

**THE PRESCRIPTION FOR ERADICATING METH LABS:
A CALL FOR STATES TO ENACT STRICTER CHEMICAL
CONTROL OVER PRECURSORS**

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INTRODUCTION

Through the 1990s and into the turn of this century, methamphetamine abuse in the United States increased at a steady rate.¹ At the same time there were between 106.5 and 144.1 metric tons of uncut methamphetamine available in the United States.² This staggering statistic is a consequence of methamphetamine's sprawling infiltration into the Central and Midwestern States.³ Most methamphetamine laboratories in the United States are mobile, well-hidden, and extremely hazardous.⁴ Consequently, the production of methamphetamine threatens even those who operate under the illusion that they are far removed from the crisis.

In response to this national epidemic, the federal government established a new class of drugs.⁵ Classifying methamphetamine precursors as "scheduled listed chemical products," federal law now limits the quantity of precursors that may be sold to individuals and creates

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¹ NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, NATIONAL METHAMPHETAMINE THREAT ASSESSMENT 2008 1 (2007), *available at* <http://www.usdoj.gov/ndic/pubs26/26594/26594p.pdf> [hereinafter METH THREAT].

² DRUG AVAILABILITY STEERING COMM., DRUG AVAILABILITY ESTIMATES IN THE UNITED STATES 74 & n.31 (2002) (explaining that the term "uncut" is used to describe methamphetamine that is at least ninety-two percent pure).

³ DARYL S. INABA & WILLIAM E. COHEN, *UPPERS, DOWNERS, ALL AROUNDERS* 104-05 (5th ed. 2004).

⁴ MICHAEL S. SCOTT & KELLY DEDEL, U.S. DEP'T OF JUSTICE, *CLANDESTINE METHAMPHETAMINE LABS* 7-9 (2d ed. 2006), *available at* <http://www.cops.usdoj.gov/files/ric/Publications/e07063402.pdf>.

⁵ Samantha S. McKinley & Joseph L. Fink III, "*Speed Limits: States' Approaches to Regulating Access to Methamphetamine Chemical Precursors with Statutes and Regulations Limiting Pseudoephedrine Availability*," 82 N.D. L. REV. 1217, 1227 (2006).

storage and record keeping requirements for these items.⁶ The federal government's half-hearted attempt to regulate methamphetamine precursors has been met with limited success.⁷ However, history reveals that when it comes to solutions with built-in loopholes, any success enjoyed is likely to be short lived.⁸

This comment argues that as an alternative to establishing a new category of drugs, restricting the sale of methamphetamine precursors to prescription-only purchases would more effectively combat the illicit production of methamphetamine. Part I affords a background on the evolution of the methamphetamine problems that plague the nation today. Part II provides an overview of current laws aimed at preventing methamphetamine manufacturing and production. Part III examines how past legislative efforts aimed at fighting methamphetamine manufacturing and abuse have been circumvented by those involved with the illicit production of methamphetamine and how the same fate threatens current legislation. Finally, Part IV addresses state authority to enact laws to control dangerous drugs and balances chemical control of methamphetamine precursors against legitimate interests.

I. THE BIRTH OF AN EPIDEMIC

The stimulant effect of amphetamines was popularly recognized in 1930.⁹ This effect was exploited in World War II by Allied, German, and Japanese forces as soldiers were routinely supplied methamphetamine to keep them alert for longer periods of time.¹⁰ Shortly after the war, methamphetamine was commercially available as the active ingredient in Methedrine inhalers, and was also marketed as an over-the-counter appetite suppressant.¹¹ By 1959 wide spread abuse of these products resulted in the restriction of such sales.¹² Methamphetamine was classified as a Schedule

⁶ *Id.*

⁷ OFFICE OF NAT'L DRUG CONTROL POLICY, PUSHING BACK AGAINST METH: A PROGRESS REPORT ON THE FIGHT AGAINST METHAMPHETAMINE IN THE UNITED STATES 2 (2006), available at <http://www.nattc.org/resPubs/meth/FINALPushingBackAgainstMethReport.pdf> [hereinafter PUSHING BACK].

⁸ See FRANK OWEN, NO SPEED LIMITS: THE HIGHS AND LOWS OF METH 19 (2007).

⁹ INABA & COHEN, *supra* note 3, at 102.

¹⁰ *Id.* at 103.

¹¹ *Id.* at 102–03.

¹² *Id.* at 103.

II controlled substance under the Controlled Substances Act of 1970.¹³ Despite these efforts to restrict methamphetamine abuse, the illicit use of methamphetamine continued to gain momentum.¹⁴

A. *Effects of Methamphetamine Abuse*

The physical effects of small doses of methamphetamine include increased heart rate, raised body temperature, and appetite suppression.¹⁵ Those who abuse methamphetamine on a larger scale sometimes go on sleepless binges for up to ten days at a time.¹⁶ Long-term users risk severe adverse health effects including stroke and heart arrhythmias.¹⁷

Emotional effects associated with methamphetamine abuse include paranoia, hallucinations, and inflated confidence, all of which lead to aggressive behavior.¹⁸ In extreme cases users are plagued by drug-induced psychosis.¹⁹ Long-term abuse of methamphetamine significantly alters brain chemistry, which results in disruption of physical control and emotional pleasure.²⁰

B. *Methamphetamine Manufacturers*

Early illicit manufacturing of methamphetamine is attributed to West Coast biker gangs such as the Hell's Angels.²¹ Today, roughly three-quarters of illicit methamphetamine consumed in the United States is produced in super labs run by Mexican gangs and drug cartels.²² Super labs are capable of producing over ten pounds of methamphetamine in a single cycle.²³ The remaining quarter of illicit methamphetamine comes from small toxic labs, which constitute the vast majority of laboratories seized in the United States.²⁴

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 106.

¹⁶ *Id.*

¹⁷ *Id.* at 106–07.

¹⁸ *Id.* at 107.

¹⁹ *Id.*

²⁰ *Id.* at 106 (citation omitted).

²¹ OWEN, *supra* note 8, at 17.

²² INABA & COHEN, *supra* note 3, at 104–05; SCOTT & DEDEL, *supra* note 4, at 7, 9.

²³ SCOTT & DEDEL, *supra* note 4, at 6.

²⁴ *Id.* at 7.

The popularity of small toxic labs grew as methamphetamine producers discovered simple synthetic routes using readily obtainable ingredients.²⁵ Despite the limited capability of producing only one to four ounces of methamphetamine per production cycle,²⁶ the cumulative quantity of methamphetamine produced by small toxic labs is overwhelming. In 2004, 10,015 small toxic labs were seized.²⁷ These labs were capable of producing anywhere from 10,015 to 40,060 ounces of methamphetamine per production cycle, the equivalent of as many as two hundred fifty super labs.²⁸

C. *Methamphetamine Synthetic Routes*

Small toxic labs have caused methamphetamine abuse to be addressed in a different manner than the abuse of other controlled substances. Unlike other commonly abused drugs such as cocaine and heroin, methamphetamine can be easily manufactured with common household products by those with little to no formal chemical education.²⁹ Rather than originating outside of the United States, illicit methamphetamine can be inconspicuously manufactured next door.³⁰ This makes the task of combating methamphetamine abuse unique in that it must be fought on two fronts. Both the abuse and the manufacturing must be addressed individually for an effective response.

Despite Drug Enforcement Administration (DEA) estimates that there are roughly 300 different ways to manufacture methamphetamine,³¹ a large majority of laboratories seized are variations of just three manufacturing

²⁵ *Id.*

²⁶ *Id.* at 6.

²⁷ OWEN, *supra* note 8, at 23.

²⁸ SCOTT & DEDEL, *supra* note 4, at 6 (based on lab production estimate of one to four ounces produced per production cycle, and 10,015 labs total in 2004).

²⁹ Jean C. O'Connor et al., *Developing Lasting Legal Solutions to the Dual Epidemics of Methamphetamine Production and Use*, 82 N.D. L. REV. 1165, 1171 (2006); *see also* OWEN, *supra* note 8, at 20.

³⁰ *See* INABA & COHEN, *supra* note 3, at 104.

