

# NOTES

## *UNITED STATES v. SAFEHOUSE*: AN UNINTENDED AND UNNECESSARY HOBBLING OF LOCAL DISCRETION IN RESPONDING TO THE OPIOID EPIDEMIC\*

### I. INTRODUCTION

Since the first government-sanctioned supervised injection site opened in Switzerland in 1986, about one hundred sites have been established in at least ten countries.<sup>1</sup> Unfortunately, the United States was not one of those countries until recently.<sup>2</sup> In November 2021, two supervised injection sites opened in New York City.<sup>3</sup> Even with this modest progress, these two facilities remain the only such legally operated sites in the country as of November 2022.<sup>4</sup>

Supervised injection sites (sometimes called safe injection sites) seek to provide individual drug users with a safe and clean environment where they can use their own drugs under the supervision of trained medical staff.<sup>5</sup> Driven largely by the War on Drugs, illicit drug use in the United States has been treated mainly as a criminal matter, with public health concerns taking a backseat.<sup>6</sup> However, beginning with the HIV/AIDS crisis of the 1980s and the problems associated with sharing needles to inject intravenous drugs, activists and public health officials alike began advocating for more practical harm reduction strategies to address drug use.<sup>7</sup>

Harm reduction encompasses a wide range of “strategies and ideas aimed at reducing negative consequences associated with drug use[,]” attempting to mitigate harm

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1. Alex H. Kral & Peter J. Davidson, *Addressing the Nation’s Opioid Epidemic: Lessons from an Unsanctioned Supervised Injection Site in the U.S.*, 53 AM. J. PREVENTATIVE MED. 919, 919 (2017).

2. *Id.* Although no government-sanctioned supervised injection sites have opened in the U.S., at least one unsanctioned facility has operated in “an undisclosed urban area” in the country since 2014. *Id.*

3. Jeffery C. Mays & Andy Newman, *Nation’s First Supervised Drug-Injection Sites Open in New York*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/nyregion/supervised-injection-sites-nyc.html> [https://perma.cc/2WTV-U4P6]; Caroline Lewis & Brian Mann, *New York City Allows the Nation’s 1st Supervised Consumption Sites for Illegal Drugs*, NPR (Nov. 30, 2021, 3:54 PM), <https://www.npr.org/2021/11/30/1054921116/illegal-drug-injection-sites-nyc> [https://perma.cc/QL9B-D27Q].

4. Lewis & Mann, *supra* note 3.

5. Kral & Davidson, *supra* note 1.

6. See Alex Kreit, *Safe Injection Sites and the Federal “Crack House” Statute*, 60 B.C. L. REV. 413, 416 (2019) (discussing how policymakers have been hesitant to support safe injection sites because they contradict the war on drugs).

7. Kral & Davidson, *supra* note 1.

for people who are not yet ready to quit using drugs entirely.<sup>8</sup> Familiar harm reduction strategies, employed to combat the rise of opioid abuse, include needle exchanges, where drug users can obtain clean needles, and the expanded availability of overdose-reversal medications, such as naloxone.<sup>9</sup> Although U.S. policymakers have been resistant to supervised injection sites as a viable harm reduction strategy, the experience of other countries has shown these sites to be effective in reducing overdose deaths, lessening drug use in public, and increasing participation in drug treatment programs.<sup>10</sup> In fact, between 2003 and 2018, one facility operating in Vancouver, Canada, supervised over 3.6 million injections and provided preventive care to more than six thousand visitors experiencing overdoses, yet not one person died there.<sup>11</sup> And, closer to home, the two recently opened supervised injection facilities operating in New York City successfully reversed more than one hundred overdoses in just a three-month period.<sup>12</sup>

When the Canadian government approved the supervised injection site in Vancouver, it mandated scientific evaluations of the impact.<sup>13</sup> According to one study published in *The Lancet*, the rate of overdose deaths in the immediate area surrounding the Vancouver facility sharply decreased after it opened.<sup>14</sup> Additional evaluations also found that those who used the facility were less likely to engage in behaviors that put them at risk of contracting HIV and more likely to initiate drug treatment.<sup>15</sup> Inspired by the success of supervised injection sites in cities like Vancouver, Safehouse, a Pennsylvania nonprofit, sought to open the nation's first sanctioned supervised injection site in Philadelphia.<sup>16</sup>

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8. *Principles of Harm Reduction*, NAT'L HARM REDUCTION COAL., <http://www.harmreduction.org/about-us/principles-of-harm-reduction/> [<https://perma.cc/SSG6-WHXN>] (last visited Nov. 1, 2022).

9. Kral & Davidson, *supra* note 1.

10. See Kreit, *supra* note 6, at 416, 422.

11. Elana Gordon, *What's the Evidence That Supervised Injection Sites Save Lives?* NPR (Sept. 7, 2018, 2:40 PM), <https://www.npr.org/sections/health-shots/2018/09/07/645609248/whats-the-evidence-that-supervised-drug-injection-sites-save-lives> [<https://perma.cc/D4PD-ELSR>].

12. See Aubrey Whelan, *Philly Residents in Areas Affected by Overdoses Want a Say in Talks over Supervised Injection Site*, PHILA. INQUIRER (Mar. 2, 2022), <https://www.inquirer.com/health/opioid-addiction/supervised-injection-site-safehouse-kensington-20220302.html> [<https://perma.cc/X8EM-N7UZ>].

13. See Brandon DL Marshall, M-J Milloy, Evan Wood, Julio SG Montaner & Thomas Kerr, *Reduction in Overdose Mortality After the Opening of North America's First Medically Supervised Safer Injecting Facility: A Retrospective Population-Based Study*, 377 THE LANCET 1429 (April 18, 2011), [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(10\)62353-7.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(10)62353-7.pdf) [<https://perma.cc/S5BN-QM57>]; see also Thomas Kerr, Sanjana Mitra, Mary Clare Kennedy & Ryan McNeil, *Supervised Injection Facilities in Canada: Past, Present, and Future*, HARM REDUCTION J., at 2 (2017), <https://harmreductionjournal.biomedcentral.com/track/pdf/10.1186/s12954-017-0154-1.pdf> [<https://perma.cc/BT69-ZJWD>].

14. See Marshall et al., *supra* note 13, at 1429.

15. Gordon, *supra* note 11.

16. See Bobby Allyn & Michaela Winberg, *Philadelphia Nonprofit Opening Nation's 1st Supervised Injection Site Next Week*, NPR (Feb. 26, 2020, 12:19 PM), <https://www.npr.org/2020/02/26/809608489/philadelphia-nonprofit-opening-nations-first-supervised-injection-site-next-week> [<https://perma.cc/CC48-2MQV>] (discussing Safehouse's since-scrapped plans to open a supervised injection site in South Philadelphia); see also SAFEHOUSE, [safehousephilly.org/about](http://safehousephilly.org/about) (last visited Nov. 1, 2022) (outlining Safehouse's harm-reduction goals).

This Note focuses on the United States Court of Appeals for the Third Circuit's decision in *United States v. Safehouse*,<sup>17</sup> which effectively declared any such facility illegal under 21 U.S.C. § 856(a)(2) of the Controlled Substances Act.<sup>18</sup> In doing so, the *Safehouse* majority chose an exceptionally broad interpretation of an ambiguous statute that is not supported by standard principles of statutory construction, longstanding theories of criminal punishment, or the original intent of the legislators who enacted it.<sup>19</sup> The decision unnecessarily expands federal criminal liability in a way that sharply curtails the ability of local governments and stakeholders on the ground closest to the issue to choose how to respond to a very real and devastating health crisis.<sup>20</sup>

Section II details the background facts and procedural history leading up to the Third Circuit's ruling. Section III examines prior law, including how other courts of appeals have interpreted the provision as well as the decision of the United States District Court for the Eastern District of Pennsylvania, which the Third Circuit reversed. Section IV analyzes the Third Circuit's *Safehouse* opinion, including that of the dissenting judge. Finally, Section V explores the myriad of issues presented by the Third Circuit's reading of § 856(a)(2) through various lenses of accepted statutory interpretation principles, theories of punishment, and policy considerations.<sup>21</sup>

## II. FACTS & PROCEDURAL HISTORY

Recognizing that Philadelphia has the highest opioid overdose death rate of any large city in the country, Safehouse made plans to open the nation's first sanctioned, supervised injection facility in the city.<sup>22</sup> After years of litigation and despite some community opposition, Safehouse began to finalize plans to open their site in South Philadelphia in late February 2020,<sup>23</sup> until the United States Court of Appeals for the Third Circuit stepped in.<sup>24</sup>

Following the failure of attempts to reach an agreement between Safehouse and the Department of Justice (DOJ) regarding Safehouse's proposed supervised injection site, the DOJ initiated legal action in 2019, seeking a declaratory judgment in the United

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17. 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

18. 21 U.S.C. §§ 801–904. Section 856(a) makes it unlawful to:

(a)(1) knowingly open, lease, rent, use, or *maintain any place*, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;

(a)(2) 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.

21 U.S.C. § 856(a) (emphasis added); *see Safehouse*, 985 F.3d at 243.

19. *See infra* Part V.A.

20. *See infra* Part V.C.

21. *See infra* Part V.B.

22. *See Allyn, supra* note 16.

23. *See id.*

24. *See United States v. Safehouse*, 985 F.3d 225, 243 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021) (reversing the district court's decision and declaring that Safehouse's proposed site would violate federal law).

States District Court for the Eastern District of Pennsylvania.<sup>25</sup> The DOJ asserted that supervised injection activities would violate a provision of the Controlled Substances Act, 21 U.S.C. § 856(a)(2),<sup>26</sup> which makes it unlawful to “manage or control any place . . . for the purpose of unlawfully . . . using a controlled substance.”<sup>27</sup>

Safehouse responded by seeking a declaratory judgment, arguing, among other things, that its operation would not, in fact, violate § 856(a)(2).<sup>28</sup> United States District Judge Gerald McHugh concluded that nothing in § 856(a) prohibited Safehouse’s proposed supervised injection activities because Safehouse would not “operate them ‘for the purpose of’ unlawful drug use within the meaning of the statute.”<sup>29</sup> Safehouse’s proposed supervised injection site would not fall within the scope of § 856(a)(2), Judge McHugh concluded, because the actor being charged must act with the requisite purpose, and Safehouse’s purpose was actually to prevent overdoses and ultimately reduce drug use.<sup>30</sup> Judge McHugh denied the Government’s motion to judgment on the pleadings.<sup>31</sup>

The Government appealed to the Third Circuit, which reviewed the district court’s reading of § 856(a) and application of the statute to Safehouse’s proposed activity *de novo*.<sup>32</sup> The Third Circuit heard the argument in November 2020 and filed its opinion in January 2021, concluding that safe injection sites were unlawful under federal law.<sup>33</sup>

### III. PRIOR LAW

This Section discusses relevant developments in the law before the *Safehouse* decision, including the history of 21 U.S.C. § 856(a), the so-called “crack-house statute,” and the interpretation of the statute’s applicability concerning the operators and employees of supervised injection sites.

