and middlemen—and a money launderer cleans the proceeds for various members. Each actor serves as a cog in the larger hierarchy, and each role is indispensable to the organization and furthers the end goal of narcotics distribution.¹⁷⁸

The typical dark net drug marketplace is much less hierarchical,¹⁷⁹ and therefore the group danger element, which society seeks to deter through a standalone conspiracy charge, loses much of its force. The hierarchy in the typical marketplace consists of an operator who creates and maintains the site, with sellers and buyers transacting with each other on the platform and

177. *Callanan v. United States*, 364 U.S. 587, 593–94 (1961) (“Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.”); Note, *The Conspiracy Dilemma: Prosecutions of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 283–84 (1948) (“[T]he crucial importance of the conspiracy weapon stems from its effectiveness in reaching organized crime. The advantages of division of labor and complex organization characteristic of modern economic society have their counterparts in many forms of criminal activity. Manufacture or importation and distribution of contraband goods, for example, often demands a complicated organization. The interrelations of the parties in schemes to defraud may be highly complex.”).

178. *See, e.g., United States v. Giry*, 818 F.2d 120, 127 (1st Cir. 1987) (“A scheme to manufacture and distribute a large quantity of illicit drugs involves a great many discrete steps and includes a large number of people, most of whom know few of the other participants in the scheme. . . . [T]he federal courts have adopted [a] view, permitting the entire scheme to be characterized as a single conspiracy and treating each discrete step as one of the links in an indivisible chain.”); *United States v. Warner*, 690 F.2d 545, 549 (6th Cir. 1982) (“Conspiracies to distribute narcotics, which normally involve numerous sales and resales of drugs until they reach the ultimate consumers, are often ‘chain’ conspiracies.”); *United States v. Agueci*, 310 F.2d 817, 826 (2d Cir. 1962) (“The ‘chain’ conspiracy has as its ultimate purpose the placing of the forbidden commodity into the hands of the ultimate purchaser. That form of conspiracy is dictated by a division of labor at the various functional levels—exportation . . . and importation . . . adulteration and packaging, distribution to reliable sellers, and ultimately the sale to the narcotics user.” (citation omitted)).

179. *See supra* note 108.

paying a commission to the operator.¹⁸⁰ Some staff or administrators may help the normal function of the marketplace, but the structure of the “conspiracy” includes only the party providing the platform, the party using the platform to sell, and the party using the platform to purchase.

Despite being less hierarchical, dark net drug marketplaces do pose unique dangers. While the conspiracy’s special danger is its ability to compound harm via multiple, coordinating actors,¹⁸¹ the dark net drug marketplace’s special danger is its nature as a near-anonymous place where users across the world can buy and sell controlled substances.¹⁸² The special danger of the conspiracy is addressed by the advantages that the conspiracy charge carries with it.¹⁸³ The advantages of the conspiracy charge are aimed towards that particular danger, and its use becomes less justifiable in the case of the typical dark net drug marketplace operator, whose most culpable behavior is creating a near-anonymous, wide-reaching platform mostly outside of the reach of law enforcement.

Another reason for the standalone conspiracy charge is the secrecy that conspiracies naturally cloak themselves in.¹⁸⁴ But here, too, the force of the policy is weaker in the typical dark net drug marketplace than in the typical narcotics conspiracy. Dark net drug marketplaces operate openly online—a simple Google search turns up a list of markets, and tutorials as to how to access those markets are available freely as well.¹⁸⁵ The anonymity provided by the dark net is a function of the design of Tor-like browsers and difficult-to-trace currencies like Bitcoin,¹⁸⁶ neither of which are illegal on their own. There is nothing inherently secretive in the marketplace-seller-buyer relationship.

III. THE “CRACK HOUSE” STATUTE—TAILORED FOR ONLINE DRUG MARKETS

21 U.S.C. § 856 criminalizes the type of behavior operators of dark net drug marketplaces engage in. This Part will argue that a plain reading of the statute permits the prosecution of such operators through the statute,

180. *See supra* Part II.A.

181. *See supra* notes 177–78.

182. *See supra* notes 25–26 and accompanying text.

183. *See supra* notes 40–44 and accompanying text.

184. *United States v. Rabinowich*, 238 U.S. 78, 88 (1915) (“For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character [I]t is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.”).