³¹ *Id.* at 104–05. The methods included in this paper are mere outlines intended to aid in demonstrating the hazards generated when even common household items are used in clandestine laboratories. Detailed descriptions of the methamphetamine manufacturing process are intentionally omitted.

methods.³² All methamphetamine manufacturing methods require the use of a precursor.³³ The term “precursor” is defined as “a substance—which the Attorney General has found to be and by regulation designated as being the principal compound used . . . in the manufacture of a controlled substance” and “which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance.”³⁴ The term is sometimes used broadly, but for the purposes of this paper the term “precursor” will be limited to describing those compounds necessary to manufacture methamphetamine irrespective of the synthetic route chosen. These compounds include phenyl-2-propanone (P2P), ephedrine, and pseudoephedrine.³⁵ Commercial availability in cold medications makes ephedrine and pseudoephedrine attractive to a vast majority of methamphetamine producers, or “cooks.”³⁶

Initially, illicit methamphetamine was manufactured by biker gangs who employed the P2P method.³⁷ In 1980, the DEA successfully managed to deter this manufacturing method by classifying P2P as a Schedule II controlled substance.³⁸ Consequently, the P2P method is only employed by roughly three percent of modern clandestine laboratories.³⁹

After the scheduling of P2P, the red phosphorus method replaced the P2P method as the most common type of methamphetamine laboratory seized in the United States.⁴⁰ Widespread popularity of the red phosphorus method can be attributed to its low maintenance character as well as the ease of obtaining necessary chemicals to complete the reaction.⁴¹ Rather than requiring the use of a Schedule II controlled substance as a precursor,

³² SCOTT & DEDEL, *supra* note 4, at 12.

³³ *Id.* at 10.

³⁴ 21 U.S.C. § 802(23)(A)–(B) (2006).

³⁵ Harry F. Skinner, *Methamphetamine Synthesis Via Hydriodic Acid/Red Phosphorous Reduction of Ephedrine*, 48 FORENSIC SCI. INT’L 123, 123 (1990).

³⁶ SCOTT & DEDEL, *supra* note 4, at 12.

³⁷ See INABA & COHEN, *supra* note 3, at 104.

³⁸ OWEN, *supra* note 8, at 135; *see also* 21 U.S.C. § 811(e) (2006) (which allows the Attorney General to “place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation”); 21 C.F.R. § 1308.12(g)(1) (2008).

³⁹ INABA & COHEN, *supra* note 3, at 104.

⁴⁰ See OWEN, *supra* note 8, at 136–37.

⁴¹ INABA & COHEN, *supra* note 3, at 105; *see also* SCOTT & DEDEL, *supra* note 4, at 11.

a synthesis using the red phosphorus method can be completed with the use of either ephedrine or pseudoephedrine.⁴² Other ingredients generally include iodine, red phosphorous, and a solvent.⁴³ Common sources of these ingredients include iodine tinctures, a book of matches for phosphorous and common sources of organic solvents include brake cleaner, camping fuel, paint thinner, and lighter fluid.⁴⁴

The Birch Reduction method⁴⁵ of manufacturing methamphetamine is another popular synthetic route of modern day methamphetamine cooks.⁴⁶ Like the red phosphorus method, either ephedrine or pseudoephedrine may be used as precursors.⁴⁷ This method also requires the use of lithium metal, an organic solvent and the ingredient that poses the greatest harm, anhydrous ammonia.⁴⁸ Lithium metal is often times obtained from batteries and the same solvent sources listed for the red phosphorus method.⁴⁹ In order to obtain anhydrous ammonia, it is typical for methamphetamine cooks to steal ammonia from large storage tanks on farms and then store it in emptied fire extinguishers.⁵⁰

D. Dangers Associated with Clandestine Methamphetamine Laboratories

Safety in a clandestine laboratory is rarely, if ever, a primary concern of those who operate it.⁵¹ Many risks emerge because each method requires the use of a flammable solvent as well as the application of heat at

⁴² SCOTT & DEDEL, *supra* note 4, at 12; *see also* Rob Bovett, *Methamphetamine Epidemic Solutions*, 82 N.D. L. REV. 1195, 1197 n.9 (2006) (using phenylpropanolamine as a precursor will result in the production of amphetamine as opposed to methamphetamine).

⁴³ SCOTT & DEDEL, *supra* note 4, at 10.

⁴⁴ *Id.* at 11; *see also* INABA & COHEN, *supra* note 3, at 105.

⁴⁵ The Birch Reduction method is also referred to as the Nazi method due to the questionable belief that it was the method used by Germany to manufacture methamphetamine during War World II. OWEN, *supra* note 8, at 15–16.

⁴⁶ Bovett, *supra* note 42, at 1197 n.8.

⁴⁷ *Id.* at 1196. Again, using phenylpropanolamine as a precursor will produce amphetamine. *Id.* at 1197 n.9.

⁴⁸ SCOTT & DEDEL, *supra* note 4, at 12.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 12; OWEN, *supra* note 8, at 25.

⁵¹ Terry A. Dal Cason, *The Characterization of Some 3,4-Methylenedioxyisopropylamine (MDA) Analogs*, 34 J. FORENSIC SCI. 928, 929 (1989).

some juncture in the synthesis.⁵² In addition, a number of other primary ingredients become perilous when handled by the untrained.⁵³ Harms generated by methamphetamine laboratories are generally classified according to three categories: “physical injury from explosions, fires, chemical burns, and toxic fumes;” child endangerment; and environmental hazards.⁵⁴

Physical injury associated with illicit methamphetamine laboratories is frequently caused by the misuse of anhydrous ammonia.⁵⁵ The low boiling point of ammonia makes it particularly susceptible to explosion if handled improperly.⁵⁶ When a compound boils, it expands, causing pressure inside a closed container to build.⁵⁷ Proper anhydrous ammonia storage tanks are equipped with release valves which prevent pressure from building inside the container.⁵⁸

Because anhydrous ammonia is commercially unavailable to the general public, it is typically stolen in order to manufacture methamphetamine.⁵⁹ Common containers used to store stolen ammonia are propane tanks used for gas grills and empty fire extinguishers.⁶⁰ Both lack the safety features present in approved ammonia containers.⁶¹ As a result, pressure continually builds inside the containers and eventually leads to failure of the container itself.⁶² The consequence is the subsequent violent release of ammonia.⁶³ Exposure to anhydrous ammonia can cause severe chemical burning of both the skin and respiratory system.⁶⁴

⁵² SCOTT & DEDEL, *supra* note 4, at 2–3.

⁵³ INABA & COHEN, *supra* note 3, at 104.

⁵⁴ SCOTT & DEDEL, *supra* note 4, at 2.

⁵⁵ OWEN, *supra* note 8, at 25–26; *see also* Ralph Weisheit, *Making Methamphetamine*, S. RURAL SOC., Vol. 23(2) 2008, at 78, 89–91.

⁵⁶ OWEN, *supra* note 8, at 25.

⁵⁷ Weisheit, *supra* note 55, at 90.

⁵⁸ OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROT. AGENCY, ANHYDROUS AMMONIA THEFT 3 (2000), *available at* <http://www.epa.gov/emergencies/docs/chem/csalert.pdf>.

⁵⁹ OWEN, *supra* note 8, at 26.

⁶⁰ *Id.* at 25.

⁶¹ Weisheit, *supra* note 55, at 90.

⁶² *Id.*

⁶³ *Id.* at 90–91.

⁶⁴ *Id.*

The flammable liquids used to manufacture methamphetamine produce hazardous gas and present explosion hazards.⁶⁵ The presence of flammable liquids and hazardous gases place laboratory operators, first responders, and anyone else in close proximity to a methamphetamine laboratory in danger.⁶⁶ In areas where methamphetamine laboratories are prevalent, hospitals report that many of burn victims were injured in a methamphetamine-related explosion or fire.

Methamphetamine laboratories can be accurately described as miniature toxic waste sites. This is clearly indicated by the dozens of first responders who are injured by fires, explosions, and chemicals encountered while investigating clandestine laboratories.⁶⁷ For example, in 2003 six volunteer fire fighters suffered severe burns while fighting a blaze caused by an illicit methamphetamine laboratory.⁶⁸ One of the volunteers was overcome by the chemicals which burned his lungs and chest.⁶⁹

One of the most harmful consequences of the effects of methamphetamine manufacturing is the victimization of children.⁷⁰ Such is the case when young children are found playing on the floor of a methamphetamine laboratory where toxic synthetic residue deposits.⁷¹ Infants and toddlers under the care of methamphetamine manufacturers are incapable of removing themselves from harmful laboratory conditions.⁷² Consequently, children found in small toxic labs are reported to have internal methamphetamine levels equal to or greater than that of adults who abuse the drug.⁷³

⁶⁵ INABA & COHEN, *supra* note 3, at 104.

⁶⁶ SCOTT & DEDEL, *supra* note 4, at 2.

⁶⁷ Weisheit, *supra* note 55, at 95.

⁶⁸ WASHINGTON/BALTIMORE HIDTA, METHAMPHETAMINE: A UNIQUE THREAT TO LAW ENFORCEMENT 13 (2004), available at http://www.hidta.org/programs/docs/040922_Meth_Report.pdf.

