

## SHAKE AND BAKE: THE METH THREAT AND THE NEED TO RETHINK 21 U.S.C. § 841(C)(2)

21 U.S.C. § 841(c)(2) (the “pseudoephedrine statute”) imposes a prison term of up to twenty years for any person who “distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance.”<sup>1</sup> Federal courts of appeals have spent the last decade deciphering how to interpret the statutory phrase “reasonable cause to believe,” specifically in cases involving the sale of pseudoephedrine by pharmacy or convenience store workers that ends up in the hands of methamphetamine producers.<sup>2</sup> Some circuit decisions have analyzed the phrase in question using a subjective test, looking “through the lens of [a] particular defendant” to determine whether he had reasonable cause to believe that a sale of pseudoephedrine would lead to methamphetamine production;<sup>3</sup> others decry such an analysis as “redundant” and instead use “an objective *mens rea* requirement.”<sup>4</sup>

This Note examines the pseudoephedrine statute and discusses whether a circuit split regarding its wording, as well as changing methods of methamphetamine production, warrants a rewriting of the statute. Due to improved efficiency in methamphetamine production methods and a growing domestic production market, pharmacy and convenience store workers are increasingly at risk of serving customers who purchase pseudoephedrine for methamphetamine production.<sup>5</sup> Depending on which federal circuit court(s) can claim jurisdiction over such sales of

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1. 21 U.S.C. § 841(c)(2) (2006). *Nota bene*, the pseudoephedrine statute applies to chemicals other than pseudoephedrine and controlled substances other than methamphetamine, but this Note focuses on its application to pseudoephedrine sales and methamphetamine production. *See* 21 U.S.C. § 802(34)(K) (2006) (defining pseudoephedrine as a “list I chemical”); 21 U.S.C. § 812(c) (2006) (providing a schedule of controlled substances, including methamphetamine).

2. *See infra* notes 39–111 and accompanying text. The scope of this Note is limited to the application of the pseudoephedrine statute to sales of pseudoephedrine by convenience store and pharmacy workers only. Although the language of the statute does encompass the sale of pseudoephedrine by an individual not associated with a pharmacy or convenience store, this Note looks primarily to circuit cases involving store workers because such cases have formed the substance of the circuit split. *See id.*

3. *United States v. Saffo*, 227 F.3d 1260, 1268 (10th Cir. 2000).

4. *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005). *See infra* note 68 and accompanying text. *Mens rea* refers to the “state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime . . . .” BLACK’S LAW DICTIONARY 454 (3d pocket ed. 2006). A person may commit an act that falls under a certain criminal statute, but the act is often not criminal unless the person also possessed a “guilty mind” at the time he committed the act. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 115 (3d ed. 2001).

5. *See infra* notes 27–30 and accompanying text.

pseudoephedrine, cases with similar facts may end up with very dissimilar outcomes as a result of circuits interpreting the scienter standard of the pseudoephedrine statute differently.

Part I of this Note provides a background of methamphetamine issues within the United States today. Part II explores the circuit split surrounding the scienter requirements of the pseudoephedrine statute. Part III examines the language of the statute and compares it to other similarly worded statutes in order to find the congressional intent behind such wording. Part IV analyzes how to revise the pseudoephedrine statute to achieve the goals of Congress and create a more reasonable system for enforcing the statute against pharmacy and convenience store workers. Ultimately, this Note looks for an alternative solution that will resolve the circuit inconsistency and address the changing nature of methamphetamine production. This Note argues for removing “reasonable cause to believe” from the statute, while simultaneously establishing a strict liability offense when pseudoephedrine products are sold in quantities over current legal limits as set by Congress in the Combat Methamphetamine Epidemic Act of 2005 (the “Combat Meth Act”),<sup>6</sup> and strengthening the standard of scienter required to convict store clerks who sell pseudoephedrine products in quantities within such limits.

## I. BACKGROUND

Methamphetamine is a highly addictive stimulant produced and abused in significant quantities within the United States.<sup>7</sup> In fact, methamphetamine “is second only to alcohol and marijuana as the drug used most frequently in many Western and Midwestern states.”<sup>8</sup> As a result of the neurotransmitter dopamine being released within the brain, methamphetamine users who smoke or inhale the drug experience a “brief, intense sensation,” while those who snort or ingest it report a “long-lasting

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6. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 256 (codified as amended in scattered sections of 21 U.S.C.).

7. U.S. Drug Enforcement Admin., *Methamphetamine*, GET SMART ABOUT DRUGS, <http://www.getsmartaboutdrugs.com/drugs/methamphetamine.html> (last visited Jan. 30, 2011) [hereinafter *Methamphetamine*].

8. News Release, U.S. Drug Enforcement Admin., 34 Arrested in Northwest Indiana Alleged Methamphetamine Distribution Ring (June 26, 2008), <http://www.justice.gov/dea/pubs/states/newsrel/chicago063008.html>. According to the United Nations, survey data of cannabis, opiates, and cocaine indicate that such markets are in decline; “[i]n contrast, there are several indications that the global problem with amphetamine-type stimulants (ATS) is worsening.” UNITED NATIONS OFFICE ON DRUGS & CRIME, WORLD DRUG REPORT 2009, EXECUTIVE SUMMARY 9 (2009), available at [http://www.unodc.org/documents/wdr/WDR\\_2009/Executive\\_summary\\_LO-RES.pdf](http://www.unodc.org/documents/wdr/WDR_2009/Executive_summary_LO-RES.pdf).