Part III.A discusses the original intent of 21 U.S.C. § 856(a) and the relevant circumstances motivating its enactment in the broader context of the Controlled Substances Act and the War on Drugs. It further outlines and discusses early judicial interpretations of the statute to evaluate how various circuit courts have understood the purpose” requirements of § 856(a)(1) and (a)(2). Part III.B turns to the specific prior law involving supervised injection sites, particularly a new application of federal law that is still largely unsettled.

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25. *United States v. Safehouse*, 408 F. Supp. 3d 583, 585 (E.D. Pa. 2019), *rev’d* 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

26. *Id.* at 586–87.

27. 21 U.S.C. § 856(a)(2).

28. *Safehouse*, 408 F. Supp. 3d at 587.

29. *Id.*

30. *See id.* at 592.

31. *Id.* at 618.

32. *United States v. Safehouse*, 985 F.3d 225, 231–32 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

33. *See id.* at 225.

A. The “Crack-House Statute”—21 U.S.C. § 856(a)

Originally enacted under the Anti-Drug Abuse Act of 1986,<sup>34</sup> 21 U.S.C. § 856(a) makes it a crime to “manage or control any place . . . for the purpose of unlawfully . . . using a controlled substance.”<sup>35</sup> Section 856(a) is often informally referred to as the “crack-house statute” because it was explicitly enacted to address concerns at the time about “so-called ‘crack houses,’ where ‘crack,’ cocaine and other drugs are manufactured and used.”<sup>36</sup> The Anti-Drug Abuse Act was also “the law that instituted the crack/powder cocaine sentencing differential” of one hundred-to-one, where it would take one hundred times the amount of powder to crack cocaine to trigger the same mandatory minimum and maximum sentences.<sup>37</sup> Enacted during the height of “moral panic about crack cocaine,” legislators pushed the bill forward not based upon data or input from experts but rather to “appease an electorate that had become hysterical over an alleged epidemic of crack cocaine.”<sup>38</sup>

Early interpretations of § 856(a), consistent with the idea that it was enacted to combat “crack-houses,” generally applied the statute to relatively large-scale operations involving buildings being used for drug sales, manufacturing, and storage.<sup>39</sup> Although the statute was enacted based on concerns regarding crack cocaine and, particularly, concerns about property owners who allowed their houses to be used to manufacture the drug, courts soon began to interpret § 856(a) to have a broader reach.<sup>40</sup>

For example, in *United States v. Chen*,<sup>41</sup> the United States Court of Appeals for the Fifth Circuit found § 856(a) to apply to a motel owner who allowed tenants and guests to use and sell drugs from the motel.<sup>42</sup> Similarly, in *United States v. Tamez*,<sup>43</sup> a defendant

34. Pub. L. No. 99-570 (HR 5484), 100 Stat. 3207, 3207-52 (1986); *see also* *United States v. Sturmoski*, 971 F.2d 452, 462 (10th Cir. 1992) (discussing the legislative history of § 856(a)).

35. Section 856(a) makes it unlawful to:

(a)(1) knowingly open, lease, rent, use, or *maintain any place*, whether permanently or temporarily, *for the purpose of* manufacturing, distributing, or *using any controlled substance*;

(a)(2) *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*.

21 U.S.C. § 856(a) (emphasis added).

36. 132 CONG. REC. 26,474 (1986) (excerpt of Senate Amendment No. 3034 to H.R. 5484).

37. Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 25 (2010).

38. *Id.*

39. *See, e.g.*, *United States v. Wicker*, 848 F.2d 1059 (10th Cir. 1988) (applying § 856 to a methamphetamine lab); *United States v. Martinez-Zyas*, 857 F.2d 122, 124–25 (3rd Cir. 1988) (applying § 856 to a building used as a cocaine warehouse where the drug was packaged in large quantities).

40. Kreit, *supra* note 6, at 429–30 (“Though clearly inspired by concerns about property owners who allow their houses to be used as crack houses, the statute sweeps much more broadly, as early decisions applying it make clear. For example, in the 1991 Ninth Circuit case *United States v. Tamez*, the defendant was prosecuted under the crack house statute for drug distribution that occurred at his used car dealership. He argued that the statute should not apply to his case because it ‘was intended only to apply to ‘crack houses’ or manufacturing operations.’ . . . [T]he court explained [that] ‘the words of the statute clearly imply more expansive coverage.’” (quoting *United States v. Tamez*, 941 F.2d 770, 773 (9th Cir. 1991))).

41. 913 F.2d 183 (5th Cir. 1990).

42. *Id.* at 185.

43. 941 F.2d 770 (9th Cir. 1991).

argued that § 856(a) did not apply to cocaine distribution out of his car dealership because this was not the purpose of the dealership building itself (although, here, it was certainly this defendant's purpose) and because there was "no evidence of manufacturing operations."<sup>44</sup> The Ninth Circuit panel rejected this a narrow reading, finding that such an interpretation "ignores the plain language" of the statute where, "[a]lthough the short title and the Congressional Record synopsis refer to manufacturing and crack houses, the words of the statute clearly imply more expansive coverage."<sup>45</sup>

In 2003, Congress amended § 856(a) in an explicit attempt to expand the statute's reach in response to "fears about teenage ecstasy use at raves."<sup>46</sup> Congress intended to ensure that § 856(a) "cover[ed] more relationships between persons and property" than it had previously.<sup>47</sup> This broadened coverage was accomplished by extending the prohibition from its original limitation to permanent locations to include temporary places (such as raves and similar events) and by "add[ing] declaratory and injunctive relief as remedies for violations of the law."<sup>48</sup> Since the 2003 amendments, § 856(a) has remained unchanged as of 2022.<sup>49</sup>

Despite its potentially broad reach, especially following the 2003 amendments, it is rare for federal prosecutors to bring charges under § 856(a).<sup>50</sup> For example, in 2017, only twenty-four defendants were sentenced for "maintaining a drug-involved premise" compared with 19,750 federal drug offenders sentenced overall that year.<sup>51</sup> Even when charges are brought under § 856(a), "it appears that federal prosecutors have used it mostly to target *property owners with close ties to the drug activities* occurring on their property."<sup>52</sup>

The application of § 856(a), however, is not always so limited.<sup>53</sup> While court opinions cited thus far generally conform to the trend that the defendants charged are somehow involved with the drug activity in question (that is, that the defendants themselves act with the "purpose" of making their facilities open to the illegal activity), there are important caveats and exceptions.<sup>54</sup> One early case that has been highly influential and was cited by the Third Circuit panel in *Safehouse* was *Chen*, which carefully distinguished how the "purpose" requirement applied in § 856(a)(1) and § 856(a)(2).<sup>55</sup> Based on the "plain language" of § 856(a)(1), the *Chen* court found that "the statute is unambiguous; the phrase *for the purpose of* applies to the person who

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44. *Id.* at 773.

45. *Id.*

46. Kreit, *supra* note 6, at 430.

47. Michael V. Sachdev, *The Party's Over: Why the Illicit Drug Anti-Proliferation Act Abridges Economic Liberties*, 37 COLUM. J.L. & SOC. PROBS. 585, 603 (2004).

48. Kreit, *supra* note 6, at 430.

49. 21 U.S.C. § 856(a); *see also* Kreit, *supra* note 6, at 430.

50. Kreit, *supra* note 6, at 430.

51. *Id.*

52. *Id.* at 431 (emphasis added).

53. *See, e.g.*, *United States v. Chen*, 913 F.2d 183, 191 (5th Cir. 1990) (applying § 856(a)(2) to a defendant motel owner based on the fact that guests were staying at the motel with the purpose of using drugs).

54. *See, e.g., id.*

55. *See id.* at 189–91.

opens or maintains the place for the illegal activity.”<sup>56</sup> In other words, a defendant facing charges under § 856(a)(1) must have acted with an illegal purpose.<sup>57</sup>

However, the *Chen* court opted to give the similar, if not identical, “purpose” requirement of § 856(a)(2) a different reading than § 856(a)(1).<sup>58</sup> The court stated:

§ 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.<sup>59</sup>

The court started with the principle that “interpretations which render parts of a statute inoperative or superfluous are to be avoided.”<sup>60</sup> The Fifth Circuit reasoned that applying the “purpose” requirement found in § 856(a)(2) to the actor being charged, as they acknowledged § 856(a)(1) does, would eliminate any distinction between the two provisions, making one or the other entirely superfluous.<sup>61</sup> Therefore, a defendant charged under § 856(a)(2) “need not have the express purpose . . . that drug related activity take place; rather, such activity is engaged in by others (*i.e.*, others have the purpose).”<sup>62</sup>

In *United States v. Tebeau*,<sup>63</sup> a recent 2013 case applying the same reasoning as *Chen*, a defendant who held music festivals on his three hundred acres of rural land violated § 856(a).<sup>64</sup> The defendant was aware that drug use and sales occurred at the festivals, and he maintained a medical site to treat overdoses, but he argued that § 856(a)(2) “should be read to require the government to show that he had the specific intent to store, distribute, manufacture, or use drugs” at the festivals.<sup>65</sup> The court disagreed, reasoning that “§ 856(a)(2) only requires that a defendant has the purpose of maintaining property where drug use takes place, and not that the defendant intends the drug use to occur.”<sup>66</sup>

### B. Supervised Injection Sites and § 856(a)

Despite the superficial similarities with the *Chen* interpretation of § 856(a), before the Eastern District of Pennsylvania decision in *Safehouse*, no court had specifically addressed the statute’s applicability to supervised injection sites.<sup>67</sup>

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56. *Id.* at 190.

57. *See id.*

58. *Id.* (finding that reading the “purpose” requirement the same way in both paragraphs would render one or the other entirely superfluous).

59. *Id.*

60. *Id.* (internal citation omitted).

61. *Id.*

62. *Id.*

63. 713 F.3d 955 (8th Cir. 2013).

64. *Id.* at 957.

65. *Id.* at 958–59.

66. *Id.* at 960.

67. *United States v. Safehouse*, 408 F. Supp. 3d 583, 588 (E.D. Pa. 2019), *rev’d* 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

Part III.B.1 addresses the legal status of supervised injection sites prior to the district court decision. Part III.B.2 addresses the state of the law surrounding such sites in the Eastern District of Pennsylvania following this decision, but prior to the Third Circuit reversal in *Safehouse*.