⁶⁹ *Id.*

⁷⁰ See Michael T. Flannery et al., *The Use of Hair Analysis to Test Children for Exposure to Methamphetamine*, 10 MICH. ST. U. J. MED. & L. 143, 177–78 (2006).

⁷¹ *Id.* at 178.

⁷² *Id.*

⁷³ John W. Martyny et al., *Chemical Concentrations and Contamination Associated with Clandestine Methamphetamine Laboratories*, J. CHEM. HEALTH & SAFETY, July–Aug. 2007, at 40, 51.

Children in and around these illicit laboratories are also subject to particularly atrocious harms brought about as a result of neglect.⁷⁴ Often, the children of parents who manufacture methamphetamine fall second in priority to their parents' addiction.⁷⁵ For example, upon seizing a small toxic lab in Sacramento, officers discovered a two-year-old girl with open wounds on her face.⁷⁶ It was later discovered that the toddler's wounds were the consequence of untreated cockroach bites.⁷⁷

Illicit methamphetamine laboratories present severe environmental hazards when toxic chemicals used to produce the drug are dumped into streams and sewage systems.⁷⁸ The task of cleaning laboratory remnants also frequently force law enforcement agencies to stretch already overextended budgets.⁷⁹ The financial burden on local law enforcement agencies for cleaning the obvious hazards that a methamphetamine operation leaves behind is \$2,500 to \$10,000 for a small toxic lab and as much as \$150,000 for a super lab.⁸⁰

While the severity of long-term effects of such improper disposal is not clear, the direct results are evident. Such is demonstrated through the cases of unsuspecting tenants of former methamphetamine laboratories. When local law enforcement agencies "cleanup" homes where methamphetamine laboratories were once maintained, that does not necessarily mean that the homes are then safe for residential occupancy.⁸¹ For the fortunate, achieving that state requires everything from scrubbing and sealing drywall to scouring septic tanks.⁸² In extreme cases, however, removing drywall and floors is insufficient and the structure must be demolished.⁸³ Of course, these steps will only be taken if subsequent occupants are aware of the structure's former use. In parts of the country, homes "can change

⁷⁴ See OWEN, *supra* note 8, at 197.

⁷⁵ *Id.* at 197–98.

⁷⁶ *Id.* at 198.

⁷⁷ *Id.*

⁷⁸ SCOTT & DEDEL, *supra* note 4, at 4.

⁷⁹ *Id.* at 15–16.

⁸⁰ *Id.* at 16.

⁸¹ See Sheila McLaughlin, *Meth House Nightmare*, CINCINNATI ENQUIRER, Dec. 2, 2007, at A1.

⁸² *Id.*

⁸³ *Id.*

hands repeatedly without anyone knowing about their potentially poisonous past.”⁸⁴

Those exposed to methamphetamine laboratories risk chemical burns to their skin and mucous membranes, seizures, kidney failure, gastrointestinal toxicity, and liver damage.⁸⁵ One case in Hamilton County, Ohio left a woman and her three children with coughing spasms and nosebleeds for four months after moving out of their home, which was a former methamphetamine laboratory.⁸⁶ The woman’s five-month-old child, who was not yet born while the family occupied the former laboratory, also exhibited signs of methamphetamine exposure.⁸⁷ Despite the fact that she disposed of clothes, toys and other personal items, her pediatrician informed her that her child’s symptoms were likely due to cross contamination.⁸⁸

II. INTERDICTION EFFORTS

Over the past several years, states have devised a unique manner by which to address the nation’s methamphetamine epidemic.⁸⁹ The solution has been to mandate sales restrictions for over-the-counter precursors.⁹⁰ Following the implementation of this new approach by several states, the federal government passed legislation that parallels the states’ approach and which serves as the default rule for states with less stringent laws than the federal legislation.⁹¹

A. *Oklahoma Takes a Stand*

The federal government credits Oklahoma’s law restricting the sale of methamphetamine precursors with the initiation of national trends in the reduction of methamphetamine laboratory incidents.⁹² Title 63 of Oklahoma Statute section 2-212 classifies pseudoephedrine as a Schedule V controlled substance. The statute limits the sale of pseudoephedrine to

⁸⁴ *Id.*

⁸⁵ Flannery et al., *supra* note 70, at 175–76.

⁸⁶ McLaughlin, *supra* note 81.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Bovett, *supra* note 42, at 1208.

⁹⁰ *Id.* at 1207–08.

⁹¹ See PUSHING BACK, *supra* note 7, at 2.

⁹² *Id.*

those transactions “under the supervision of, a licensed pharmacist or a registered pharmacy technician.”⁹³ Further, those engaged in such transactions must provide state-issued identification and sign a log book that has been approved by the Oklahoma Bureau of Narcotics and Dangerous Drugs Control.⁹⁴ The log must include the date of the transaction, the name of the purchaser, number of the state-issued identification and state from which it is issued, the name of the seller, identify the product sold, and the quantity of product sold.⁹⁵

By enacting its methamphetamine precursor restriction law, Oklahoma became the first state in the nation to limit the purchase of pseudoephedrine in over-the-counter cold remedies.⁹⁶ However, despite being classified as a Schedule V controlled substance, the Oklahoma statute does not require that consumers first obtain a prescription before purchasing pseudoephedrine.⁹⁷ In large part, so long as consumers purchase quantities within the specified transaction limits, no prescription is needed in order to obtain pseudoephedrine.⁹⁸

B. The Federal Government’s Response

The federal government’s response to the nation’s rising methamphetamine problem was to amend the Controlled Substances Act in a manner similar to Oklahoma’s statute.⁹⁹ The Combat Methamphetamine Epidemic Act of 2005 (CMEA)¹⁰⁰ took full effect on September 30, 2006.¹⁰¹ While initially introduced as an independent bill, the CMEA was ultimately enacted as Title VII of the USA PATRIOT Improvement and Reauthorization Act of 2006.¹⁰² The CMEA consists of five subtitles.¹⁰³ These subtitles are intended to restrict the sale of necessary ingredients to

⁹³ OKLA. STAT. ANN. tit. 63, § 2-212(A)(2)(a) (West Supp. 2009).

⁹⁴ *Id.* § 2-212(A)(2)(b).

⁹⁵ *Id.*

⁹⁶ PUSHING BACK, *supra* note 7, at 40.

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *Id.* at 2.

¹⁰⁰ Pub. L. No. 109-177, §§ 701–756, 120 Stat. 256 (2006) (codified as amended in scattered sections of 21, 22, 28, 42, and 49 U.S.C.).

¹⁰¹ PUSHING BACK, *supra* note 7, at 2.

¹⁰² Pub. L. No. 109-177, 120 Stat. 192 (2006); Bovett, *supra* note 42, at 1211.

¹⁰³ §§ 701–756, 120 Stat. at 256–77.

make methamphetamine, create a new DEA classification for methamphetamine precursors, enhance international enforcement against methamphetamine trafficking, grant assistance to regions most affected by methamphetamine, and enhance criminal penalties for methamphetamine production and trafficking.¹⁰⁴

Perhaps the CMEA's most substantial impact on federal drug laws is the creation of a new class of chemicals. Under the CMEA, products containing ephedrine, pseudoephedrine, or phenylpropanolamine are now categorized as "scheduled listed chemical product[s]."¹⁰⁵ As is the case in the drafting of all federal drug laws, the ultimate goal was to establish necessary regulations while maintaining the availability of such chemicals to legitimate consumers.¹⁰⁶

C. *Remaining States Follow Oklahoma's Lead*

In 2005, thirty-eight states responded to the national methamphetamine epidemic by passing their own legislation.¹⁰⁷ Despite substantial variations in each state's statute, most include the same five provisions.¹⁰⁸ These include: "regulation of precursor chemicals, punishment of users and manufacturers, facilitation of methamphetamine laboratory cleanup, protection of victimized children, and treatment for users."¹⁰⁹ Nationwide, states' methamphetamine precursor restrictions appear to have had a positive impact on the number of reported clandestine laboratory incidents.¹¹⁰ Some states have published laboratory incident reports that claim a reduction as high as seventy-five percent, while others report more marginal findings.¹¹¹ However, these legislative achievements resemble the success following similar federal attempts at chemical control.¹¹²

¹⁰⁴ *Id.*

¹⁰⁵ 21 U.S.C. § 802(45)(A)(i) (2006).

¹⁰⁶ DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, DRUGS OF ABUSE 1 (2005) [hereinafter DRUGS OF ABUSE].