185. *See, e.g.*, Ofir Beigel, *Accessing the Darknet, Dark Web and Deep Web in Under 2 Minutes—Beginner’s Guide*, 99BITCOINS, <https://99bitcoins.com/accessing-dark-net-under-minutes-beginners-guide> [<https://perma.cc/2B6D-LLNE>] (last updated July 6, 2019); Paul Bischoff, *Step by Step Guide to Safely Accessing the Dark Net and Deep Web*, COMPARITECH (Sept. 12, 2018), <https://www.comparitech.com/blog/vpn-privacy/how-to-access-the-deep-web-and-darknet/> [<https://perma.cc/5U37-YXQV>].

186. *See supra* note 53 and accompanying text.

sometimes termed the “crack house” statute.¹⁸⁷ In doing so it will examine the word “place,” argue that the statute’s legislative history leaves open the possibility of its use in prosecuting such operators,¹⁸⁸ suggest that law enforcement is in need of tools to reduce the availability of controlled substances given the current opioid crisis,¹⁸⁹ answer why such a novel approach is preferable to the conspiracy charge, and finally conclude by addressing likely counterarguments.

While the crack house statute’s use in this context is novel, there is a history of tension between technological advances and statutory law. Scholars have long argued that instead of waiting for legislatures to revise laws upon every new technological advance, courts should allow for statutes to cover situations that may not have been contemplated by their drafters due to advances in technology.¹⁹⁰ Criminal statutes have been employed to address new technologies in a variety of ways throughout history.¹⁹¹ Though a prosecution of a dark net drug marketplace operator with the crack house statute would be the first prosecution of its kind, it would continue a long line of similar statutes adapting to modern use.

A. A Realistic Solution

The problems with charging the typical dark net drug marketplace operator with a single conspiracy encompassing all of the users of his or her site can be summarized as follows: (1) the structure alleged, instead of forming a single conspiracy, actually forms a rimless hub-and-spoke structure which creates not a single conspiracy but many separate operator-seller-buyer conspiracies;¹⁹² (2) given the rimless hub-and-spoke structure that fails to tie users together, there are serious issues concerning the conspiracy each user

187. See *infra* Part III.B.

188. See *infra* Part III.B.

189. See *infra* Part III.C.

190. See, e.g., Gregory E. Perry & Cherie Ballard, *A Chip by Any Other Name Would Still Be a Potato: The Failure of Law and Its Definitions to Keep Pace with Computer Technology*, 24 TEX. TECH. L. REV. 797, 801–02 (1993); Keith A. Christiansen, Note, *Technological Change and Statutory Interpretation*, 1968 WIS. L. REV. 556, 557.

191. See, e.g., Ellen S. Podgor, “What Kind of a Mad Prosecutor” Brought Us This White Collar Case, 41 VT. L. REV. 523, 524–26 (2017) (criticizing, but recognizing, prosecutorial “statute stretching” in the fraud, obstruction of justice, and bribery realms); Jed. S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772–73 (1980) (“[T]he mail fraud statute, together with its lineal descendant, the wire fraud statute, has been characterized as the ‘first line of defense’ against virtually every new area of fraud to develop in the United States in the past century. . . . In many . . . areas, where legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.”); Press Release, U.S. Dep’t of Justice, California Operator of myRedBook.com Website Pleads Guilty to Facilitating Prostitution (Dec. 11, 2014), <http://www.justice.gov/opa/pr/california-operator-myredbookcom-website-pleads-guilty-facilitating-prostitution> [https://perma.cc/2NJA-8AKD] (announcing that the operator of website that hosted advertisements posted by prostitutes pleaded guilty to using a facility of interstate commerce with the intent to facilitate prostitution, “represent[ing] the first federal conviction of a website operator for facilitation of prostitution”).