### 1. Prior to the District Court Decision in *Safehouse*

Although supervised injection sites have gained increasing recognition as a potential harm reduction strategy in various countries, as of 2022, no sanctioned supervised injection sites have been opened in the United States.<sup>68</sup> While at least one unsanctioned facility had been operating in “an undisclosed urban area” in the United States since 2014, there had not yet been a city-sanctioned site to test the practice’s legality.<sup>69</sup> The benefits of sanctioned supervised injection sites, unavailable to unsanctioned sites, are manifold; they include the ability to hire licensed clinicians to provide care onsite, the ability to collaborate with other agencies, the ability to provide “wrap-around services” to connect people directly with essential resources, and additional potential funding sources.<sup>70</sup>

In fact, there had previously been resistance from policymakers who viewed harm reduction strategies such as supervised injection sites as “incompatible with the war on drugs[,] . . . ‘a form of surrender’ . . . [to be] rejected out of hand.”<sup>71</sup> More recently, however, the opioid epidemic—which saw a 300% increase in drug overdoses between 2000 and 2015—prompted several cities, including Philadelphia, to approve plans for supervised injection facilities in an attempt to mitigate the problem.<sup>72</sup> Although federal courts had not directly addressed the legality of supervised injection sites until 2019, the general understanding was that the sites were illegal but that the federal government could “turn a blind eye” or “stay out of the way” of well-intentioned local government attempts to open them.<sup>73</sup> However, “[b]ecause safe injection site operators do not handle drugs themselves, it is unlikely the facilities would run afoul of federal laws criminalizing drug possession and distribution.”<sup>74</sup> So, proponents of harm-reduction strategies were left to wonder—how does § 856(a) apply to them?<sup>75</sup>

Cases such as *Chen* and *Tebeau* suggest that § 856(a), particularly § 856(a)(2), has such a broad reach—applicable to property owners who open their properties to others

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68. Kral & Davidson, *supra* note 1 (reporting that supervised injection sites are currently operating in Australia, Canada, Denmark, France, Germany, Luxembourg, the Netherlands, Norway, Spain, and Switzerland—but not in any U.S. cities).

69. *Id.*; but see Lewis & Mann, *supra* note 3.

70. Kral & Davidson, *supra* note 1, at 920.

71. Kreit, *supra* note 6, at 416 (quoting William J. Bennett, *The Drug War Worked Once; It Can Again*, WALL STREET J. (May 15, 2001), <https://www.wsj.com/articles/SB989884118310019941> [<https://perma.cc/YT5A-JJXU>]).

72. *Id.* at 416–17.

73. The Editorial Board, *Let Cities Open Safe Injection Sites*, N.Y. TIMES (Feb. 24, 2018), <https://www.nytimes.com/2018/02/24/opinion/sunday/drugs-safe-injection-sites.html> [<https://perma.cc/EWQ6-5RAJ>].

74. Kreit, *supra* note 6, at 417.

75. *See id.*



who have a purpose of using drugs, regardless of the actor's purpose—that safe injection sites would indeed run afoul of federal law.<sup>76</sup>

## 2. *United States v. Safehouse*—Eastern District of Pennsylvania

As Safehouse prepared to open its city-sanctioned supervised injection site in Philadelphia, the United States Attorney's Office for the Eastern District of Pennsylvania filed a lawsuit in 2019, seeking a declaratory judgment that, by operating a supervised injection site, Safehouse would automatically be violating § 856(a).<sup>77</sup> In *Safehouse*, Judge McHugh declined to adopt the government's position, finding instead that operators of supervised injection sites were not acting with the required purpose of illegal drug use and, therefore, would not violate § 856(a) at all.<sup>78</sup> Judge McHugh noted that no federal court of appeals had considered § 856(a)'s application to medically supervised consumption sites—thus, no controlling standard of statutory construction existed for the circumstances.<sup>79</sup> Judge McHugh approached the issue as a novel question of statutory interpretation, and his application of various canons of interpretation reached the same result—Safehouse must act with the illicit purpose required under the statute.<sup>80</sup>

First, Judge McHugh began by reading the statute's text, looking for its plain meaning.<sup>81</sup> In this matter, a judge should first “read the statute in its ordinary and natural sense.”<sup>82</sup> Judges generally only find a provision to be ambiguous “where the disputed language is reasonably susceptible to different interpretations.”<sup>83</sup> At the same time, it is not uncommon to encounter cases where both sides claim that the language of a statute is clear and unambiguous while reaching opposite results.<sup>84</sup> As a result, Judge McHugh found “substantial merit to the observation that “[p]lain meaning is a conclusion, not a method.”<sup>85</sup>

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76. See, e.g., *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990) (finding a third-party acting with the purpose of illegal drug use can be sufficient to subject a defendant to criminal liability under § 856(a)(2)).

77. Complaint for Declaratory Judgment at 2, 5, *United States v. Safehouse*, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (No. 2:19-cv-00519-GAM), <https://www.courthousenews.com/wp-content/uploads/2019/02/SAFEHOUSE.pdf> [<https://perma.cc/WCM2-3TXZ>]; see also Bobby Allyn, *U.S. Prosecutors Sue to Stop Nation's First Supervised Injection Site for Opioids*, NPR (Feb. 6, 2019, 2:29 PM), <https://www.npr.org/sections/health-shots/2019/02/06/691746907/u-s-prosecutors-sue-to-stop-nation-s-first-supervised-injection-site> [<https://perma.cc/ARK4-JTVP>].

78. See *United States v. Safehouse*, 408 F. Supp. 3d 583, 587 (E.D. Pa. 2019) (holding that “§ 856(a) does not prohibit Safehouse's proposed medically supervised consumption rooms because Safehouse does not plan to operate them ‘for the purpose of’ unlawful drug use within the meaning of the statute.”), *rev'd* 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

79. *Id.* at 588.

80. *Id.* at 588–92.

81. *Id.* at 588–89 (en banc) (Ambro, J., majority opinion) (quoting *Pellegrino v. Transp. Sec. Admin.*, 937 F.3d 164, 181 (3d Cir. 2019)).

82. *Id.* at 589 (quoting in re *Harvard Indus., Inc.*, 568 F.3d 444, 451 (3d Cir. 2009) (internal quotation marks omitted)).

83. *Id.* (quoting *Dobrek v. Phelan*, 419 F.3d 259, 264 (3d Cir. 2005)) (additional internal quotation marks omitted).

84. See *id.*

85. *Id.* (alteration in original) (quoting VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 5, 66, 68–69 (Harv. Univ. Press 2016)).

Next, Judge McHugh explored the legislative intent underlying § 856(a) because the plain meaning of the statute was unclear and, therefore, materials regarding Congress's intent in enacting the statute were particularly relevant.<sup>86</sup> Indeed, the Third Circuit has indicated that a judge's "goal when interpreting a statute is to effectuate Congress's intent."<sup>87</sup>

Citing Victoria Nourse, one of the nation's preeminent scholars on statutory interpretation,<sup>88</sup> Judge McHugh identified five principles to facilitate an objective use of legislative history: (1) statements of a law's opponents should not be cited for an authoritative meaning of the law; (2) later legislative evidence can trump earlier evidence; (3) Congress's rules can help guide interpretation; (4) legislative history may be misleading "absent an understanding of the realities of legislative conflict, sequence, and congressional rules;" and (5) courts and Congress have different institutional expectations and incentives that may lead courts to misunderstand the significance of some legislative language and history.<sup>89</sup> These principles all point to § 856(a)'s inapplicability to Safehouse's plans.

Finally, Judge McHugh considered the so-called "'canons' of construction" championed by the late Justice Antonin Scalia.<sup>90</sup> However, he noted that chief among the limitations of these canons is that many are premised on unrealistic assumptions about the lawmaking process,<sup>91</sup> as well as the manipulability of canons which risks the possibility that a judge may rewrite statutes based on improper preferences and considerations "under the guise of adherence to objective rules."<sup>92</sup>

After outlining the potential benefits and limitations of the various statutory interpretation methods, Judge McHugh sought to apply them each in turn.<sup>93</sup> By utilizing these tools, Judge McHugh searched for the statute's plain, ordinary meaning (i.e., "the meaning consistent with the undisputed, prototypical examples of circumstances in which the statute applies—those to which legislators and members of the public would

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86. *Id.* ("Where plain meaning proves elusive or a statute is unclear on its face . . . 'good arguments exist that materials making known Congress's purpose should be respected, lest the integrity of legislation be undermined.") (quoting *Pellegrino*, 937 F.3d at 179) (additional internal quotation marks omitted)).

87. *Id.* at 588 (quoting S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 257 (3d Cir. 2013)) (internal quotation marks omitted).

88. Victoria Nourse, *Faculty & Research*, GEORGETOWN L., <https://www.law.georgetown.edu/faculty/victoria-nourse/> [<https://perma.cc/X2XW-XEZG>] (last visited Nov. 1, 2022).

89. *Safehouse*, 408 F. Supp. 3d at 589–90; see also VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 5, 66, 68–69 (Harv. Univ. Press 2016).

90. *Safehouse*, 408 F. Supp. 3d at 590.

91. *Id.* (citing ROBERT A. KATZMANN, JUDGING STATUTES, 52–53 (2014)); see also Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 940, 947 (2013) (noting that "staff, not members [of Congress] are the primary drafters of enacted text[.]" therefore, "the accuracy of judicial assumptions about canon awareness and use [by drafters of statutes] may depend on what kind of staffer is doing the drafting").

92. *Safehouse*, 408 F. Supp. 3d at 590 (citing, *inter alia*, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) ("Vacuous and inconsistent as they mostly are, the canons do not constrain judicial decision making but they do enable a judge to create the appearance that his decisions are constrained.")).

93. See *id.* at 591.

have expected the statute to apply at the time of enactment[.]” which still affords appropriate respect and deference to Congress.<sup>94</sup>

Under a plain language analysis, it might be possible to read § 856(a) to apply to supervised injection sites.<sup>95</sup> However, such an application was actually inconsistent with the statute’s plain language because principles of statutory construction make clear that the actor being charged, not some third party, must possess the relevant state of mind—the purpose of drug use.<sup>96</sup> Indeed, using a painstaking grammatical and textual analysis, Judge McHugh found the only reasonable conclusion was that the “purpose” requirement of § 856(a)(2)—like all courts to have considered the question agree is the case for identical wording in § 856(a)(1)—must be the purpose of the actor charged.<sup>97</sup>

Judge McHugh declined to follow the Fifth Circuit’s interpretation of § 856(a) from *Chen*, where that court found that the actor being charged must have the illegal purpose under § 856(a)(1) but that it was enough for a third party to have such purpose under § 856(a)(2) to avoid a superfluous result.<sup>98</sup> He saw no reason that the accepted interpretation of the mens rea “purpose” element of § 856(a)(1), which requires the actor being charged to have the illicit purpose, should not extend to the exact same words found in § 856(a)(2).<sup>99</sup> In Judge McHugh’s view, the *Chen* court “unnecessarily applied the rule against surplusage to address a redundancy that in [his] view does not exist.”<sup>100</sup> The difference, in his understanding, was that “(a)(1) refers to one’s use of their property for *their own* drug activity, and (a)(2) refers to one making property available for the purpose of *others* engaging in drug activity”; therefore, no redundancy appears simply because a court applies the “purpose” requirement of both provisions to the actor being charged.<sup>101</sup>

The necessary “purpose” was interpreted to “refer to one’s end or goal” and should be understood “to require that the actor have a significant, but not sole, purpose to facilitate drug activity” for their actions to fall under the prohibitions of § 856(a); an incidental purpose is not enough.<sup>102</sup> The “proscribed *purpose must bear a significant relationship* to the conduct that Congress sought to prohibit.”<sup>103</sup> Ultimately, the court found that to run afoul of § 856(a)(2), an operator of a supervised injection site must make the place available for illegal drug use—the operators themselves must have that

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94. *Id.*

95. *Id.* at 592.