¹⁰⁷ Note, *Cooking Up Solutions to a Cooked Up Menace: Responses to Methamphetamine in a Federal System*, 119 HARV. L. REV. 2508, 2513 (2006).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2513–14.

¹¹⁰ PUSHING BACK, *supra* note 7, at 2.

¹¹¹ *Id.*

¹¹² OWEN, *supra* note 8, at 126.

Subsequent to each of these triumphs was a resurgence in methamphetamine abuse and production.¹¹³

III. A HISTORY OF EXPLOITING LEGISLATIVE LOOPHOLES

This new approach to restricting methamphetamine precursor availability follows two decades of federal experimentation with drug laws aimed at minimizing methamphetamine abuse and manufacturing in the United States.¹¹⁴ For various reasons, these federal efforts met limited success and interests in illicit methamphetamine continued to grow.¹¹⁵ Current trends indicate that the various state laws leading to the CMEA restrictions on the sale of specified precursors are reaching their intended impact on the clandestine manufacturing of methamphetamine.¹¹⁶ However, those with an interest in such criminal enterprises are willing to exploit any weakness remaining in current legislation.¹¹⁷

A. Past Attempts to Reduce Methamphetamine Manufacturing and Abuse

In 1988 Congress passed the Anti-Drug Abuse Act which regulated the ephedrine and pseudoephedrine industries, but only with respect to raw forms of the precursors.¹¹⁸ This regulation had the unforeseen side effect of leading cooks to over-the-counter cold medications as new sources of precursors.¹¹⁹ The trend of using active ingredients in over-the-counter cold medications for manufacturing initiated the growth of methamphetamine manufacturing from a West Coast epidemic to a nationwide epidemic.¹²⁰

Almost simultaneously, a rising Mexican drug cartel, headed by brothers Jesus and Luis Amezcua, viewed this limitation on American imports as a business opportunity.¹²¹ Anticipating that the precursor

¹¹³ *Id.*

¹¹⁴ *Id.* at 126–27.

¹¹⁵ *Id.* at 127.

¹¹⁶ PUSHING BACK, *supra* note 7, at 2, 4.

¹¹⁷ *See infra* Part III.A. (demonstrating how previous federal legislative enactments were exploited by criminal enterprises).

¹¹⁸ O'Connor et al., *supra* note 29, at 1175.

¹¹⁹ *Cf. id.* at 1176.

¹²⁰ *The Meth Epidemic: Timeline*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/meth/etc/cron.html> (last visited Mar. 13, 2009) [hereinafter *Timeline*].

¹²¹ *See* OWEN, *supra* note 8, at 143–44.

import restrictions would reduce the quantity of methamphetamine produced in the United States, the Amezcua brothers sought to profit by providing methamphetamine for the unmet demand.¹²² Soon, the Amezcua Brothers began to manufacture illicit methamphetamine that was purer than any previously offered.¹²³ By the time the Amezcua brothers were arrested, estimates were that eighty percent of methamphetamine consumed in the United States was manufactured by the Amezcua brothers.¹²⁴

Next, Congress passed the Domestic Chemical Diversion and Control Act of 1993.¹²⁵ This legislation mandated that those who sell over-the-counter ephedrine tablets register with the DEA, maintain sales records, and report the activities of suspicious customers.¹²⁶ Conspicuously absent from the newly enacted legislation was a requirement to track pseudoephedrine tablet sales.¹²⁷ As the use of pseudoephedrine tablets increased, the use of flammable solvents needed to extract active ingredients from the tablet matrix did as well.¹²⁸ Small toxic labs became more explosive than ever.¹²⁹

In 1996, the federal government passed the Comprehensive Methamphetamine Control Act of 1996 (CMCA).¹³⁰ The CMCA regulated sales of pseudoephedrine that contained more than nine grams of the precursor.¹³¹ Exempt from these regulated sales were transactions involving pseudoephedrine sold in blister packs.¹³² Due to the CMCA's exception for the sale of blister packs, methamphetamine cooks quickly

¹²² *Timeline*, *supra* note 120.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Pub. L. No. 103-200, 107 Stat. 2333 (codified as amended in scattered sections of 21 U.S.C.).

¹²⁶ O'Connor et al., *supra* note 29, at 1176.

¹²⁷ See Bovett, *supra* note 42, at 1202.

¹²⁸ *Timeline*, *supra* note 120.

¹²⁹ *Id.*

¹³⁰ Pub. L. No. 104-237, 110 Stat. 3099 (codified as amended in scattered sections of 21, 28, and 42 U.S.C.).

¹³¹ O'Connor et al., *supra* note 29, at 1177 (citing 42 U.S.C. § 802(39)(B)(i) (2000)).

¹³² *Id.* (citing 42 U.S.C. § 802(39)(B)(i)).

resorted to purchasing pseudoephedrine sold in these unregulated packages.¹³³

Interestingly, “After each law passed, supply declined, prices spiked, and meth purity fell But within a year or two, meth indicators rose again, often surpassing their previous levels.”¹³⁴ All previous legislative attempts to decrease the number of methamphetamine laboratories were defeated by the adaptability and ingenuity of manufacturers.¹³⁵ As criminal enterprises begin responding to the CMEA, it is proving to be no different.

B. Loopholes within the CMEA

The CMEA is exploited by criminals who engage in the practice of “smurfing.”¹³⁶ Smurfing occurs when one purchases the maximum number of pseudoephedrine tablets permitted by statute at a single pharmacy.¹³⁷ Those engaged in the criminal enterprise then travel to another pharmacy where again the maximum number of tablets are purchased.¹³⁸ This routine is repeated until the quantity of tablets necessary to manufacture methamphetamine is purchased.¹³⁹ Smurfing can be successfully implemented by a single person or by a group of people.¹⁴⁰

Those who engage in smurfing can successfully obtain the amount of precursor required by their recipe in a short amount of time and with relative ease.¹⁴¹ That is exactly what Oregon State Senators Ginny Burdick and Roger Beyer, along with State Representatives Wayne Krieger and Greg Macpherson set out to prove in 2005.¹⁴² Their task was initiated to

¹³³ *Id.*

¹³⁴ OWEN, *supra* note 8, at 126.

¹³⁵ *Id.*

¹³⁶ The verb smurfing was appropriately derived from the once popular children’s cartoon, *The Smurfs*, who were themselves gatherers. Interview by Frontline with Robert Pennal, Head of Fresno, Ca. Meth Task Force (Aug. 8, 2005), *available at* <http://www.pbs.org/wgbh/pages/frontline/meth/interviews/pennal.html>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Bovett, *supra* note 42, at 1209 n. 94.

¹⁴¹ Jeff Mapes, *Lawmakers Score Pills to Cook Up Support for Prescription Bill*, OREGONIAN, July 20, 2005, at A1.

¹⁴² *Id.*

rally support for Oregon's House Bill 2485, which would make all pseudoephedrine-containing drugs available only by prescription.¹⁴³ At the time that House Bill 2485 was introduced, precursors were already classified as Schedule V controlled substances in Oregon.¹⁴⁴ Throughout the duration of their experiment, the legislators stayed within the permitted transaction limits at each pharmacy visited.¹⁴⁵ It took just one hour of smurfing in order for the four legislatures to purchase enough pseudoephedrine to yield \$900 worth of methamphetamine.¹⁴⁶

Schering-Plough, the manufacturer of Claritin, strongly opposed House Bill 2485.¹⁴⁷ It responded to the research conducted by the lawmaking quartet by asking "[i]s that surprising to anybody?"¹⁴⁸ The answer to that question was part of the problem. Nobody is surprised that four legislators who lacked any known criminal history were able to secure enough pseudoephedrine for a respectable batch of methamphetamine. The CMEA and related state statutes are vulnerable to an easily abused legislative loophole. As detailed above, illicit methamphetamine manufacturing has a long history of adapting to changes in legislation and coming back unscathed or in some cases stronger.¹⁴⁹ That same grim outlook threatens the success of the CMEA if adequate measures are not taken to stop clandestine manufacturers' continued access to precursors.

Where there is suspicion of criminal activity involving smurfing, gathering evidence through handwritten pharmacy logbooks is extremely time consuming.¹⁵⁰ In the event that an officer is afforded the time to investigate handwritten logbooks, that officer must examine "hundreds of pages of handwritten logs from thousands of retailers in an attempt to

¹⁴³ *Id.*; see also OR. ALLIANCE FOR DRUG ENDANGERED CHILDREN, OREGON METH LAB STATS: PRE AND POST PSEUDOEPHEDRINE CONTROL, <http://www.oregondec.org/OregonMethLabStats.pdf> (last visited Mar. 13, 2009) [hereinafter OREGON METH LAB STATS].