192. See *supra* Part II.B.1.

is agreeing to, especially considering the “automated agreement” contemplated by the *Ulbricht* court;¹⁹³ (3) the public policy purposes for the standalone conspiracy charge do not apply as forcefully to the online drug marketplace as they would to a typical narcotics conspiracy;¹⁹⁴ and (4) the operator’s intent is the main thing separating the typical dark net drug marketplace operator from the operator or director of a legitimate online marketplace like eBay or Amazon.¹⁹⁵

While the conspiracy charge is a poor conceptual fit for the behavior engaged in by the typical dark net drug marketplace operator, prosecutors should be encouraged to charge that behavior under laws that do proscribe it. A statute explicitly prohibiting this behavior would be ideal, such as a statute that criminalizes the creation and operation of a website which is designed as a safe haven for drug dealers and purchasers. Such a statute would avoid most of the difficulties specific to the conspiracy charge discussed above. Rimless hub-and-spoke issues wash away where no proof of conspiracy is needed. Any agreements the alleged members of the conspiracy may or may not have made would be irrelevant, as would be the temporal proximity of those agreements; only the conduct and intent of the operator would matter. Any concerns about the conspiracy charge’s public policy goals not being met in the dark net context would fade away where a standalone conspiracy charge is not used. While the eBay problem is endemic to any sort of criminal prosecution of an operator of an online marketplace, because the main difference between legitimate and illegitimate marketplaces is the intent of the operator, the hypothetical statute would place intent at the forefront of the charge. That intent, instead of being tangled up in the knowledge, agreement, objective, and overt act elements of the conspiracy charge, would become nearly the only factual issue jurors must resolve.

B. A Plain Text Reading Permits Prosecutions of This Type

21 U.S.C. § 856(a)(1) makes it a crime to “knowingly . . . maintain any place, whether permanently or temporarily, for the purpose of . . . distributing . . . any controlled substance,” while 21 U.S.C. § 856(a)(2) makes it a crime to “manage or control any place . . . and knowingly and intentionally . . . profit from . . . the place for the purpose of unlawfully . . . distributing . . . a controlled substance.”¹⁹⁶ The text, on its face, appears to prohibit the type of conduct that the typical dark net drug marketplace operator engages in so long as an internet platform qualifies as a “place.” Either subsection could apply to the conduct of the typical dark net drug marketplace operator. The first, which courts have interpreted to require the intent to distribute a controlled substance,¹⁹⁷ could apply to operators who, through their creation and maintenance of the marketplace, fully intend it to

193. *See supra* Part II.B.2.

194. *See supra* Part II.B.4.

195. *See supra* Part II.B.3.

196. 21 U.S.C. § 856 (2012).

197. *See supra* note 93 and accompanying text.

facilitate the distribution of controlled substances, as was alleged in the *Ulbricht* indictment.¹⁹⁸ The second, which courts have interpreted to require a lesser showing of intent—generally that the defendant intended to make the place available while knowing that distribution of controlled substances occurred therein¹⁹⁹—could be charged where issues of fact exist as to the operator’s intent.

The main issue in using the crack house statute to charge the operators of dark net drug marketplaces is that the statute prohibits only maintaining a “place,” without defining what a “place” is.²⁰⁰ There are no reported cases in which prosecutors charged that the maintenance or creation of an online place was in violation of the statute. *Merriam-Webster* defines “place” as a “physical environment; a way for admission or transit; physical surroundings; an indefinite region; a particular region, center of population, or location,” among others.²⁰¹ Referring to online locations as “places” is not unheard of in popular culture.²⁰² Absent a conclusive indication based on its plain meaning, other areas of law can perhaps be useful to analyze whether “place” should extend to online platforms.

Title III of the Americans with Disabilities Act²⁰³ (ADA) prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any *place* of public accommodation by any person who owns, leases (or leases to), or operates a *place* of public accommodation.”²⁰⁴ The First, Second, and Seventh Circuits have left open the possibility of extending the definition of “place” in the ADA to online platforms.²⁰⁵ Several courts,

198. Superseding Indictment, *supra* note 60, at 2–3.

199. See *supra* note 94 and accompanying text.

200. 21 U.S.C. § 856(a)(1)–(2).

201. *Place*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/place> [<https://perma.cc/V3XY-MXXF>] (last visited Aug. 22, 2019).