96. *Id.*

97. *Id.* at 592, 595 (“No party—and no court, for that matter—disputes that the actor in (a)(1) must act ‘for the purpose of’ drug activity. The same requirement exists in (a)(2) structured in precisely the same way. Both provisions have the same subject, identified in § 856(b) as ‘any person.’ Both further identify a knowledge requirement—‘knowingly’ or ‘knowingly and intentionally’—followed by a set of verbs and a direct object—‘place’—and conclude with the ‘for the purpose of’ clause. In both provisions, the purpose requirement applies to the person who acts knowingly—an elaboration of the requisite mental state. *The text suggests no reason to read the requirement differently in (a)(2) than in (a)(1).*” (emphasis added)).

98. *Id.* at 599–605; *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990).

99. *Safehouse*, 408 F. Supp. 3d at 599.

100. *Id.*

101. *Id.* at 600 (emphasis added).

102. *Id.* at 592.

103. *Id.* at 608 (emphasis added).

purpose; and this illicit purpose must be a significant, not an incidental one.<sup>104</sup> As such, Judge McHugh reasoned that Safehouse's proposed supervised injection site would not violate § 856(a)(2).<sup>105</sup>

#### IV. THIRD CIRCUIT'S ANALYSIS

In *United States v. Safehouse*, the Third Circuit reversed the district court's decision and held that Safehouse's operation of a proposed supervised injection site would violate § 856(a)(2).<sup>106</sup> As discussed in Part III.B.2, *supra*, the case involved plans by Safehouse to open the nation's first sanctioned supervised injection site in Philadelphia in an attempt to implement a public health-focused response to the opioid epidemic.<sup>107</sup> The facility would employ trained staff to supervise drug use, respond to overdoses, and offer visitors treatment options and resources.<sup>108</sup> After the DOJ brought suit and the district court found for Safehouse, the Government appealed to the Third Circuit.<sup>109</sup>

Part IV.A explores the *Safehouse* majority opinion, including an in-depth analysis of the reasoning and methods of statutory interpretation employed. Part IV.B turns to the dissent's critiques the majority's reading of key elements of § 856(a) and how the provision applies to supervised injection sites.

##### A. Majority Opinion

While indicating that “[t]here is no consensus and no easy answer” regarding how to respond to problems surrounding drug addiction, the majority repeatedly stated that its “focus is on what Congress has done, not what it should do.”<sup>110</sup> Beginning its analysis with the implementation of the Controlled Substances Act, the majority noted that, initially, it “said nothing about people who opened their property for drug activity.”<sup>111</sup> Following the rise of “crack houses” in the 1980s, Congress responded by enacting § 856, which prohibits, *inter alia*, maintaining a place for the purpose of using drugs.<sup>112</sup>

The majority next turned specifically to § 856(a)(2), which makes it illegal to “manage or control” a property while “knowingly and intentionally” opening it to others “for the purpose of . . . using a controlled substance.”<sup>113</sup> Ultimately, the “case turn[ed] on how to construe and apply § 856(a)(2)’s last phrase: ‘for the purpose of . . .’”<sup>114</sup> Critically, unlike the district and dissenting judges, the majority concluded that “[t]he

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104. *Id.* at 618.

105. *Id.*

106. *United States v. Safehouse*, 985 F.3d 225, 229 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021) (finding “[b]ecause Safehouse knows and intends that its visitors will come with a significant purpose of doing drugs, its safe-injection site will break the law”). The Third Circuit’s opinion in *United States v. Safehouse* was heard by a three-judge panel and had one dissenter. *See id.* at 243 (Roth, J., dissenting).

107. *Id.* at 229.

108. *Id.*

109. *Id.* at 231.

110. *Id.* at 230.

111. *Id.*

112. *Id.*

113. *Id.* at 232 (omission in original) (quoting 21 U.S.C. § 856(a)).

114. *Id.*

text of the statute focuses on the *third party's purpose*, not the defendant's[.]" therefore, Safehouse would violate the law by "knowingly and intentionally" opening its facility to visitors who come to use drugs—regardless of Safehouse's purpose.<sup>115</sup>

The majority's interpretation would not eliminate mens rea—a defendant must still have acted with the requisite mental state.<sup>116</sup> The words "knowingly and intentionally" apply to the actor being charged, and they mean (1) the defendant must know that others are or will be engaging in the unlawful drug activity proscribed by § 856(a)(2); (2) the defendant only must know these visitors are selling or using certain drugs, but they need not know that the visitors are violating the law or intend them to do so; and (3) the defendant must make the place available to others intentionally.<sup>117</sup>

After acknowledging that a defendant charged under § 856(a)(2) must have acted intentionally and knowingly, the majority found that the final mental state included in the statute, "purpose,"<sup>118</sup> only applies to third-party visitors.<sup>119</sup> To reach this conclusion, based on their view on the "plain text" of the statute, the majority said it was necessary to understand § 856(a)(2) in the context of "its sibling," § 856(a)(1).<sup>120</sup>

In the case of § 856(a)(1), the statute criminalizes behavior involving only one actor and two sets of actions.<sup>121</sup> A defendant violates the law if they "open, lease, rent, use, or maintain" a place "for the purpose of manufacturing, distributing, or using" illegal drugs.<sup>122</sup> Importantly, this behavior does not require a third party at all—an actor can violate the statute with third-party involvement or "all by himself."<sup>123</sup> The majority, district court, and the other circuit courts are in accord on this issue, agreeing that § 856(a)(1) "bars a person from operating a place for *his own purpose* of illegal drug activity."<sup>124</sup>

Turning to § 856(a)(2), the majority read it, unlike § 856(a)(1), to require at least two actors: a defendant and a third party.<sup>125</sup> Although "[t]he law does not mention this third party . . . its verbs require her," because if a defendant "'make[s] [the place] available for use,' someone must be there to use it."<sup>126</sup> Based on the language and sentence structure, the majority concluded that the defendant is the one who must

115. *Id.* (emphasis added).

116. *See id.* at 232–33.

117. *Id.*

118. Section 856(a) makes it unlawful to:

(a)(1) knowingly open, lease, rent, use, or *maintain any place*, whether permanently or temporarily, *for the purpose of manufacturing, distributing, or using any controlled substance*;

(a)(2) *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*.

21 U.S.C. § 856(a) (emphasis added).

119. *Safehouse*, 985 F.3d at 233.

120. *Id.*

121. *Id.* at 234.

122. *Id.* (quoting 21 U.S.C. § 856(a)).

123. *Id.*

124. *Id.* (emphasis added).

125. *Id.*

126. *Id.*

“manage or control” or “make available for use” the place in question.<sup>127</sup> However, it is a third party, not the defendant, who must have the purpose to manufacture, store, distribute, or use illegal drugs.<sup>128</sup> The court reasoned:

This third party . . . is the one who must act “for the purpose of” illegal drug activity. The parties vigorously contest this point. But this reading is logical. Paragraph (a)(1) requires just the defendant. He must have the purpose of drug activity, whether he engages in it by himself or with others. Paragraph (a)(2) requires at least two people, adding the third party. She performs the drug activity. The phrase “for the purpose of” refers to this new person.<sup>129</sup>

The majority’s reasoning was bolstered by its conclusion that the contrary interpretation, requiring the defendant to act with illicit purpose under § 856(a)(2), would render both the paragraph and the mens rea word “intentionally” in § 856(a)(2) redundant.<sup>130</sup> In their view, the two paragraphs together should be read to “compose a coherent package, forbidding different ways of ‘[m]aintaining [a] drug-involved premises.’”<sup>131</sup> Although Safehouse argued that, while the provisions somewhat overlap, they are not redundant because § 856(a)(1) applies to a “crack house’s operator” and § 856(a)(2) covers a “distant landlord,” the majority found this unpersuasive.<sup>132</sup> According to the majority, if the “purpose” required under § 856(a)(1) and § 856(a)(2) were both read to apply to just one actor, even the “distant landlord” would be covered by the former paragraph and the latter would have no independent nor additive value.<sup>133</sup>

Furthermore, because Congress chose to add the word “intentionally” to § 856(a)(2) but not to § 856(a)(1), requiring a defendant to act both “intentionally” and “for the purpose of” illegal drug use would add an additional layer of redundancy.<sup>134</sup> Both intent and purpose are mental states requiring volition, and the majority reasoned that someone “cannot have a *purpose* of unlawful drug activity without *intending* that activity.”<sup>135</sup> Accordingly, because the majority concluded that Safehouse’s proposed reading would render § 856(a)(2) doubly redundant, the “purpose” requirement of § 856(a)(2) must be applied differently from the same requirement in § 856(a)(1).<sup>136</sup>

The majority next noted that six other circuits agree with their reading of § 856(a) and that no circuit has adopted Safehouse’s proposed interpretation.<sup>137</sup> While acknowledging that none of these circuits had specifically addressed the applicability of § 856(a) to supervised injection sites, the majority nonetheless concluded that all these

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127. *Id.* at 234–35.

128. *Id.* at 235.

129. *Id.*

130. *See id.*

131. *Id.* (alterations in original).

132. *Id.*

133. *Id.*

134. *Id.* at 235–36.

135. *Id.* at 236 (emphasis added).