¹⁴⁴ Mapes, *supra* note 140; see also OREGON METH LAB STATS, *supra* note 143.

¹⁴⁵ Mapes, *supra* note 140.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ O'Connor et al., *supra* note 29, at 1175-77.

¹⁵⁰ E-mail interview with Scott Duff, Special Agent Supervisor, Ohio Bureau of Criminal Identification & Investigation Clandestine Drug/Marijuana Eradication Unit, in London, Ohio (Jan. 11, 2008) (on file with author).

identify individuals involved in the illegal purchase of [precursors]. This cost can be seen in the man hours not only dedicated to these investigations, but the man hours lost to other law enforcement activities.”¹⁵¹

One popular solution intended make investigations into the practice of smurfing more reasonable is the development of real time electronic point of purchase monitoring systems.¹⁵² The idea is to develop statewide programs whereby pharmacy log books are maintained on an electronic database.¹⁵³ The same database would be used by all pharmacies in the state and be capable of alerting pharmacists when a person has already purchased the statutory maximum at another pharmacy in the state.¹⁵⁴

The suggestion of a computerized tracking system for precursor sales is not a novel idea.¹⁵⁵ The idea was informally discussed in 1987 between the House Judiciary Committee’s Subcommittee on Crime and Gene Haislip, former Deputy Assistant Administrator in the DEA’s Office of Diversion Control.¹⁵⁶ The computerized tracking of precursor sales has never been implemented nationally, likely because by itself, it is an insufficient solution. These computerized networks would only prevent smurfing performed by individuals, and not those working in groups to purchase more than the statutory maximum. Furthermore, the potential that a person engaged in such practices will cross state lines in order to circumvent sales restrictions remains. Finally, establishing these statewide databases is time consuming and financially burdensome.¹⁵⁷

In the absence of a state law restricting precursor sales or where state restrictions are more lenient than those established under federal statute, provisions within the CMEA govern.¹⁵⁸ Therefore, individual states are

¹⁵¹ *Id.*

¹⁵² *Id.*; see also OREGON METH LAB STATS, *supra* note 143.

¹⁵³ Interview with Scott Duff, *supra* note 150.

¹⁵⁴ *Id.*

¹⁵⁵ Steve Suo, *Lobbyists and Loopholes*, OREGONIAN, Oct. 4, 2004, at A1.

¹⁵⁶ *Id.*

¹⁵⁷ See IOWA FISCAL SERVS. DIV., LEGISLATIVE SERVS. AGENCY, HF 852 – PSEUDOEPHEDRINE SALES AND TRACKING 3 (2007), available at http://www3.legis.state.ia.us/fiscalnotes/data/82_1286HVv0_FN.pdf (Some states estimate that the financial impact would consist of an initial investment between \$230,000 and \$288,000 and a continuing cost between \$30,000 and \$86,000.).

¹⁵⁸ PUSHING BACK, *supra* note 7, at 2.

reserved the authority to implement restrictions more stringent than those found in the CMEA.¹⁵⁹ The more desirable solution is to ensure that clandestine methamphetamine cooks do not have access to precursors by reclassifying all over-the-counter methamphetamine precursors as controlled substances that may only be purchased with a doctor's prescription.

C. The CMEA and Its Unanticipated Shortcomings

Aside from its inability to adequately address the issue of smurfing, the CMEA has created unexpected hurdles to the receipt of law enforcement intelligence.¹⁶⁰ Prior to the classification of methamphetamine precursors as scheduled listed chemical products, large purchases of methamphetamine precursors alerted store employees as to the improper motive of their consumers.¹⁶¹ Frequently, these employees would then report the suspicious sale to law enforcement.¹⁶² Under the transaction limits established by the CMEA and most current state laws, it is much more difficult for those selling precursors to recognize when the subject matter of these transactions might be diverted for illegal purposes.¹⁶³ If a person engaged in the practice of smurfing is skilled, a pharmacist will never know that a particular transaction ought to be reported to law enforcement.¹⁶⁴

The unfortunate result is that reported successes for the CMEA and related state laws are called into question. This is especially concerning in a climate of fiscal responsibility where the distribution of limited law enforcement resources is reevaluated if a problem is perceived as no longer existing.¹⁶⁵ It is feasible that the fewer law enforcement resources directed toward the interdiction of clandestine laboratories, coupled with a decline in the receipt of intelligence, could result in artificially low reports of laboratory incidents.¹⁶⁶ As one well-respected law enforcement official

¹⁵⁹ *Id.*

¹⁶⁰ Interview with Scott Duff, *supra* note 150.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

stated, “one of the biggest obstacles to eradicating these highly volatile small toxic domestic clandestine laboratories is the belief that the CMEA has solved the problem.”¹⁶⁷

Certainly the CMEA and related state laws make it more difficult for those engaging in criminal methamphetamine manufacturing to fulfill their tasks.¹⁶⁸ However, current legislation is also likely to have made the detection of illicit laboratories less convenient for law enforcement.¹⁶⁹ Lending credence to this theory are the events that occurred subsequent to the news media coverage of nine-year-old Isaiah Polk’s story.¹⁷⁰

Isaiah and two of his friends were playing in the woods behind their homes when the three came across a black duffel bag.¹⁷¹ Inside they found a two-liter bottle containing a milky liquid.¹⁷² After briefly investigating the contents of the bag, the bottle exploded.¹⁷³ Isaiah suffered burns to his face and doctors had to wait on Isaiah’s body to heal before deciding on whether to perform a corneal transplant on one of Isaiah’s eyes.¹⁷⁴

The young boys had encountered remnants of a clandestine methamphetamine laboratory.¹⁷⁵ Significantly, after media coverage of Isaiah’s story, local law enforcement authorities were flooded with reports of other laboratory remnants and even a large number of active laboratories.¹⁷⁶

Isaiah’s tragic story was enough to compel the reports of informants who had long refused to cooperate with authorities.¹⁷⁷ While Isaiah’s injuries led law enforcement to be put on notice as to existence of a significant number of clandestine methamphetamine laboratories, these events serve as a reminder to law enforcement. Effective eradication of methamphetamine laboratories requires cooperation throughout

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Dan Barry, *Caught Up in a Storm, with His Eyes Wide Open*, N.Y. TIMES, Dec. 2, 2007, § 1, at 31.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

communities and across disciplines, forms of intelligence that have been hindered since implementing the CMEA. Notwithstanding regulations implemented by the CMEA, authorities became aware of these illicit laboratories by emotionally-driven informants, rather than from signatures documented in a pharmacy log.

IV. SCHEDULING PRECURSORS AS A SOLUTION TO THE NATION'S METHAMPHETAMINE EPIDEMIC

In an effort to balance the illegal abuse of drugs with their legitimate use, federal and many state drug laws classify drugs according to five schedules.¹⁷⁸ A drug is placed into a schedule based upon its potential for abuse, accepted medicinal uses, and safety or dependence liability.¹⁷⁹ Those drugs with high potential for abuse and no accepted medicinal use are classified as Schedule I controlled substances.¹⁸⁰ Drugs classified as a Schedule I controlled substance include heroin and lysergic acid diethylamide (LSD).¹⁸¹ Those drugs with accepted medicinal use and relatively low potential for abuse are recognized as Schedule V controlled substances.¹⁸² Common examples of Schedule V controlled substances are cough medicines containing codeine.¹⁸³

The federal government has the authority to restrict the availability of methamphetamine precursors to those consumers with a valid prescription.¹⁸⁴ Unfortunately, the current version of the CMEA merely classifies these precursors as schedule listed chemical products.¹⁸⁵ The next best solution is for states to uniformly categorize methamphetamine precursors as a prescription-only class of chemicals.

¹⁷⁸ 21 U.S.C. § 812(a) (2006).

¹⁷⁹ *Id.* § 811(c).

¹⁸⁰ *Id.* § 812(b)(1)(A)–(B).

¹⁸¹ DRUGS OF ABUSE, *supra* note 106, at 3.

¹⁸² *Id.* at 4.

¹⁸³ *Id.*

¹⁸⁴ 21 U.S.C. § 811(e) (“The Attorney General may . . . place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation.”).

¹⁸⁵ *Id.* § 802(45)(A)(i).