202. See, e.g., Theodora Blanchfield, *The 10 Happiest Places on the Internet*, DAILY BURN (Aug. 15, 2016), <https://dailyburn.com/life/lifestyle/happiness-best-apps-websites/> [<https://perma.cc/3DDW-G3XK>]; Candice Darden, *16 of the Most Beautifully Odd & Useful Places on the Internet That You Didn't Know Existed*, HELLO GIGGLES (Aug. 18, 2016, 5:51 PM), <https://helogiggles.com/lifestyle/technology/beautifully-odd-places-internet-didnt-know-existed/> [<https://perma.cc/FP7G-UQRA>]; Leanna Garfield, *The 8 Creepiest Places on the Internet*, BUS. INSIDER (Oct. 31, 2015, 1:36 PM), <https://www.businessinsider.com/the-8-creepiest-places-on-the-internet-2015-10> [<https://perma.cc/EG8V-WLQS>]; Max Knoblach, *9 Absolutely Petrifying Places on the Internet*, MASHABLE (Oct. 15, 2013), <https://mashable.com/2013/10/15/scary-internet/#Eh3rJYD1HZqO> [<https://perma.cc/A5LT-K3DY>]; Christopher Null, *The 15 Best Places to Waste Time on the Web*, PCWORLD (Dec. 13, 2006, 1:00 AM), <https://www.pcworld.com/article/128122/article.html> [<https://perma.cc/9M9L-5J2T>].

203. 42 U.S.C. §§ 12181–12189 (2012).

204. *Id.* § 12182(a) (emphasis added).

205. *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32 (2d Cir. 1999) (“Title III’s mandate that the disabled be accorded ‘full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation,’ suggests to us that the statute was meant to guarantee them more than mere physical access.” (citation omitted) (quoting 42 U.S.C. § 12182(a))); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (“The core meaning of this provision, plainly enough, is that the owner of a store, hotel, restaurant, . . . Web site, or other facility (whether in physical space or in electronic space) that is open to the public cannot

however, have held that the ADA speaks only to physical locations or that for a nonphysical place to be covered under the ADA, there needs to be some nexus between the nonphysical place and a physical one.²⁰⁶ Scholars concerned with the ADA's applicability to online places have argued for its applicability,²⁰⁷ against its applicability,²⁰⁸ or commented on the confused state of courts in this realm, arguing instead for executive branch guidance.²⁰⁹

A more problematic issue in applying the crack house statute to online places concerns the heading of 21 U.S.C. § 856, "Maintaining Drug-Involved Premises."²¹⁰ The word "premises," as compared to the ambiguous "place," denotes more strongly a physical location. *Merriam-Webster* defines premises as "a tract of land with the buildings thereon; a building or part of a building usually with its appurtenances (such as grounds)."²¹¹ The *Cambridge Dictionary* defines premises as "a house or other building and the land on which it is built."²¹² Courts may use statutory titles and section headings in interpreting the meaning of statutes.²¹³ However, using titles and headings to interpret a statute will usually only be permissible when the text

exclude disabled persons from entering the facility." (citation omitted)); *Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass'n of New Eng. Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding that a travel service without a physical location could be covered under the Act, as "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not" and that "Congress could not have intended such an absurd result"); see also Victoria Smith Ekstrand, *Democratic Governance, Self-Fulfillment and Disability: Web Accessibility Under the Americans with Disabilities Act and the First Amendment*, 22 COMM. L. & POL'Y 427, 440–48 (2017) (summarizing current ADA law).

206. *Earll v. eBay, Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015) ("Because eBay's services are not connected to any 'actual, physical place[],' eBay is not subject to the ADA."); *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004) (stating that while "Title III's applicability to web sites—either because web sites are themselves places of public accommodation or because they have a sufficient nexus to such physical places of public accommodation—is a matter of first impression before this Court," the instant case was not the proper time to answer such a question); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) ("The clear connotation of the words in § 12181(7) is that a public accommodation is a physical place."); see also Ekstrand, *supra* note 205 (summarizing the case law).

207. See, e.g., Shani Else, Note, *Courts Must Welcome the Reality of the Modern World: Cyberspace Is a Place Under Title III of the Americans with Disabilities Act*, 65 WASH. & LEE L. REV. 1121, 1157–58 (2008).

208. See, e.g., Michael O. Finnigan, Jr. et al., Comment, *Accommodating Cyberspace: Application of the Americans with Disabilities Act to the Internet*, 75 U. CIN. L. REV. 1795, 1825–26 (2007).

209. See, e.g., Arjeta Albani, Note, *Equality in the Age of the Internet: Websites Under Title III of the Americans with Disabilities Act*, 13 J. BUS. & TECH. L. 97, 115–16 (2017).

210. 21 U.S.C. § 856 (2012).

211. *Premise*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/premise> [<https://perma.cc/4FJM-XYQ4>] (last visited Aug. 22, 2019).