136. *See id.*

137. *Id.*; *see also* *United States v. Wilson*, 503 F.3d 195, 197–98 (2d Cir. 2007) (per curiam); *United States v. Chen*, 913 F.2d 183, 189–90 (5th Cir. 1990); *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993); *United States v. Tebeau*, 713 F.3d 955, 959–61 (8th Cir. 2013); *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991); *United States v. Verners*, 53 F.3d 291, 296–97 & n.4 (10th Cir. 1995).

circuit courts interpreted the “purpose” requirement of § 856(a)(2) as a third party’s purpose.<sup>138</sup> To the majority, the text was clear, and “good intentions cannot override the plain text of the statute.”<sup>139</sup> Although Congress was aiming the law at crack houses and “never expected [it] to apply to safe-injection sites,” this was seen as irrelevant because “[s]tatutes often reach beyond the principal evil that animated them.”<sup>140</sup>

The majority also addressed and quickly dismissed three further arguments put forward by Safehouse: (1) the language “for the purpose of” in § 856(a)(2) cannot mean different things in two sister paragraphs, (2) the rule of lenity requires the ambiguity of § 856(a)(2) to be interpreted in favor of the defendant, and (3) it is “extremely odd” to tie a defendant’s liability to a third party’s mental state.<sup>141</sup> First, the court held that the word “purpose” does, in fact, have the same meaning in both paragraphs. Indeed, it requires someone to act with an illicit purpose of using a controlled substance; the difference is the *actor* who must have this purpose.<sup>142</sup> Second, the majority found the rule of lenity inapplicable.<sup>143</sup> Although courts interpret ambiguities in criminal statutes in favor of defendants, the text of § 856(a) is “clear enough”—the majority saw no real ambiguity.<sup>144</sup>

Third, the majority did not consider tying a defendant’s criminal liability to a third party’s state of mind particularly unusual.<sup>145</sup> For example, the majority noted that third party mental states could impact the criminal liability of a defendant involved in a robbery with a toy gun because a cashier must have a “real fear of injury.”<sup>146</sup> Third party mental states can also be relevant in the case of kidnapping (a victim must not have consented to come along), and for conspirators in a drug ring where a member kills someone (murder liability on conspirators even though only the killer had the requisite specific intent).<sup>147</sup> Ultimately, the majority was untroubled by the criminal liability exposure based on a third party’s mental state because the defendant still “must have a mental state: he must knowingly and willingly let others use his property for drug activity.”<sup>148</sup>

Even if the “purpose” requirement of § 856(a)(2) were applied to Safehouse, the majority found that Safehouse would violate the statute by operating a supervised injection site.<sup>149</sup> Because a defendant can have multiple purposes, it was sufficient to the majority that one of Safehouse’s “significant purposes” would be to allow drug use.<sup>150</sup> This is a far more lenient standard than the district court and dissenting judge believed

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138. *Safehouse*, 985 F.3d at 236.

139. *Id.*

140. *Id.* at 238 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

141. *Id.* at 236–37.

142. *Id.* at 236.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 236–37.

147. *Id.* at 237.

148. *Id.*

149. *Id.* at 238.

150. *Id.*

was required by precedent,<sup>151</sup> but “motive is distinct from mens rea[.]” and a “defendant can be guilty even if he has the best of motives.”<sup>152</sup>

Finally, as noted above, the fact that “Congress targeted crack houses, but never expected the law to apply to safe-injection sites” was irrelevant to the majority where the plain text was clear.<sup>153</sup> Ultimately, although “[t]he public-policy debate [surrounding supervised injection sites] is important . . . it is not one for the courts” and, therefore, Congress is better suited to address the issue.<sup>154</sup>

### B. *Dissenting Opinion*

In her dissent, Judge Jane R. Roth argued strenuously that the statute does not sweep so broadly.<sup>155</sup> Judge Roth took particular issue with the majority’s interpretation which created a situation where “§ 856(a)(2)—unlike § 856(a)(1) or any other federal criminal statute—criminalizes otherwise innocent conduct, based solely on the ‘purpose’ of a third party who is neither named nor described in the statute.”<sup>156</sup> She described this severe form of criminal liability as “*sui generis*”<sup>157</sup> (i.e., of its own kind<sup>158</sup>). Judge Roth further reasoned that the government failed to meet its burden of showing that drug use will be “one of Safehouse’s motivating purposes” and, therefore, the “purpose” requirement of § 856(a)(2) would not be satisfied if appropriately applied to the actor potentially being charged under the statute.<sup>159</sup>

Pointing out that the awkward grammatical structure renders § 856 “nearly incomprehensible,” Judge Roth criticized the majority’s decision to broaden criminal liability by emphasizing a third party’s purpose, even though basic tenets of statutory construction call for courts to interpret ambiguities in criminal statutes narrowly.<sup>160</sup> Judge Roth called attention to clear guidance from the Supreme Court that “identical words used in different parts of the same statute are generally presumed to have the same meaning.”<sup>161</sup> She considered the decision to interpret the same word—“purpose”—found in §§ 856(a)(1) and (a)(2) differently particularly problematic.<sup>162</sup> Both sides agreed that the “purpose” requirement of § 856(a)(1) applies to a defendant’s mental state.<sup>163</sup> Yet, Judge Roth argued that the majority, without any attempt to justify its departure from this presumption, found that the same word does, in fact, apply differently in two side-by-side sections of the same statute.<sup>164</sup>

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151. *See supra* Part III.B.2; *infra* Part IV.B.

152. *Safehouse*, 985 F.3d at 238.

153. *Id.*

154. *Id.*

155. *See id.* at 243 (Roth, J., dissenting).

156. *Id.*

157. *Id.*

158. *Sui generis*, BLACK’S LAW DICTIONARY (11th ed. 2019).

159. *Safehouse*, 985 F.3d at 252 (Roth, J., dissenting).

160. *Id.* at 244–45.

161. *Id.* at 245 (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)).

162. *Id.* .

163. *Id.*

164. *Id.*



Next, Judge Roth took aim at the majority's reliance on *Chen*.<sup>165</sup> Rejecting the argument by *Chen* and its progeny that reading the "purpose" requirements of §§ 856(a)(1) and (a)(2) as having the same meaning would render the two provisions superfluous, Judge Roth noted that "[w]hen *Chen* was decided, the only overlap between the two sections was the phrase 'for the purpose of,'" and "*Chen* and its progeny decided that, to avoid superfluity, the only words that were the same between the two sections must have different meanings."<sup>166</sup> Following the 2003 amendments, Judge Roth acknowledged the 2003 amendments created a "minor overlap" between §§ 856(a)(1) and (a)(2) with the addition to (a)(1) of the words "rent" and "lease."<sup>167</sup> However, Judge Roth saw no reason to "twist the text of the statute based on the potential overlap of two words."<sup>168</sup>

Judge Roth also illustrated how the majority's reading might lead to unintended or absurd results, another violation of a fundamental canon of statutory interpretation.<sup>169</sup> Indeed, parents could be held criminally liable under the statute if they allow their drug-addicted son to move into their home, knowing he will use drugs, even if their only purpose in doing so is to be able to help him if he suffers an overdose.<sup>170</sup> Although the majority dismissed this concern by noting that an "incidental" purpose would not expose the parents to liability, Judge Roth pointed out that the hypothetical son's drug use is not necessarily an incidental purpose at all.<sup>171</sup> It is entirely possible that the son may move into his parents' home only because he will now have a safe place to use drugs.<sup>172</sup> In that case, drug use is his primary purpose and, under the majority's construction of § 856(a)(2), the parents would be exposed to criminal liability of up to twenty years' imprisonment—all due to their understandable concern for their child's wellbeing and despite their total lack of illicit purpose.<sup>173</sup>

The same reasoning would also expose vacationing homeowners who allow the house sitter to smoke marijuana or to homeless shelters where the operators know residents will be using drugs.<sup>174</sup> If it turns out that drug use was not an incidental purpose in the third parties' decision to use these places (i.e., if the house sitter cared more about the ability to use the home to smoke marijuana or the shelter resident's main motivation was to have a concealed place to use or sleep off her high), then criminal liability could attach.<sup>175</sup>

Judge Roth also found the majority's construction at odds with other federal policies.<sup>176</sup> For example, the Department of Housing and Urban Development (HUD)

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165. *Id.* at 246; see *United States v. Chen*, F.2d 183, 190 (5th Cir. 1990) (finding a third party acting with the purpose of illegal drug use can be sufficient to subject a defendant to criminal liability under § 856(a)(2)).

166. *Safehouse*, 985 F.3d at 247 (Roth, J., dissenting) (emphasis omitted).

167. *Id.*

168. *Id.*

169. *See id.*

170. *Id.*

171. *Id.* at 247–48.

172. *Id.* at 248.

173. *Id.* at 246, 248.

174. *Id.* at 248–49.

175. *Id.*

176. *Id.* at 249.

discourages landlords from evicting tenants based on their drug use alone, yet a landlord who allows tenants who may have a motivating purpose of drug use to remain on the property would be criminally liable.<sup>177</sup> Similarly, Congress has provided grants for programs seeking to distribute sanitary syringes and provide naloxone to reverse potential opioid overdoses, which is equivalent to an implicit acknowledgment that drug use would likely occur on or near the programs' properties. Apparently, under the majority's reasoning, "Congress is knowingly funding conduct that . . . is a crime punishable by twenty years' imprisonment."<sup>178</sup> Results such as the criminalization of the conduct of concerned parents, shelter operators, landlords following HUD guidance, and syringe exchange programs funded by Congress are "far afield from the crack houses and raves targeted by the statute" and render the majority's construction of § 856(a)(2) "intolerably sweeping."<sup>179</sup>

Under a different line of reasoning, Judge Roth also posited that enforcement of the statute against supervised injection facility operators would violate the Equal Protection Clause of the United States Constitution, regardless of to whom the purpose requirement is applied.<sup>180</sup> Under federal law, using a controlled substance is not illegal, but possessing one is.<sup>181</sup> State laws vary widely, with some outlawing drug use, others (e.g., Pennsylvania) outlawing only the use of drug paraphernalia, and others still outlawing only drug possession or decriminalizing it entirely.<sup>182</sup> The Fourteenth Amendment guarantees "equal protection of the laws,"<sup>183</sup> yet, "because 'drug use' is not unlawful in some states but is unlawful in others, we are faced with situations where property possessors in different states may be treated differently by section 856(a)(2)."<sup>184</sup> Judge Roth indicated that there was no rational basis for prosecuting those who control property in a state where "drug use" is illegal, but not prosecuting in other states where it is not illegal.<sup>185</sup>

The dissent also addressed the contention put forward by the government and accepted by the majority that, even if the defendant has a relevant purpose, Safehouse will still be acting with a sufficient purpose of drug use.<sup>186</sup> Acknowledging that a defendant can be criminally liable under a mens rea element requiring purposeful action even though that defendant acts with multiple purposes, Judge Roth argued that Third Circuit precedents make clear that, where a statute uses the phrase "for *the* purpose of" (as opposed to *a* purpose), the focus must be on the defendant's motivations.<sup>187</sup> If the

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177. *See id.*

178. *Id.* at 250.

179. *Id.* at 248–49.

180. *See id.* at 253.

181. *Id.*

182. *Id.*

183. U.S. CONST. amend. XIV, § 1.

184. *Safehouse*, 985 F.3d at 253 (Roth, J., dissenting).

185. *Id.*

186. *Id.* at 247.

187. *Id.* at 251.

illicit purpose is a significant motivating factor, the defendant acts for that purpose under the law.<sup>188</sup>

The fact that Safehouse requires participants to bring their own drugs suggested to Judge Roth that Safehouse likely believes the drug use will happen regardless of whether or not its services are available.<sup>189</sup> Also, the idea that it desires “participants to use the drugs in the Consumption Room, *as opposed to the street*, does not imply that Safehouse desires that they use drugs at all.”<sup>190</sup> Safehouse seeks to facilitate access to emergency medical care, drug rehabilitation resources, and education, and, ultimately, to provide a safer alternative for people struggling during a nationwide opioid epidemic.<sup>191</sup> To the dissent, it appeared clear that drug use is manifestly *not* Safehouse’s motivating purpose; rather, it is “trying to save people’s lives”—Safehouse’s true “motivating purpose is to put itself out of business.”<sup>192</sup>

#### V. PERSONAL ANALYSIS

In *Safehouse*, the majority’s decision to impose significant criminal liability upon operators of supervised injection sites, based in large part on the mental state of third parties,<sup>193</sup> is misguided and at odds with the general belief in the Anglo-American legal tradition that serious crimes typically require the actor to have a culpable state of mind—a belief that goes back centuries.<sup>194</sup> The majority’s interpretation of the statute not only ignores the longstanding concept of *mens rea* in criminal law, it defies American principles of punishment by imposing unjustly broad criminal liability on nonculpable actors.