A. State Authority to Independently Schedule Precursors

The police power afforded to individual sovereignties permits states to enact legislation as a method of compensating for insufficiencies in federal law.¹⁸⁶ The authority of a state to protect the health, safety, and welfare of its citizens by restricting the use of drugs was addressed by the Supreme Court in *Whipple v. Martinson*.¹⁸⁷ In *Whipple*, the Court was tasked first with determining whether a Minnesota prescription drug restriction regulated lawful business in violation of the Fourteenth Amendment.¹⁸⁸ Second, the Court decided whether Minnesota exceeded its scope of authority by enacting legislation that conflicted with a federal statute.¹⁸⁹

With respect to the first issue, the Court unequivocally stated:

There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.¹⁹⁰

As for a potential conflict between the restriction and federal legislation, the court held that so long as state law did not interfere with the enforcement of the federal act, it would be permitted.¹⁹¹

In a more recent decision, the Court held that “State legislation which has some effect on individual liberty . . . may not be held unconstitutional” because “individual States have broad latitude in experimenting with possible solutions of vital local concern.”¹⁹² In *Whalen v. Roe*, the

¹⁸⁶ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

¹⁸⁷ 256 U.S. 41, 45 (1921).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 45–46.

¹⁹² *Whalen v. Roe*, 429 U.S. 589, 597 (1977).

constitutionality of a New York Public Health Law was examined.¹⁹³ The law required that the State maintain for five years a record of the prescribing physician, the dispensing pharmacy, the name, address and age of the patient as well as the drug and dosage for all Schedule II prescriptions.¹⁹⁴ Opponents to the law challenged it claiming that it would cause patients who are prescribed Schedule II controlled substances to be stigmatized, which may in some cases deter patients from having legitimate prescriptions filled.¹⁹⁵ The lower court held that the law unconstitutionally impeded on one of the constitutionally protected zones of privacy.¹⁹⁶ The Supreme Court overruled the lower court's decision, finding that the civil liberties on which the law may infringe must give way to the benefit of the State's legitimate interest.¹⁹⁷

The misuse of methamphetamine precursors presents significant dangers to those who run clandestine methamphetamine laboratories as well as the public at large.¹⁹⁸ Moreover, the misuse creating these dangers is not minor.¹⁹⁹ In areas of the country where methamphetamine abuse is historically prevalent, as much as seventy percent of pseudoephedrine sales have been diverted for illicit purposes.²⁰⁰ Methamphetamine precursors are precisely the types of dangerous drugs implicating the legitimate state interest defined in *Whipple* and in *Whalen*. Furthermore, the primary purpose of implementing legislation that would make precursors available only by prescription is to eradicate clandestine methamphetamine laboratories.²⁰¹ Thus, restricting the purchase of methamphetamine precursors to those consumers with a valid prescription is rationally related to ensuring the health and welfare of State citizens.

¹⁹³ *Id.* at 591.

¹⁹⁴ *Id.* at 593.

¹⁹⁵ *Id.* at 595 (footnote omitted).

¹⁹⁶ *Id.* at 596.

¹⁹⁷ *Id.* at 598, 603–04.

¹⁹⁸ See *supra* Part I.D. (discussing the harms associated with clandestine methamphetamine production).

¹⁹⁹ Interview by Frontline with Rob Bovett, Legal Counsel to Or. Narcotics Enforcement Agency (July 22, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/meth/interviews/bovett.html>.

²⁰⁰ *Id.* “The pharmaceutical companies are getting paid for those products whether they’re being diverted or not. It doesn’t matter. They’re still making money.” *Id.*

²⁰¹ Interview with Scott Duff, *supra* note 150.

Consistent with the holdings of *Whipple* and *Whalen*, the Controlled Substances Act expressly reserves states the power to experiment with drug laws by stating:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.²⁰²

Conspicuously absent from the CMEA is a preemption clause prohibiting states from effectuating stronger and more effective controls.²⁰³ Therefore, the states are cloaked with the authority to enact stricter purchasing requirements for methamphetamine precursors than those established by the CMEA.

Despite the fact that the Court will afford great latitude to states in matters concerning sovereign legislation,²⁰⁴ states have failed to aggressively exercise this liberty with respect to methamphetamine precursors. As of this writing, eleven states have amended their drug laws to schedule over-the-counter methamphetamine precursors.²⁰⁵ Only one of those states, Oregon, requires a prescription for all methamphetamine precursor purchases, including those in liquid, gel, or gel capsule form.²⁰⁶

²⁰² 21 U.S.C. § 903 (2006).

²⁰³ Bovett, *supra* note 42, at 1211 n.105.

²⁰⁴ *Whalen v. Roe*, 429 U.S. 589, 597 (1977).

²⁰⁵ ARK. CODE ANN. § 5-64-212(a) (2005); 720 ILL. COMP. STAT. ANN. 570/212(d-5) (West Supp. 2008); IOWA CODE ANN. § 124.212(4) (West Supp. 2008); KAN. STAT. ANN. § 65-4113(e)-(f) (2008); MINN. STAT. ANN. § 152.02(6) (West Supp. 2009); MO. ANN. STAT. § 195.017(10)(3) (West Supp. 2009); N.M. STAT. ANN. § 30-31-10(A)(2) (LexisNexis Supp. 2008); OKLA. STAT. ANN. tit. 63, § 2-212(A)(2) (West Supp. 2009); OR. REV. STAT. § 475.973 (2007); W. VA. CODE ANN. § 60A-2-212(e) (LexisNexis Supp. 2008); WIS. STAT. ANN. § 961.22(2m) (West 2007).

²⁰⁶ OR. REV. STAT. § 475.973(1)(a) (2007); PUSHING BACK, *supra* note 7, at 41. Under many state laws, classification as a Schedule V controlled substance does not necessarily restrict the distribution of that substance to those with a valid pharmaceutical prescription.

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The remaining states either enacted statutes closely resembling the CMEA or failed to establish precursor sales restrictions in their state.²⁰⁷ Subsequent to classifying all pseudoephedrine products as schedule III controlled substances, Oregon enjoyed an eighty-seven percent reduction in methamphetamine laboratory incidents.²⁰⁸ Meanwhile most other states find themselves struggling to adequately enforce newly enacted methamphetamine precursor sales restrictions as small toxic labs continue to be uncovered.²⁰⁹

B. Evaluating Scheduling Criteria for Methamphetamine Precursors

While each state is at liberty to develop its own criteria to determine whether it is appropriate to schedule a particular substance, most states rely heavily on the evaluation of eight factors included in the federal Controlled Substances Act.²¹⁰ These factors are intended to determine whether there

See, e.g., ARK. CODE ANN. § 5-64-212(b)(3)(A) (2005); IOWA CODE ANN. § 124.212(4)(c) (West 2008); OKLA. STAT. ANN. tit. 63 § 2-212(A)(2) (West Supp. 2009).

²⁰⁷ ALA. CODE § 20-2-190(c) (LexisNexis 2006); ALASKA STAT. § 11.71.210(a) (2008); ARIZ. REV. STAT. ANN. §§ 13-3404 to -3404.01 (2001); CAL. HEALTH & SAFETY CODE §§ 11383.5, .7 (West 2007); COLO. REV. STAT. § 18-18-412.8 (2008); DEL. CODE ANN. tit. 16 § 4740 (2007); FLA. STAT. ANN. § 893.149 (West 2000); GA. CODE ANN. §§ 16-13-30.3-4 (2007); HAW. REV. STAT. § 329-75 (2008); IDAHO CODE ANN. § 37-3302 (2002); IND. CODE ANN. § 35-48-4-14.7 (West Supp. 2008); KY. REV. STAT. ANN. § 218A.1446 (West Supp. 2008); LA. REV. STAT. ANN. § 40:962.1.2 (Supp. 2009); ME. REV. STAT. ANN. tit. 32 §§ 13795-13796 (Supp. 2008); MICH. COMP. LAWS ANN. §§ 333.17766e-.17766f (West 2008); MISS. CODE ANN. § 41-29-315 (2005); MONT. CODE ANN. §§ 50-32-501 to -502 (2007); NEB. REV. STAT. § 28-456 (Supp. 2007); N.J. STAT. ANN. § 2C:35-25 (West Supp. 2008); N.Y. PENAL LAW § 220.72 (McKinney 2008); N.C. GEN. STAT. §§ 90-113.52-.53 (2007); N.D. CENT. CODE § 19-03.4-08 (2004); OHIO REV. CODE ANN. §§ 2925.55-.56 (LexisNexis 2008); S.C. CODE ANN. § 44-53-398 (Supp. 2008); S.D. CODIFIED LAWS §§ 34-20D-1 to -20D-2 (Supp. 2008); TENN. CODE ANN. § 39-17-431 (2006); TEX. HEALTH & SAFETY CODE ANN. §§ 486.013-.014 (Vernon Supp. 2008); UTAH CODE ANN. § 58-37c-20.5 (2007); VT. STAT. ANN. tit. 18 § 4234b (Supp. 2008); VA. CODE ANN. § 18.2-248.8 (Supp. 2008); WASH. REV. CODE ANN. § 69.43.105 (West 2007); WYO. STAT. ANN. § 35-7-1059 (2007).