212. *Premises*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/premises> [<https://perma.cc/VGL3-GEQP>] (last visited Aug. 22, 2019).

213. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998); see also *Church of the Holy Trinity v. United States*, 143 U.S. 457, 462 (1892) ("Among other things which may be considered in determining the intent of the legislature is the title of the act. We do not mean that it may be used to add to or take from the body of the statute, but it may help to interpret its meaning." (citation omitted)).

of the statute itself is ambiguous.²¹⁴ Based on the arguments discussed above, the word “place” is not necessarily ambiguous and can support a broad definition extending to nonphysical locations without necessitating analysis of the statute’s title.

Assuming that “place” *can* apply to online platforms, applying the crack house statute to dark net drug marketplace operators becomes somewhat straightforward. First the prosecution would have to show that the operator “maintained” the place—in subsection (a)(1) cases, the prosecution could even show the operator “opened” the place. In crack house statute prosecutions, maintenance might be shown in a variety of ways, including through possession of the place, dominion or control over the place, protecting the place, and making repairs to the place.²¹⁵ The typical dark net drug marketplace operator designs the website, acts as administrator, reaps the commissions for transactions that occur on the website, and might make repairs to the code of the website—all of which would clearly evidence maintenance. Second, the prosecution would have to show purpose. In subsection (a)(1) cases, the prosecution would have to show that the operator’s purpose was the distribution of drugs.²¹⁶ In subsection (a)(2) cases, the prosecution would have to show that the users of the marketplace had the purpose of distributing controlled substances and that the operator was aware of such distribution or acted deliberately ignorant of such distribution.²¹⁷ Proving such a purpose would likely be easy in most subsection (a)(2) cases—especially if the vast majority of the transactions were drug transactions.²¹⁸ While more difficult in subsection (a)(1) cases, proving such a purpose could be done where the facts are strong, such as in the *Ulbricht* case.²¹⁹

214. *Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528–29 (1947) (“[T]he title of a statute and the heading of a section cannot limit the plain meaning of the text.”).

215. *See, e.g.*, *United States v. Clavis*, 956 F.2d 1079, 1091 (11th Cir. 1992) (“Acts evidencing such matters as 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 are, of course, evidence of knowingly maintaining the place considered alone or in combination with evidence of distributing from that place.”); *United States v. Roberts*, 913 F.2d 211, 221 (5th Cir. 1990) (finding that sufficient dominion and control were shown in crack house prosecution where the defendant paid rent on his condo, his jacket was found inside the condo, police found him in the condo during the search warrant execution, a witness had observed defendant cutting cocaine inside the condo, and the defendant had arranged to swap the condo with someone else’s apartment temporarily); *see also* *United States v. Basinger*, 60 F.3d 1400, 1405 (9th Cir. 1995) (summarizing other courts’ treatment of the “dominion and control” inquiry).

216. *Basinger*, 60 F.3d at 1404; *see also supra* note 93 and accompanying text.

217. *See supra* note 94 and accompanying text.

218. *See supra* note 26 and accompanying text.

219. *See, e.g.*, Government’s Opposition to Defendant’s Post-Trial Motions at 3–4, *United States v. Ulbricht*, No. 14-cr-68 (KBF) (S.D.N.Y. Apr. 27, 2015), 2015 WL 1530766 (evidence produced by the prosecution included “thousands of pages of chat logs, reflecting Ulbricht’s communications with coconspirators who helped him run Silk Road”; “files in which Ulbricht wrote about how he conceived of Silk Road, launched it, and grew it into a bustling illegal enterprise”; “a ‘log’ file reflecting actions taken by Ulbricht in connection with the day-to-day maintenance of Silk Road”; and other items).

C. Why Push for This Reading At All?

Given successful narcotics conspiracy prosecutions,²²⁰ why push for the crack house statute as a prosecutorial tool in dark net drug marketplace cases at all? Three reasons advise it: first, as compared with conspiracy law, the crack house statute provides a better conceptual fit for the typical dark net drug marketplace operator's actions; second, the crack house charge avoids the unique prejudices suffered by the defendant in the typical dark net drug marketplace case; and third, the ongoing overdose crisis in America demands creative prosecutorial tools in the absence of the strong facts necessary to charge a narcotics conspiracy in these cases.