Part V.A examines general *mens rea* principles in our criminal law and how *Safehouse* failed to apply them appropriately. Part V.B explores the various theories of punishment and how the majority’s application of the “purpose” element of § 856(a)(2) to the mental state of a third party does not comport with these theories. Part V.B also discusses strict liability crimes and the justifications underlying them. Finally, Part V.C outlines policy implications of the majority’s decision to strip discretion from local policymakers and foreclose their ability to attempt novel solutions in the face of an ongoing and intractable opioid epidemic.

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188. *See id.* (citing *United States v. Hayward*, 359 F.3d 631, 638 (3d Cir. 2004) (“[T]he District Court’s charge that ‘a *significant or motivating purpose* of the travel across state or foreign boundaries was to have the individual transported engage in illegal sexual activity. In other words, the illegal sexual activity must not have been merely incidental to the trip’ was not in error.” (emphasis added))).

189. *Id.* at 252.

190. *Id.*

191. *Id.* at 244.

192. *Id.* at 251–52.

193. *Id.* at 237–38 (majority opinion).

194. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 20–21 (1769) (“[A]n unwarrantable act without a vitious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.”).

*A. A Culpable State of Mind—or Mens Rea—Is a Deeply Rooted Concept in Criminal Law Generally Presumed To Be a Prerequisite to Serious Criminal Liability and Should Not Be Abandoned Here.*

This Part argues that the *Safehouse* court failed to apply longstanding mens rea principles appropriately when it concluded that operators of supervised injection sites entirely lacking a criminal intent or purpose could nonetheless be found criminally liable under § 856(a)(2) based solely on the mental state of third parties.<sup>195</sup>

Part V.A.1 first explores the concept of mens rea in the Anglo-American legal tradition and the enduring belief that serious criminal liability should be accompanied by some degree of mental culpability. Part V.A.2 then argues that, by accepting the contention that a visitor’s “purpose of using drugs” at a supervised injection facility can criminalize the conduct of facility operators regardless of *their* purpose, the *Safehouse* majority has grossly distorted accepted understandings of the importance of mens rea.

1. Mens rea as a prerequisite for criminal liability finds ample support in the history and tradition of the Anglo-American legal system.

Mens rea<sup>196</sup> has historically been understood to constitute “the second of two essential elements of every crime at common law, the other being the actus reus.”<sup>197</sup> The requirement of proving the existence of some degree of mens rea before a criminal conviction has deep roots and is based on the belief that society generally should not punish “morally blameless” conduct.<sup>198</sup> U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. went so far as to state that a system of criminal justice that is not “founded on blameworthiness . . . would shock the moral sense of any civilized community.”<sup>199</sup>

This concept has held relatively firm since its centuries-old origins, carrying into the twentieth and twenty-first centuries. In *Morissette v. United States*,<sup>200</sup> the Supreme Court emphasized the critical importance of a defendant’s intent that has carried over into modern conceptions of criminal punishment, tying mental culpability to “freedom of the human will” and the ability of individuals to choose between good and evil.<sup>201</sup> In

195. See *Safehouse*, 985 F.3d at 243 (Roth, J., dissenting).

196. Law Latin for “guilty mind.” *Mens rea*, BLACK’S LAW DICTIONARY (11th ed. 2019). Mens rea is defined as “[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime. . . . Also termed *mental element*; *criminal intent*; *guilty mind*.” *Id.*

197. *Id.*

198. Stephen F. Smith, “*Innocence*” and the *Guilty Mind*, 69 HASTINGS L.J. 1609, 1617 (2018).

199. *Id.* at 1618 (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 50 (1881)).

200. 342 U.S. 246 (1952).

201. *Id.* at 250–51. The Court in *Morissette* stated:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory “But I didn’t mean to,” and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this

fact, the belief that moral blameworthiness should be a prerequisite to criminal liability became so ingrained in the United States' early adherence to "intense individualism" that, even as state statutes increasingly displaced the old common law crimes, courts had no scruples about finding implicit mens rea elements even where legislators were silent on the issue.<sup>202</sup> And the Supreme Court still adheres to the idea that crimes generally require mental culpability—the "concurrence of an evil-meaning mind with an evil-doing hand."<sup>203</sup>

2. The reasoning of the *Safehouse* majority grossly distorts longstanding understandings of mens rea in criminal law.

Far from any "concurrence of an evil-meaning mind with an evil-doing hand,"<sup>204</sup> the *Safehouse* majority's interpretation of § 856(a)(2) merely requires a hand. The innocuous act of "mak[ing] [a place] available for use,"<sup>205</sup> provided that those who will use the place have the "purpose" of illegal drug use, is enough to impose criminal liability. While the statute uses the word "purpose," which appears to be a mens rea requirement, by applying this mental state to third parties, even though the most natural reading of the statute would suggest it applies to the actor,<sup>206</sup> the majority essentially erases the word from the statute entirely—at least as far as the actor facing the charges is concerned.

It is true that a defendant charged under § 856(a)(2) must still act "knowingly and intentionally" in making a place available for drug use.<sup>207</sup> Yet, by insisting that the only mens rea word relating to intent—"purpose"—applies instead to third parties, the

doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

*Id.*

202. *Id.* at 251–52 ("As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that *intent was so inherent in the idea of the offense* that it required no statutory affirmation." (emphasis added)).

203. *Id.* at 251; *Ruan v. United States*, 142 S. Ct. 2370, 2376 (2022).

204. *Morissette*, 342 U.S. at 251.

205. 21 U.S.C. § 856(a)(2).

206. See *United States v. Safehouse*, 408 F. Supp. 3d 583, 595 (E.D. Pa. 2019), *rev'd* 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021). The district court in *Safehouse* stated:

In the most natural reading of the sentence, the "for the purpose of" clause refers to the mental state of the actor.

The context of the whole statute supports this reading. Sections 856(a)(1) and (a)(2) both contain the requirement that one engage in the prohibited conduct "for the purpose of" drug activity. No party—and no court, for that matter—disputes that the actor in (a)(1) must act "for the purpose of" drug activity. The same requirement exists in (a)(2) structured in precisely the same way. Both provisions have the same subject, identified in § 856(b) as "any person." Both further identify a knowledge requirement—"knowingly" or "knowingly and intentionally"—followed by a set of verbs and a direct object—"place"—and conclude with the "for the purpose of" clause. In both provisions, the purpose requirement applies to the person who acts knowingly—an elaboration of the requisite mental state. The text suggests no reason to read the requirement differently in (a)(2) than in (a)(1).

*Id.*

207. *United States v. Safehouse*, 985 F.3d 225, 232 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

majority's interpretation renders criminal liability dependent upon the mental state and intent of others, which upends and distorts the general understanding that culpability is inherently connected to criminal punishment.

Neither the dissent nor the majority in *Safehouse* was able to identify a single federal criminal statute that criminalizes conduct "solely because of the subjective thoughts of a third party not mentioned in the statute."<sup>208</sup> Yet that is precisely what the majority's construction of the "purpose" element of § 856(a)(2) did.<sup>209</sup> This interpretation criminalizes otherwise innocent conduct—legally making your property "available for use" (actus reus applied to *Safehouse*)—if a third party subjectively has the "purpose of illegal drug use" (mens rea applied to unnamed third parties).<sup>210</sup>

At oral argument, the DOJ compared this construction with statutes criminalizing conspiracy.<sup>211</sup> However, unlike the majority's decision to essentially eliminate any intent-related mens rea element on the part of a defendant charged under § 856(a)(2), conspiracy is a specific intent crime, and the government must still prove this important element of culpability—that a defendant intended to facilitate a coconspirator's illicit purpose.<sup>212</sup> Additionally, although coconspirators are typically exposed to the same degree of criminal liability, a defendant charged under § 856(a)(2), no matter their mental culpability, may be subjected to a prison sentence of *twenty years*, while a third-party drug user whose purpose is the vehicle for this criminal liability may face as little as one year of imprisonment.<sup>213</sup> Such a distortion of the link between wrongdoing and criminal liability diminishes the principle that the punishment should fit the crime.<sup>214</sup>

*B. The Various Theories of Punishment that Undergird the Anglo-American Criminal Justice System Run Counter to the Safehouse Court's Reading of the "Purpose" Requirement of § 856(a)(2).*

Criminal punishment consists of a spectrum of unpleasant governmental or societal sanctions ranging from fines and probation to imprisonment or even death.<sup>215</sup> Because such punishment is supposed to be unpleasant, there has been "universal agreement . . . that government must have a strong justification when it deliberately seeks to inflict physical or emotional pain on an individual."<sup>216</sup> These justifications generally fit within two broad categories: utilitarian (focusing on the useful results of punishment more broadly and dispassionately) and retributive (where punishment is seen as a righteous consequence that the punished individual deserves because of his or her actions).<sup>217</sup>

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208. *Id.* at 245 (Roth, J., dissenting).

209. *See id.*

210. *Id.*

211. *Id.*

212. *Id.* at 245–46.

213. *Id.* at 246.

214. *See* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 100 (Wolters Kluwer, 10th ed. 2017).

215. *Id.* at 81.

216. *Id.* at 96.

217. *Id.*

From early on, commentators adhering to the utilitarian justification for criminal punishment, such as Jeremy Bentham, emphasized that the punishment itself is a form of evil; consequently, punishment, in a utilitarian's view, should be inflicted upon individuals only "as far as it promises to exclude some greater evil."<sup>218</sup> Simply put, punishment is valuable because of its ability to influence potential criminals' cost-benefit analyses and, ultimately, prevent criminal behavior by impressing upon them the idea that the pain of their inevitable punishment for wrongdoing will outweigh any benefit they may receive.<sup>219</sup> At the same time, this justification has faced criticism, especially by those who insist that the utilitarian view presupposes a high degree of calculation before a person acts when, in reality, many crimes are committed with a less than full understanding of the potential consequences or entirely the result of a disconnected and uncalculating passion.<sup>220</sup>

On the other hand, retributivism is rooted in the idea of criminals receiving their just deserts such that, to its proponents, it is the only justification for punishment that properly acknowledges society's impulse to seek "[j]ustice and [r]ighteousness" in punishing wrongdoing.<sup>221</sup> Rather than hiding behind the cold calculations of utilitarian views, retributivists candidly embrace the idea that punishment is a just form of retaliation that a criminal has earned through his or her actions.<sup>222</sup> In other words, criminals should be punished "because, and only because, the offender deserves it" by way of his or her morally culpable acts.<sup>223</sup>

Although retributivists place a greater emphasis on moral blameworthiness than utilitarians, a degree of mental culpability is clearly a necessary condition for punishment under both views.<sup>224</sup> While retributive theories directly link the punishment to the deserts of one's actions, a utilitarian ability to impact an individual's cost-benefit calculations to deter criminal behavior necessarily requires the actor to have some state of mind that can be deterred in the first place.<sup>225</sup> Indeed, if and when society punishes behavior detached from any culpable mental state, there is no righteous moral justification for the punishment, as a retributivist would demand; nor is there any way to reach the utilitarian goal of preventing the behavior in the first place because there can be no calculation of the costs versus benefits without some form of *mens rea* antecedent to punishment. What use is the specter of criminal liability in preventing certain actions if that liability can attach regardless of a person's best intentions (or lack of any intent entirely)?