²⁰⁸ PUSHING BACK, *supra* note 7, at 41.

²⁰⁹ *See generally id.* (summarizing methamphetamine laboratory incidents from 2000 to 2006 by state).

²¹⁰ *See, e.g.*, ALA. CODE § 20-2-20(a) (LexisNexis 2006); FLA. STAT. ANN. § 893.035(4) (West 2000); 720 ILL. COMP. STAT. ANN. 570/201(a) (West 2003); MO.

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exists substantial “evidence of potential for abuse such as to warrant control.”²¹¹ The eight factors are as follows:

- (1) [A substance’s] actual or relative potential for abuse.
- (2) Scientific evidence of its pharmacological effect, if known.
- (3) The state of current scientific knowledge regarding the drug or other substance.
- (4) Its history and current pattern of abuse.
- (5) The scope, duration, and significance of abuse.
- (6) What, if any, risk there is to the public health.
- (7) Its psychic or physiological dependence liability.
- (8) Whether the substance is an immediate precursor of a substance already controlled under [the Controlled Substances Act].²¹²

Pseudoephedrine and ephedrine are both “immediate precursors” of methamphetamine, a substance already controlled.²¹³ Under federal drug laws, a controlled substance is “a drug or other substance, or *immediate precursor*, included in schedule I, II, III, IV, or V.”²¹⁴ To qualify as an “immediate precursor,” the control of that substance must be “necessary to prevent, curtail, or limit the manufacture of [a] controlled substance.”²¹⁵ Satisfaction of this factor alone is a sufficient showing that a substance can be properly scheduled.²¹⁶

From a chemical perspective, the effective control of ephedrine and pseudoephedrine is necessary to curtail the illicit manufacturing of methamphetamine.²¹⁷ The objective of a modern clandestine methamphetamine synthesis is to remove an oxygen atom from either ephedrine or pseudoephedrine in a process referred to as a chemical reduction.²¹⁸ Methamphetamine is the product of that reaction.²¹⁹ The

ANN. STAT. § 195.015(1) (West 2004); OKLA. STAT. ANN. tit. 63, § 2-201(D) (West Supp. 2009) (providing nearly identical criteria used to evaluate whether a substance should be scheduled as that provided under the Controlled Substances Act).

²¹¹ 21 U.S.C. § 811(b) (2006).

²¹² *Id.* § 811(c).

²¹³ *Id.* § 812(c)(Schedule I)(a)(3).

²¹⁴ *Id.* § 802(6) (emphasis added).

²¹⁵ *Id.* § 802(23)(C).

²¹⁶ DRUGS OF ABUSE, *supra* note 106, at 3.

²¹⁷ Skinner, *supra* note 35, at 123.

²¹⁸ *Id.* at 123, 125.

only function performed by additional ingredients is aiding in the reduction of the methamphetamine precursor.²²⁰ It is the chemical structure of the precursor, not that of the various other ingredients, that is essential to the production of methamphetamine.²²¹ Thus, the unavailability of both ephedrine and pseudoephedrine will significantly limit the ability of cooks to produce illicit methamphetamine.

Furthermore, the control of methamphetamine precursors is necessary to prevent clandestine manufacturing from a practical standpoint. This is demonstrated by the federal legislative history of methamphetamine precursor restrictions.²²² From California to Washington D.C., prior chemical control attempts have had the same deterrent effect on the clandestine methamphetamine production.²²³ Fault with prior legislation is not in its inability to effect clandestine laboratories, but rather in its reluctance to properly weigh the benefits of precursor control against legitimate use in favor of stricter chemical control.

For Oregon State Representative, Wayne Krieger, the most compelling reason to pass House Bill 2485 was his conclusion that giving children “an opportunity for a meth-free future,” far outweighed assuring that “people can be treated for their sniffles.”²²⁴ The DEA reports a reduction in the number of children harmed by clandestine methamphetamine abuse as a positive “side effect” of the CMEA.²²⁵ It boasts that as of August 28, 2007, the number of children exposed to hazardous methamphetamine laboratories for the calendar year was only 319.²²⁶ Granted that statistic is down significantly from the 3,663 children harmed in 2003, the year prior

²¹⁹ *Id.* at 123.

²²⁰ *Id.* at 125.

²²¹ *Id.*

²²² PUSHING BACK, *supra* note 7, at 2; Interview by Frontline with Steve Suo, Reporter, Oregonian (July 7, 8 & 11, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/meth/interviews/suo.html>.

²²³ Interview with Steve Suo, *supra* note 222.

²²⁴ Jeff Mapes, *House Votes to Restrict Meth Ingredient*, OREGONIAN, July 21, 2005, at A1.

²²⁵ *Breaking the Methamphetamine Supply Chain: Law Enforcement Challenges, Before the S. Comm. on Finance*, 109th Cong. (2006) (statement of Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration).

²²⁶ *Id.*

to the establishment of precursor restrictions.²²⁷ However, 319 children harmed by the production of methamphetamine over eight months is still more than one child per day.

Given that Oregon's legislation has led to consistent monthly reports of no more than four laboratory incidents,²²⁸ scheduling precursors appears to be a more effective method of reducing the secondary harms caused to children by laboratories. Oregon was once a state plagued by clandestine methamphetamine laboratories to a greater degree than most other states.²²⁹ Each month that Oregon reports no laboratory incidents also means that there have been no reports of people harmed by the hazards they present. Simply put, if illicit methamphetamine laboratories do not exist, then people cannot be harmed by them.

Although they do so in the face of well-settled principles, those opposed to states scheduling methamphetamine precursors challenge limiting sales to consumers with prescriptions as an unacceptable barrier to the legitimate consumer base.²³⁰ More specifically, opponents claim that restricting the sale of methamphetamine precursors will require more visits to doctors, raise healthcare costs, and prevent consumers from being able to visit their grocer and obtain trusted cold remedies.²³¹

In addition to the inconvenience of having to obtain a prescription for methamphetamine precursors, the fear generated by such arguments is that a prescription-only restriction will inhibit those without prescription coverage or health insurance from obtaining treatment.²³² These arguments tend to lead to the belief that pseudoephedrine is the only available and trusted over-the-counter remedy for the relief of cold symptoms. To the contrary, dextromethorphan, phenylephrine, loratadine, oxymethazoline, clemastine, chlorpheniramine, and guaifenesin are all active ingredients in

²²⁷ *Id.*

²²⁸ OREGON METH LAB STATS, *supra* note 143.

²²⁹ See PUSHING BACK, *supra* note 7 (summarizing methamphetamine laboratory incidents from 2000 to 2006 by state).

²³⁰ See *Comprehensively Combating Methamphetamines: Impacts on Health and the Environment, Before the H. Comm. on Energy & Commerce*, 109th Cong. (2005) (statement of Gordon Knapp, President, North American Region, Pfizer Consumer Healthcare North America).

²³¹ *Id.*

²³² SCOTT & DEDEL, *supra* note 4, at 27.

a long list of over-the-counter cold medications that do not contain pseudoephedrine.²³³

Some manufacturers have chosen to maintain the convenience of safe and effective over-the-counter cold remedies by replacing pseudoephedrine with phenylephrine in their over-the-counter cold remedy formulas.²³⁴ One such pharmaceutical manufacturer is Pfizer.²³⁵ Shortly after introducing Sudafed PE with phenylephrine as its active ingredient, Pfizer reported high levels of consumer satisfaction with its new product.²³⁶

C. Chemical Control and Its History of Effectively Reducing Clandestine Laboratories

The nation's most successful experiment with restricting the ingredients necessary to compound widely abused drugs occurred in the early 1980s.²³⁷ At that time, the DEA reported that Quaalude abuse was as wide spread as the abuse of cocaine and heroin.²³⁸ Quaaludes, commonly referred to as "ludes," were prescribed as a sedative-hypnotic until the DEA classified the active ingredient, methaqualone, as a Schedule I controlled substance.²³⁹ After taking Quaaludes off of the market, the illicit manufacturing of Quaaludes increased dramatically.²⁴⁰ In response to the widespread manufacturing of Quaaludes, Gene Haislip presented evidence of illicit Quaalude production and its adverse effects to the world's suppliers of the pharmaceutical's active ingredient.²⁴¹ In light of that evidence, the manufacturers agreed to halt sales to the sources of illicitly manufactured Quaaludes.²⁴² The effect of this tactic is clear.