First, for a variety of reasons, the conspiracy to distribute narcotics charge is a poor fit in the case of the typical dark net drug marketplace operator.²²¹ In short, the difficulties are that: (1) the typical marketplace structure creates individual conspiracies between the operator and each of the sellers rather than a single conspiracy encompassing the operators and every seller on the site;²²² (2) issues exist at the individual seller level as to what conspiracy they knowingly and intentionally join;²²³ (3) the only categorical difference between dark net drug marketplaces and legitimate online marketplaces is the intent of the operator/management team;²²⁴ and (4) the public policy objectives for the standalone conspiracy charge are not as salient in the dark net drug marketplace operator case.²²⁵

Alleging a single, all-encompassing conspiracy in the typical dark net drug marketplace operator case, where no conspiracies or multiple operator-seller conspiracies exist, poses unique prejudices to the operator, generally due to the sheer number of coconspirators alleged.²²⁶ First, the typical operator likely suffers prejudice when he or she is alleged to have masterminded a large, thousand-person conspiracy, and this prejudice is especially acute when the prosecution fails to introduce evidence as to each operator-seller relationship at trial. Second, large, complex trials pose issues for juries, court resources, and defendants.²²⁷ While only a single operator faces trial in the typical dark net drug marketplace case, complexity issues remain concerning

220. *See supra* note 9.

221. *See supra* Part II.B.

222. *See supra* Part II.B.1.

223. *See supra* Part II.B.2.

224. *See supra* Part II.B.3.

225. *See supra* Part II.B.4.

226. *See, e.g.,* *Pinkerton v. United States*, 328 U.S. 640, 650 (1946) (Rutledge, J., dissenting) (stating that the dangers of conspiracy law include “the almost unlimited scope of vicarious responsibility for others’ acts which follows once agreement is shown, [and] the psychological advantages of such trials for securing convictions by attributing to one proof against another”); *see also* Note, *Federal Treatment of Multiple Conspiracy*, 57 COLUM. L. REV. 387, 403 (1957) (discussing *Kotteakos v. United States* and stating that it was distinguishable from prior precedent in part because “*Kotteakos* appears to be inextricably involved with numbers”).

227. *See, e.g.,* Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 10–14 (1992) (compiling practitioner concerns over trials involving large amounts of coconspirators).

the evidence necessary to prove each conspiracy and the number of individual relationships. Third, the doctrine of the crime of conspiracy naturally tends to grow,²²⁸ so experimental and tangential uses of the conspiracy charge should be carefully guarded against, employed only when the public interest goals of the standalone conspiracy charge are most salient.²²⁹

Finally, although the conspiracy charge is ill-fit for the typical dark net drug marketplace operator, the crack house charge can serve as an excellent replacement tool, especially at a time when the opioid epidemic demands effective intervention by law enforcement. Overdose deaths have risen to a zenith in recent years, and though the crisis has shown signs of leveling off, the number of overdose deaths is still unacceptably high.²³⁰ While it is beyond the scope of this Note to argue that the dark net is a cause of the overdose epidemic, the sheer volume of drug transactions that occur on dark net drug marketplaces, along with the large revenues that operators are earning, suggests that these marketplaces are a contributing source. At the individual level, dark net drug marketplace transactions have resulted in overdose deaths.²³¹

D. Addressing Counterarguments

This use of the crack house statute is novel and, admittedly, there may be one or more good reasons for this novelty. This section addresses some arguments against using the crack house statute in this manner, and ultimately argues that despite them, the crack house statute is a better prosecutorial fit than conspiracy law. The arguments against using the statute in this manner can be approximated as: first, the language of the statute, as evidenced by the statute's legislative history, cannot sanction this use; second, the rule of lenity prohibits this type of expansive reading of the

228. See *Krulewicz v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring in the judgment) (criticizing the case at hand as “characteristic of the long evolution of that elastic, sprawling and pervasive offense,” the offense of conspiracy). Justice Robert H. Jackson, quoting Justice Benjamin N. Cardozo, stated that conspiracy’s history exemplifies the “tendency of a principle to expand itself to the limit of its logic.” *Id.*

229. The public policy goals supporting the substantive conspiracy charge are not met in the typical dark net drug marketplace operator prosecution. See *supra* Part II.B.4.