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218. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 14 (photo. Reprt. 1823) (1789).

219. See KADISH ET AL., *supra* note 214, at 98 ("[If] the apparent magnitude or value of the pleasure or good he expects to be the consequence of the [criminal] act, he will be absolutely prevented from performing it.").

220. *Id.*

221. See IMMANUEL KANT, THE PHILOSOPHY OF LAW 196 (W. Hastie trans., 1887) (1797).

222. See KADISH ET AL., *supra* note 214, at 100.

223. Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND EMOTIONS 179 (F. Schoeman ed., 1987).

224. See *id.*; see also BENTHAM, *supra* note 218.

225. See BENTHAM, *supra* note 218.

By finding that criminal liability is an appropriate consequence of otherwise innocent conduct based on the “purpose” of third parties,<sup>226</sup> the *Safehouse* majority upends both utilitarian and retributive views of justified criminal punishment. First of all, by allowing criminal charges based on the mental state of others, § 856(a)(2) will be unlikely to impact the behavior the statute purports to seek to end—illegal drug use. At the same time, the operators of the facilities may be deterred from offering services that may reduce harms caused by drugs; however, by this interpretation of the statute, no deterrent to actual drug use is apparent. Instead, actions that may save lives are discouraged with little to no impact on the criminal activity that renders such services valuable. Additionally, if operators of supervised injection sites can be liable for the mental state of visitors, who are not charged under the statute,<sup>227</sup> then any punishment that follows is not truly rooted in moral culpability. Indeed, even a morally blameless actor, seeking only to reduce overdose deaths, may nonetheless face significant prison time<sup>228</sup> simply because they have chosen a means that, although never considered by Congress at the time of § 856(a)(2)’s enactment, has now been rendered illegal by an exercise in judicial lawmaking.

To many, *Safehouse*’s intended conduct does not appear culpable nor deserving of punishment.<sup>229</sup> Even though applying criminal liability to those in *Safehouse*’s position lacks any ability to meaningfully deter illegal drug use and comports with neither general theories of punishment nor common sense, the *Safehouse* majority opted for a mechanical reading of § 856(a)(2).<sup>230</sup> In the midst of what has been described as an opioid epidemic in the United States,<sup>231</sup> operators of supervised injection sites, such as *Safehouse*, are seeking to stem the ensuing tide of overdose deaths<sup>232</sup> which society has been ill-prepared to adequately combat.<sup>233</sup> And, while suggesting that the legislature is responsible for policy decisions, the majority’s reasoning results in sweeping limitations on available local harm-reduction strategies—itsself a policy decision that does not find support in the policy concerns motivating Congress at the time § 856(a)(2) was enacted (i.e., preventing “crack houses”).

Instead of applying long understood and accepted common law concepts that should require mental culpability as a prerequisite for or some potential benefit to stem from criminal punishment,<sup>234</sup> the majority chose an interpretation of the statute that

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226. *United States v. Safehouse*, 985 F.3d 225, 243 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021) (Roth, J., dissenting).

227. *Id.* at 237 (majority opinion).

228. *Id.* at 244 (Roth, J., dissenting).

229. *See Whelan*, *supra* note 12. (discussing views of community members on both sides of the debate).

230. *See Safehouse*, 985 F.3d at 244 (Roth, J., dissenting) (“At oral argument, the government conceded that *Safehouse* could provide the exact same services it plans to provide in the Consumption Room if it did not do so indoors . . .”).

231. *See, e.g., What Is the U.S. Opioid Epidemic*, U.S. DEP’T OF HEALTH AND HUMAN SERVS., <https://www.hhs.gov/opioids/about-the-epidemic/index.html> [<https://perma.cc/5EEL-H5F6>] (last updated Oct. 27, 2021).

232. *Safehouse*, 985 F.3d at 244 (Roth, J., dissenting).

233. *See Opioid Crisis Statistics*, DEP’T OF HEALTH AND HUMAN SERVICES, <https://www.hhs.gov/opioids/about-the-epidemic/opioid-crisis-statistics/index.html> [<https://perma.cc/P3UU-UKV3>] (last updated February 12, 2021).

234. *See* discussion *supra* Part V.B.



criminalizes actions that may save lives through reasoning that fails to reach behavior Congress intended to target and applies a rigid formality that leads to absurd results.<sup>235</sup> Indeed, little to no case law supports the decision to disembodify a statutory mens rea requirement so thoroughly and criminalize behavior based on subjective thoughts of other, unnamed parties.<sup>236</sup>

*C. By Tying the Hands of Local Policymakers and Limiting the Available Tools to Confront the Opioid Crisis, the Safehouse Majority Made an Active Policy Choice*

The *Safehouse* majority concludes by noting that “[t]he opioid crisis is a grave problem that calls for creative solutions” and that it “is not [the Court’s] job to opine” on whether supervised injection sites are a wise policy option.<sup>237</sup> And yet, through an unreasonably broad reading of the statute that is not supported by standard principles of statutory interpretation, the majority, in effect, made a policy decision—needlessly tying the hands of those closest to the issue when creative solutions are needed most.

Both the district court and the *Safehouse* majority agree that it is for Congress to determine what activities deserve criminal sanction.<sup>238</sup> All also appear to agree that prohibiting harm reduction strategies, such as supervised injection sites, was not Congress’s intent when enacting § 856(a)(2).<sup>239</sup> Surprisingly, the *Safehouse* majority claims to adhere to these principles while failing to account for the obvious and well-respected principle that “a responsible use of judicial power” when confronted with vague statutory text and a clear lack of congressional intent “is to decline to expand the scope of criminal liability . . . and allow Congress to address the issue.”<sup>240</sup> Indeed, “[a] line of authority dating back to Chief Justice John Marshall cautions courts against claiming power that properly rests with the legislative branch.”<sup>241</sup> Judicial restraint demands nothing less.

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235. See *Safehouse*, 985 F.3d at 244 (Roth, J., dissenting) (“At oral argument, the government conceded that Safehouse could provide the exact same services it plans to provide in the Consumption Room if it did not do so *indoors*.”).

236. See *id.* at 244–45 (Roth, J., dissenting).

237. *Id.* at 243 (majority opinion).

238. See *United States v. Safehouse*, 408 F. Supp. 3d 583, 586 (E.D. Pa. 2019) (“Particularly in the area of criminal law, it is the province of Congress to determine what is worthy of sanction. A line of authority dating back to Chief Justice John Marshall cautions courts against claiming power that properly rests with the legislative branch.”), *rev’d* 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021); see also *Safehouse*, 985 F.3d at 238 (“The public-policy debate is important, but it is not one for courts.”).

239. See *Safehouse*, 408 F. Supp. 3d at 585 (“[N]o credible argument can be made that facilities such as safe injection sites were within the contemplation of Congress either when it adopted § 856(a) in 1986, or when it amended the statute in 2003.”); *Safehouse*, 985 F.3d at 229 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021) (“Although Congress passed § 856 to shut down crack houses, its words reach well beyond them.” (emphasis added)).

240. *Safehouse*, 408 F. Supp. 3d at 586.

241. *Id.*

1. Despite the insistence of many proponents, a textualist approach to statutory interpretation rarely—if ever—leads to a single, undisputed “true meaning.”

Despite claims that the “plain text requires” the majority’s chosen result,<sup>242</sup> such a textualist approach is hardly as value neutral as proponents suggest. In her recent article, *Living Textualism*, UCLA Law Professor Cary Franklin analyzes the landmark Supreme Court decision in *Bostock v. Clayton County*<sup>243</sup> to show that such an approach does not simply lead to some inevitable, single required result detached from personal or societal values.<sup>244</sup> While insisting they are examining the text—and the text alone—from a position of complete neutrality, Franklin suggests textualist determinations often turn on what she terms “shadow decision points.”<sup>245</sup> These shadow decision points are “generally unacknowledged [and] often outcome-determinative choices” that influence judges’ interpretations of statutory text “framed as methodological, but . . . typically fueled by substantive extratextual concerns” such as which dictionary and which definition to use and, often most importantly, whether and to what extent text is considered “ambiguous.”<sup>246</sup>

These choices by individual judges, whether conscious or not, often vary and lead to conflicting interpretations, even though proponents of each side insist they are merely following “unambiguous” or “plain text” meanings. Some commentators hailed *Bostock* as a vindication of textualism, evidence that the approach is truly objective.<sup>247</sup> But Franklin makes clear that earlier court decisions interpreting the same provision of Title VII also claimed to apply “plain ordinary meaning” of the text, yet they reached the opposite result.<sup>248</sup>

For example, in *Ulane v. Eastern Airlines, Inc.*<sup>249</sup> the Seventh Circuit began its interpretation of Title VII’s prohibition of discrimination “because of sex” by noting that

242. *Safehouse*, 985 F.3d at 233.

243. 140 S. Ct. 1731 (2020).

244. Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119 (2020).

245. *Id.* at 126.

246. Professor Franklin provides a nonexhaustive list of further examples of shadow decision points:

Examples of such shadow decision points include, but are not limited to: which bits of statutory text to subject to textualist analysis; whether to consult a dictionary or a corpus linguistics database or both; which dictionary and/or database to use; which definition to select, if, as often occurs, there are several to choose from; how literally to take that definition; whether to deem the text “ambiguous” and what quantum of ambiguity is sufficient to permit the consultation of some wider unspecified set of extratextual sources; how strongly to weigh original expected applications in determining original public meaning; when to deem a statute amended in a relevant way, potentially substantially altering the appropriate date for determining its original meaning; whether to consult and what significance to attach to earlier versions of a statute, including earlier drafts of the bill that ultimately became law or the original version of a statute that has since been amended; and because textualists acknowledge that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils,” what is the “principal evil” the statute addresses and what sorts of conduct are sufficiently comparable to that evil to also violate the statute.

*Id.*

247. See, e.g., Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (praising the *Bostock* decision as proof of the textualist approach’s ability to screen out value-judgments and apply a statute’s true semantic meaning).

248. Franklin, *supra* note 244, at 132–34.

249. 742 F.2d 1081 (7th Cir. 1984).