²³³ *Weekend Edition Saturday: Oregon Meth Law Requires Prescription for Cold Meds* (NPR radio broadcast July 1, 2006), available at <http://www.npr.org/templates/player/mediaPlayer.html?action=1&t=1&islist=false&id=5527039&m=5527040>.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Interview by Frontline with Gene Haislip, former Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (Sept. 20, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/meth/interviews/haislip.html>.

²³⁸ *Id.*

²³⁹ INABA & COHEN, *supra* note 3, at 170.

²⁴⁰ *Id.*

²⁴¹ Interview with Gene Haislip, *supra* note 237.

²⁴² *Id.*

Today, “[a] lot of people have forgotten about the Quaalude problem, but it was a very big problem. One time it was as big as the heroin or cocaine problem, and people wonder why it’s gone away. Well, it’s gone away because we beat [the illicit manufacturers]. . . . They never recouped.”²⁴³

The DEA experienced similar success with respect to methamphetamine synthesized using the P2P method. In 1980, the Controlled Substances Act was amended to include P2P as a Schedule II controlled substance.²⁴⁴ As previously stated, P2P was the most commonly used precursor prior to its scheduling.²⁴⁵ Consequently, while methods using pseudoephedrine and ephedrine were reaching new heights, only three percent of the laboratories seized in the entire nation were using the P2P method.²⁴⁶

Analogous victories have also been enjoyed by states that have taken the bold step of scheduling precursors. The year after Oklahoma implemented its own restrictions on precursors, its reported methamphetamine laboratory incidents dropped to only 129.²⁴⁷ Oregon touts even greater success after implementing its current legislation.²⁴⁸ One year after Oregon restricted precursor sales to patients with valid prescriptions, its reported laboratory incidents fell from sixty-three to eighteen.²⁴⁹ Four months of 2007 saw no reports of methamphetamine laboratory incidents at all.²⁵⁰ Even more promising is the fact that of the eighteen reported incidents in Oregon, most of those have been dump sites or laboratory remnants as opposed to active laboratories.²⁵¹ From this it can be deduced that Oregon’s legislation has effectively dried up the precursor supply for these laboratories, which leaves cooks no other option but to abandon their operation.

²⁴³ *Id.*

²⁴⁴ *United States v. Katz*, 509 F. Supp. 998, 999 n.1 (E.D.N.Y. 1981).

²⁴⁵ INABA & COHEN, *supra* note 3, at 104.

²⁴⁶ *Id.* A similar approach was attempted with respect to pseudoephedrine and ephedrine, however, the legislation was intercepted by the lobbying efforts of legitimate industry. Interview with Gene Haislip, *supra* note 237.

²⁴⁷ PUSHING BACK, *supra* note 7, at 40.

²⁴⁸ See OREGON METH LAB STATS, *supra* note 143.

²⁴⁹ *Id.* 473 clandestine methamphetamine laboratories were discovered in 2003, the last full year prior to Oregon enacting its most lenient precursor restrictions. *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

Since implementation of the CMEA, the purity of illicit methamphetamine has fallen considerably while the price has drastically increased.²⁵² It is suggested that these trends will lead to a resurgence of small toxic labs in states that have failed to restrict precursor sales to those consumers with a physician's prescription.²⁵³ However, Oregon's recent successes make clear that this is not the case where precursors are classified as prescription only medications. Methamphetamine laboratory incident reports in Oregon indicate that precursors found in active laboratories were either obtained prior to current legislation or were obtained through interstate smurfing.²⁵⁴ Except for the few cases of interstate smurfing, by classifying pseudoephedrine as a prescription only medication, Oregon has made it impractical for methamphetamine cooks to obtain their precursors. While the rest of the nation faces the potential of a small toxic lab resurgence, Oregon remains immune to a large scale resurgence.²⁵⁵

Unfortunately, the rest of the country is not so immune. In the short time since the CMEA was implemented, criminal organizations with the intent to bypass methamphetamine precursor sales restrictions have already formed in various regions of the country.²⁵⁶ The greatest areas of concern are the southeast and west central regions of the United States.²⁵⁷ Specific examples are the local networks forming in Denver with the motivation to compete with the city's dominant Mexican methamphetamine business.²⁵⁸ To do so, the groups join together twelve to twenty people who collect the necessary chemicals for methamphetamine production.²⁵⁹ As a result, these self-sustaining groups are able to obtain enough precursors to

²⁵² *Hearing on H.B. 2782 Before the H. Judiciary Comm.*, 2007 Leg., 74th Sess. (Or. 2007) (statement of Rob Bovett, Legal Counsel, Oregon Narcotics Enforcement Association), available at <http://www.oregondec.org/legislation/HB2782-ONEA-testimony.pdf>.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See Bovett, *supra* note 42, at 1213–14.

²⁵⁶ METH THREAT, *supra* note 1, at 28, 32.

²⁵⁷ *Id.* These regions include Alabama, Arkansas, Colorado, Georgia, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Utah, and Wyoming. *Id.* at 13.

²⁵⁸ *Id.* at 32.

²⁵⁹ *Id.*

produce only locally manufactured methamphetamine, with no need to rely upon imported Mexican supplies.²⁶⁰

Mere interruptions in precursor availability will be exploited by those with an interest in the clandestine manufacturing of methamphetamine. Law enforcement is familiar enough with how current loopholes are exploited that the method has received a nickname. Too much is understood about the flaws in current enforcement practices for state law makers to refrain from enacting effective legislation any longer.

D. The Effect of Scheduling Precursors on Methamphetamine Abuse

Admittedly, complete eradication of clandestine methamphetamine laboratories in the United States is not likely to eliminate the nation's methamphetamine abuse problem. This is partially due to the substantial quantity of illicit methamphetamine that is imported from Mexican super labs.²⁶¹ Not surprisingly, since laws restricting domestic sales of precursors have been implemented, the quantity of methamphetamine exported from Mexico into the United States has risen.²⁶² As illustrated above, evidence of methamphetamine produced by Mexican drug cartels has already been seen well within the Midwest.²⁶³ Effectively reducing methamphetamine abuse requires international measures not addressed in this comment. However, domestic chemical controls on precursors are designed to reduce the number of small toxic labs and the harms associated with them, not necessarily to reduce methamphetamine abuse.

That is not to say that restricting methamphetamine precursor availability has had no influence on methamphetamine abuse. Small toxic labs still produce thirty-five percent of the methamphetamine consumed in the United State each year.²⁶⁴ Because methamphetamine cooks were estimated to teach an average of four addicts a year to cook methamphetamine, this number was anticipated to grow exponentially.²⁶⁵

²⁶⁰ *Id.*

²⁶¹ See WASHINGTON/BALTIMORE HIDTA, *supra* note 68, at 16–17.

²⁶² *Id.*

²⁶³ Interview with Scott Duff, *supra* note 150.

²⁶⁴ OR. METH WATCH PROGRAM, ANSWERS TO ARGUMENTS RAISED ON PSEUDOEPHEDRINE CONTROL, <http://www.oregonmethwatch.org/pseudocontrolanswers.pdf> (last visited Apr. 3, 2009).

²⁶⁵ *Id.*

By classifying precursors as prescription only medications and better controlling the distribution of such chemicals, addicts will be prevented from learning to manufacture methamphetamine and feed that dependence.

The battle to diminish the number of illicit methamphetamine laboratories is not wrong to focus energies on domestic chemical controls. Imagine for a moment that rather than focusing interdiction efforts on local clandestine methamphetamine manufacturing, the government chose to focus on sharply decreasing illicit methamphetamine imports. The growth of small toxic labs was already expected to rise exponentially.²⁶⁶ Diminishing foreign supplies before establishing firm controls over local illicit manufacturing would have left addicts desperate and with ample opportunity to manufacture their own supply of methamphetamine. It is likely that this desperation, together with the already growing illicit manufacturing epidemic, would have caused a wave of laboratories far worse than what was seen at the turn of the century.

CONCLUSION

The illicit methamphetamine industry has a history of taking full advantage of weaknesses in legislation intended to combat methamphetamine. As a result, laws which merely render precursors less convenient to obtain will not achieve their proposed effect. As an alternative to current legislation's creation of scheduled listed products, sales of methamphetamine precursors should be restricted to consumers with prescriptions. Limiting the sale and possession of methamphetamine precursors only to consumers with a prescription would have the greatest impact if the federal government was to take this action with respect to all current over-the-counter methamphetamine precursors nationally. Absent federal action, it is left to the fifty states to enact legislation ensuring that precursors are not readily available to methamphetamine cooks.

²⁶⁶ *Id.*