230. See *supra* Part I.A.

231. See, e.g., Noelle Crombie, *Two Fentanyl Overdose Deaths Tied to Dark Web Lead to Portland Charges*, OREGONIAN (July 12, 2017), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2017/07/pennsylvania_man_accused_of_se.html [<https://perma.cc/S2KR-B8XM>]; Joseph Dill, *‘Darknet’ Drug Distributor Gets Life Sentence for Overdose of Woman with Loudoun Ties*, LOUDOUN TRIB. (Apr. 27, 2018), <https://www.loudountribune.com/darknet-drug-distributor-gets-life-sentence-for-overdose-of-woman-with-loudoun-ties/> [<https://perma.cc/5XMT-PFK8>]; Jesse Hyde, *The Park City Story: One Boy Died, Then Another—and the Opioid Epidemic Came into Full View*, DESERET NEWS (July 20, 2017), <https://www.deseretnews.com/article/900000352/the-park-city-story-one-boy-died-then-another-and-the-opioid-epidemic-came-into-full-view.html> [<https://perma.cc/DDR8-KBEX>]; Amanda Shaw, *Feds: ‘Peter the Great’ Darknet Drug Suspects Linked to Two Deaths*, FOX CAROLINA (May 11, 2018), https://www.foxcarolina.com/news/feds-peter-the-great-darknet-drug-suspects-linked-to-deaths/article_82262390-077f-5245-ac3e-f3688acb2207.html [<https://perma.cc/WJP8-594B>].

statute; finally, given successful prosecutions under conspiracy law and other charges, this novel reading of the crack house statute is unnecessary.

The crack house statute's legislative history suggests that it was not intended to cover dark net drug marketplaces. The statute was enacted in 1986,²³² several years before the creation of the World Wide Web and far before the concept of a dark web drug marketplace was fathomable.²³³ The statute was amended in 2003, and while the amendment expanded the statute to include the now-existing "place" language,²³⁴ the purpose of the amendment was at least partly to provide for prosecutions of drug activity at outdoor "rave" parties.²³⁵ The history of the statute, then, may imply that internet locations should not be covered by "place," an assertion bolstered by the fact that the heading of 21 U.S.C. § 856 is "Maintaining Drug-Involved Premises," which more strongly denotes a physical location. This argument, while persuasive, is ultimately weaker than the simple plain text of the statute. A "place" can mean many different locations other than physical spaces, as evidenced by both the word's common use and its dictionary definition.²³⁶

The rule of lenity might also prohibit this kind of expansive reading of the crack house statute. The rule of lenity²³⁷—serving the goals of providing notice to the public,²³⁸ guaranteeing that courts do not sanction overbroad readings of statutes,²³⁹ and enhancing the transparency and accountability of criminal justice²⁴⁰—circumscribes experimental uses of statutes. This

232. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

233. Martin Bryant, *Twenty Years Ago Today, the World Wide Web Opened to the Public*, TNW (Aug. 6, 2011), <https://thenextweb.com/insider/2011/08/06/20-years-ago-today-the-world-wide-web-opened-to-the-public/> [<https://perma.cc/3HNR-DXXB>]; *History of the Web*, WORLD WIDE WEB FOUND., <https://webfoundation.org/about/vision/history-of-the-web/> [<https://perma.cc/C6YR-AL3J>] (last visited Aug. 22, 2019).

234. See *supra* notes 86–92 and accompanying text.

235. Ethan Brown, *Safe to Dance*, N.Y. MAG. (Mar. 10, 2003), http://nymag.com/nymetro/news/trends/columns/cityside/n_8430/ [<https://perma.cc/LQ33-YFDP>]; Janelle Brown, *Your Glow Stick Could Land You in Jail*, SALON (Apr. 16, 2003, 9:29 PM), <https://www.salon.com/2003/04/16/rave/> [<https://perma.cc/M2HA-MSMJ>]; Craig McGuire, *Nightclub Act II*, GOTHAM GAZETTE (Nov. 17, 2003), <http://www.gothamgazette.com/development/2107-nightclub-act-ii> [<https://perma.cc/2CCE-B3AD>].

236. *Place*, *supra* note 201; see also *supra* note 202 and accompanying text.

237. *Rewis v. United States*, 401 U.S. 808, 812 (1971) (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” (citation omitted)).

238. *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”). The Court held that a statute which defined a motor vehicle and “evoke[d] in the common mind only the picture of vehicles moving on land” did not include airplanes in that definition. *Id.*

239. *United States v. Bass*, 404 U.S. 336, 348 (1971) (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”).

240. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 912 (2004). Price argues that neither the notice nor the legislative supremacy rationales for the rule of lenity are particular strong and makes a good argument for a rule of lenity based on the sturdier foundations of enhancing the transparency and accountability of criminal justice.

argument, while similarly persuasive, is rebutted by the fact that the rule of lenity may only apply when a statute is ambiguous.²⁴¹ While the word “place” is broad, it is not necessarily ambiguous, and its common use suggests that it is often used to refer to internet locations.²⁴² The statute’s more restrictive 1986 text was amended to cover more “places” rather than just buildings.²⁴³ While the rule of lenity serves to give prosecutors pause before experimental uses of statutes, it does not bar them completely if the statute is unambiguous.

Finally, one might ask why it is advisable to stretch the statute in this manner at all. Part III.C addressed this question in part,²⁴⁴ but there are a bevy of other solutions available to the federal prosecutor as well. Ulbricht, for example, was convicted not only of conspiracy to distribute narcotics but of six other crimes.²⁴⁵ While a conspiracy to distribute narcotics might not be the best-fitting charge in a dark net drug marketplace case, why would a prosecutor go out of his or her way to be the first to charge a crack house violation? The answer lies in the fact that the statute perfectly proscribes the type of behavior that the operator engages in. The culpability of the operator is not that of a buyer, not that of a seller, and not that of a “runner” that brings drugs from the seller to the buyer. It is the culpability of the person who makes large-scale drug operations possible while profiting from them as well. This is exactly the type of activity that the crack house statute penalizes. The typical dark net drug marketplace operator, through his expertise, experience, and criminal intent, makes possible a bazaar of drug dealing—not as a “cog” in a larger “machine” conspiracy, but as the person who provides that machine a clandestine space from which to operate, all while charging rent. The operator’s behavior is nearly identical to the person the crack house statute was written to address—someone who is not directly involved in dealing drugs him or herself but who instead maintains a residence, business, venue, or *place* for the purpose of the distribution of drugs. This deserves its own crime—a crime codified at 21 U.S.C. § 856.

CONCLUSION

The purpose of this Note is not to soften the treatment of operators of dark net drug marketplaces. While proponents of such places laud them as the ultimate free market platform,²⁴⁶ the drug trade they enable inevitably leads

241. *Bass*, 404 U.S. at 348 (“[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.”).

242. *See supra* note 202.

243. *See supra* notes 91–92 and accompanying text.

244. *See supra* Part III.C.

245. Verdict Form at 1–4, *United States v. Ulbricht*, No. 14-cr-68 (KBF) (S.D.N.Y. Feb. 5, 2015), 2015 WL 495543.

246. Tom Ough, *‘It’s a Self-Regulating Free Market’: How the Dark Web Brought Consumerism to Drugs*, TELEGRAPH (May 26, 2016), <https://www.telegraph.co.uk/men/thinking-man/its-a-self-regulating-free-market-how-the-dark-web-brought-consu/> [https://perma.cc/Y2EH-SQVG]; Nathaniel Popper, *Hansa Market, a Dark Web Marketplace, Bans the Sale of Fentanyl*, N.Y. TIMES: DEALBOOK (July 18, 2017), <https://www.nytimes.com>

to death, either in the form of overdoses²⁴⁷ or violence.²⁴⁸ Instead, this Note argues that the criminal charge must fit the behavior. The conspiracy to distribute narcotics charge is a poor fit. The crack house charge is a better fit. While the statute is potentially ambiguous, it is a valid law enforcement tool. Should expanding the statute in this way be too experimental for courts, the statute should be amended, as it was in 2003, to cover the new digital frontier of drug dealing. Technological advances allow for evolution in criminal enterprise—law enforcement must be allowed to evolve alongside them.

/2017/07/18/business/dealbook/hansa-market-a-dark-web-marketplace-bans-the-sale-of-fentanyl.html [https://perma.cc/X84U-J53H].

247. See *supra* note 231 and accompanying text.

248. See, e.g., Transcript of Sentencing Decision at 82–83, *United States v. Ulbricht*, No. 14-cr-68 (KBF) (S.D.N.Y. May 29, 2015) (mentioning Ulbricht’s commission of five murders).