“unless otherwise defined, words should be given their ordinary, common meaning.”<sup>250</sup> And yet, unlike Justice Gorsuch’s conclusion in *Bostock*, the Seventh Circuit majority in *Ulane* found that Title VII said nothing about discrimination against transgender individuals.<sup>251</sup> The court insisted that “the phrase [‘because of sex,’] in its plain meaning . . . do[es] not outlaw discrimination against a person who has a sexual identity disorder[.]”<sup>252</sup> Other courts, also asserting their adherence to textualism, reached similar conclusions about discrimination based on sexual orientation.<sup>253</sup> Indeed, earlier purportedly textualist approaches led courts to conclude that “‘sexual preference’ did not fall within the ordinary meaning of Title VII’s text.”<sup>254</sup>

Textualism continues to gain increasing traction in federal courts based on the assertion that, as a method of interpretation, it simply finds a statute’s “true meaning,” devoid of value judgments or other extratextual considerations. Yet, the fact that courts applying “plain, ordinary meaning” to text often reach widely divergent results belies the idea that a statute has a singular “true meaning” that is just waiting to be discerned by a neutral judge. The problem is, “textualism does not exclude [extratextual, value-driven] considerations from judicial decision-making, it simply makes judges’ reliance on those considerations harder to see.”<sup>255</sup> Franklin concludes that:

Textualism and public meaning originalism do not offer more objectivity or determinacy than their more explicitly dynamic counterparts, however. What they offer is the illusion of those characteristics. At the core of the illusion is the premise that original public meaning is something fixed and determinate that judges merely uncover by consulting period sources. In reality, original public meaning is a judicial construct. It is not something judges find, but something they produce—and something they need to produce because, in the kind of conflicts that reach the Court, there generally is not a single truth of the matter from a semantic standpoint.<sup>256</sup>

Given that adherents to textualism can reasonably disagree on the meaning of a particular text, and the often-unacknowledged factors discussed above that nonetheless appear to influence text-driven decisions, there are additional reasons for caution. In *Safehouse* and the other decisions discussed above, reasonable judges have come to different conclusions on what the text means, showing that any single, undisputable meaning is elusive—if it exists at all. Judges should be wary of taking an expansive view of criminal liability simply because, in their view, the text is “unambiguous.”

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250. Franklin, *supra* note 244, at 134 (quoting *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)).

251. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). The court also said, “if the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the *new definition* must come from Congress.” *Id.* at 1087 (emphasis added).

252. *Id.* at 1085.

253. *See, e.g.*, discussion *infra* note 254.

254. Franklin, *supra* note 244, at 133 (citing, as a further example, *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (asserting that “Congress has not shown any intent other than to restrict the term ‘sex’ to its *traditional meaning*” and interpreting the term’s “traditional meaning” not to “include sexual preference such as homosexuality” (emphasis added))).

255. *Id.* at 128.

256. *Id.* at 125.

2. Federal courts should be wary of taking policy decisions out of the hands of local governments—which are among the most politically accountable level of government—particularly during a health crisis where discretion to try nimble and novel responses is essential.

Advocates of supervised injection sites argue that the sites can provide a crucial lifeline for people experiencing addiction who are not yet ready to stop using drugs—preventing or reversing deadly overdoses, building trust, and (hopefully) helping them enter treatment.<sup>257</sup> The Philadelphia city government still strongly supports supervised injection sites, calling them “‘a powerful tool to our existing strategies’ for dealing with skyrocketing overdose deaths.”<sup>258</sup> And the federal government itself appears to be recognizing that such policy choices should rest with local governments. Instead of attempting to enforce § 856(a)(2) against operations like Safehouse, as of 2022, the Department of Justice is “evaluating” supervised injection facilities as a viable harm reduction strategy and has taken no action against the sites currently operating in New York City.<sup>259</sup>

To have a meaningful ability to confront a problem as complex and enduring as the opioid epidemic, experts and policymakers closest to the issue should have the discretion to attempt novel approaches to mitigate the ongoing devastation many communities continue to face. Federal courts should heed the words of the late Justice Brandeis that “[t]o stay experimentation in things social and economic is a grave responsibility” and remember that “one of the happy incidents of the federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of country.”<sup>260</sup> In *Safehouse*, the Third Circuit chose instead to hobble the ability of local governments to experiment with novel policy solutions—even when such creativity is needed most to stem the seemingly endless tide of overdose deaths. And they did so based on an ambiguous statute that was never intended to have such a reach.

In a city that saw the deaths of over 1,200 residents in 2020 alone,<sup>261</sup> it is unconscionable for the *Safehouse* majority to deprive local leaders of the discretion to make effective policy decisions in response to this tragedy. By declaring that dozens of local governments within its jurisdiction are prohibited from even attempting to stem the tide of overdose deaths via supervised injection sites, the Third Circuit has taken policy into their own hands and ventured well beyond the intent and text of § 856(a)(2).<sup>262</sup>

## VI. CONCLUSION

As of 2022, government-sanctioned supervised injection sites have opened in New York City, and advocates hope that other localities will follow suit.<sup>263</sup> However, this

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257. See Whelan, *supra* note 12.

258. *Id.* (quoting Philadelphia city spokesperson Kevin Lessard).

259. *See id.*

260. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

261. Whelan, *supra* note 12.

262. *See supra* Part V.A.1.

263. Mann & Lewis, *supra* note 3.

effective harm-reduction strategy<sup>264</sup> has been foreclosed to local governments and residents of Pennsylvania, New Jersey, and Delaware because of the *Safehouse* court's interpretation of § 856(a)(2).<sup>265</sup> Despite the conflicting realities on the ground—with supervised injection sites operating in New York while being declared illegal in the neighboring Third Circuit jurisdictions—it is unlikely that this discrepancy will be judicially addressed in the near future.<sup>266</sup>

Contrary to deeply rooted understandings of statutory interpretation, including the canons that undergird much judicial reasoning in this area of law, the *Safehouse* court has displaced a critical and dispositive mental-state element found in § 856(a)(2) of the Controlled Substances Act. The majority interpreted the statute such that criminal liability turns not on a defendant's culpability under § 856(a)(2), but instead on the third parties' mental state. Although the majority indicates that policy is best left to legislators, it nonetheless handed down an opinion with clear policy consequences.

The opioid crisis is showing no signs of abating in Philadelphia. Residents continue to die of overdoses every day while new and more dangerous drugs are being introduced, exacerbating the problem.<sup>267</sup> Indeed, the crisis seems only to be accelerating. Fentanyl, a far more potent and deadly drug, has now replaced most of the heroin in Philadelphia,<sup>268</sup> and the Pennsylvania Office of Attorney General investigators seized more fentanyl in the city in the first three months of 2022 than they did in all of 2021.<sup>269</sup> Throughout 2022, the city government has scrambled to find effective ways to combat this ongoing tragedy.<sup>270</sup> Yet one is left to wonder: if a public health policy decision on whether or not

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264. *See id.* (noting that a NYC Health Department feasibility study found the program “could save up to 130 lives a year” (internal quotation marks omitted)); *see also* Jeremy Roebuck & Aubrey Whelan, *Justice Department Reevaluating Supervised Injection Sites After its Yearslong Effort to Block One in Philly*, PHILA. INQUIRER (Feb. 9, 2022), <https://www.inquirer.com/news/safe-injection-sites-safehouse-philadelphia-justice-department-20220209.html> [<https://perma.cc/G9SP-LN6Q>] (reporting that supervised injection sites in New York City have intervened in more than 125 overdoses in just over two months).

265. *See* *United States v. Safehouse*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, *Safehouse v. Dep't of Just.*, 142 S. Ct. 345 (Oct. 12, 2021).

266. *See id.*; *see also* Roebuck & Whelan, *supra* note 264 (reporting that the DOJ is “reevaluating” its opposition to supervised injection sites and noting that New York City's sites have “draw[n] none of the threats of prosecution and legal action from the U.S. Attorney's Office there that *Safehouse*'s plan had provoked in Philadelphia three years earlier”).

267. Aubrey Whelan, *A Powerful Sedative in Philly's Drug Supply Is Causing Severe Wounds and Agonizing Withdrawals. It's Quickly Becoming Unavoidable*, PHILA. INQUIRER (April 10, 2022) <https://www.inquirer.com/health/opioid-addiction/xylozine-tranq-withdrawal-philadelphia-fentanyl-addiction-detox-20220410.html> [<https://perma.cc/U9K9-VSKQ>] (describing the earlier shift from pure heroin to the more dangerous fentanyl and the new emergence and increasing prevalence of an animal tranquilizer—xylozine—that is taking hold in Philadelphia).

268. Aubrey Whelan, *Fentanyl Is Soaring in Pennsylvania's Drug Market in 2022, AG Report Finds*, PHILA. INQUIRER (May 24, 2022) <https://www.inquirer.com/health/opioid-addiction/fentanyl-drug-market-philadelphia-pennsylvania-testing-strips-20220524.html> [<https://perma.cc/C3CJ-QZS6>] (noting that investigators seized forty times as much fentanyl as they did heroin in the first three months of 2022).

269. *Id.*

270. Aubrey Whelan, *City Council Members Seek Emergency Declaration over Kensington's Opioid Crisis*, PHILA. INQUIRER (April 7, 2022) <https://www.inquirer.com/health/opioid-addiction/kensington-opioid-crisis-philadelphia-emergency-20220407.html> [<https://perma.cc/3NLE-7C4U>] (pointing out that, although the city saw some successful past attempts to reduce the drug crisis in the Kensington

to allow supervised injection sites as a harm-reduction tool in the midst of an opioid epidemic is best left to the elected branches of government, why would the Third Circuit make this policy decision for local governments by outlawing the practice? After all, that is effectively what the *Safehouse* majority has done. By choosing such a strained interpretation of § 856(a)(2), which essentially dispenses with the most important mens rea element written into the statute (“purpose”), the majority has substituted policy preferences of legislators with its own. Indeed, Congress could not have conceived of policies involving supervised injection sites when drafting § 856(a)(2), as such facilities were virtually unheard of at the time. As of the writing of this Note, local governments falling under the Third Circuit’s jurisdiction are unable to control this policy area at all.

Instead of exercising restraint in the interpretation of an ambiguous statute, instead of allowing the sort of local experimentation that makes our federal system stronger, and despite Congress not indicating any preference for a policy of preventing supervised injection sites as a possible tool in the arsenal of local governments facing unprecedented levels of overdose deaths, the majority shut the door on this option.

We are left with a decision that needlessly takes policy discretion away from local governments, based on a statutory interpretation that reads “like a George Orwell novel where identical words have different meanings, different words are superfluous, and two plus two equals five.”<sup>271</sup>

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neighborhood, “the chaos of the COVID-19 pandemic and the skyrocketing overdoses that followed have largely erased that progress. This week, the neighborhood’s streets and parks were as full as ever of people in crisis.”).

271. *Safehouse*, 985 F.3d at 251 (Roth, J., dissenting).