high.”<sup>9</sup> In either case, prolonged methamphetamine use can result in serious health problems, including memory loss, aggression, psychosis, cardiac damage, malnutrition, dental problems, and death in the event of overdose.<sup>10</sup> In addition to severe physical and psychological injuries experienced by humans as a result of methamphetamine use, methamphetamine production is responsible for substantial environmental damage—between five and seven pounds of toxic waste are created for every one pound of methamphetamine produced.<sup>11</sup> Fumes from methamphetamine labs are so toxic that they can produce cancer, brain damage, and respiratory injuries.<sup>12</sup> Methamphetamine’s toxicity results from its chemical ingredients—including freon, acetone, brake cleaner, drain cleaner, battery acid, and cold medicine containing pseudoephedrine—which are heated into a volatile combination.<sup>13</sup>

Most of the methamphetamine used in the United States is produced in so-called “superlabs,” but some manufacturers create the product in smaller clandestine laboratories.<sup>14</sup> In 2009 alone, the Drug Enforcement

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9. *Methamphetamine*, *supra* note 7. Neurons are cells within the nervous system that communicate information with one another via electrical and chemical signaling; neurotransmitters are secreted by neurons to help achieve rapid, precise communication. Zach W. Hall, *The Cells of the Nervous System*, in AN INTRODUCTION TO MOLECULAR NEUROBIOLOGY 1, 2 (Zach W. Hall ed., 1992). The extent of signal processing between neurons is significant—for example, scientists estimate that a motor neuron in a mammal’s spinal cord handles signals from more than ten thousand other neurons. *Id.* “Dopamine is involved in motivation, the experience of pleasure, and motor function, and is a common mechanism of action for most drugs of abuse.” NAT’L INST. ON DRUG ABUSE, METHAMPHETAMINE ABUSE AND ADDICTION 4 (2006), available at <http://www.drugabuse.gov/PDF/RRMetham.pdf>.

10. *Methamphetamine*, *supra* note 7. “As with similar stimulants, methamphetamine most often is used in a ‘binge and crash’ pattern. Because the pleasurable effects of methamphetamine disappear even before the drug concentration in the blood falls significantly—users try to maintain the high by taking more of the drug.” NAT’L INST. ON DRUG ABUSE, *supra* note 9, at 3.

11. NAT’L DRUG INTELLIGENCE CTR., U.S. DEP’T OF JUSTICE, PRODUCT No. 2010-Q0317-001, NATIONAL DRUG THREAT ASSESSMENT 2010, at 7 (2010), available at <http://www.justice.gov/ndic/pubs38/38661/38661p.pdf> [hereinafter THREAT 2010]. Methamphetamine production is extremely dangerous due to the volatility of the chemicals used in production—“[a]pproximately 15 percent of meth labs are discovered as a result of a fire or explosion.” Karen Swetlow, U.S. Department of Justice, *Children at Clandestine Methamphetamine Labs: Helping Meth’s Youngest Victims*, OVC BULL., June 2003, at 4, available at <http://www.ojp.usdoj.gov/ovc/publications/bulletins/children/197590.pdf>.

12. Marilyn Berlin Snell, *Welcome to Meth Country*, SIERRA, Jan.–Feb. 2001, at 50, 52, available at <http://www.sierraclub.org/sierra/200101/meth.asp>. In addition to human injuries caused by methamphetamine fumes, Snell’s article also mentions the lethal effects that the fumes can have on trees in the vicinity of a methamphetamine lab. *Id.* at 53–54.

13. *Environmental Impacts of Methamphetamine*, U.S. DRUG ENFORCEMENT ADMIN., [http://www.usdoj.gov/dea/concern/meth\\_environment.html](http://www.usdoj.gov/dea/concern/meth_environment.html) (last visited Jan. 30, 2011).

14. NAT’L INST. ON DRUG ABUSE, *supra* note 9, at 1. “Superlabs” are defined by the National Drug Intelligence Center as “clandestine laboratories capable of producing 10 or more pounds of methamphetamine per production cycle.” NAT’L DRUG INTELLIGENCE CTR., U.S. DEP’T OF JUSTICE,

Administration (DEA) reported 10,064 “meth lab incidents” nationwide, most notably including 1,784 in Missouri.<sup>15</sup> In fact, the methamphetamine problem is so widespread in Missouri that the communities of Washington and Union were the first cities in the country to require prescriptions for cold and allergy medicines that contain pseudoephedrine.<sup>16</sup> Mississippi recently followed suit by passing statewide legislation requiring a doctor’s prescription for the purchase of pseudoephedrine products.<sup>17</sup>

Although not as strict as the laws of Union and Washington, Missouri, the Combat Meth Act provided a set of guidelines restricting the sale of pseudoephedrine.<sup>18</sup> Congress stated generally in Title 21 of the United States Code that “[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”<sup>19</sup> This seemingly vague and broad declaration was given sharper teeth to attack methamphetamine when Congress passed the Combat Meth

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PRODUCT NO. 2006-Q0317-003, NATIONAL DRUG THREAT ASSESSMENT 2007, at 7 n.4 (2006), available at <http://www.justice.gov/ndic/pubs21/21137/21137p.pdf> [hereinafter THREAT 2007].

15. *Maps of Methamphetamine Lab Incidents*, U.S. DRUG ENFORCEMENT ADMIN. [http://www.justice.gov/dea/concern/map\\_lab\\_seizures.html](http://www.justice.gov/dea/concern/map_lab_seizures.html) (last updated Sept. 2010). The DEA defines a “meth incident” as “including [methamphetamine] labs, ‘dumpsites,’ or ‘chemical and glassware’ seizures.” *Id.* Missouri has led the nation in reported meth lab incidents since at least 2004. *See id.* The Missouri State Highway Patrol revealed that “462 lab busts and discoveries of meth-processing dump sites were reported in the state for the first three months of 2009 . . . . That was up from 426 in the first quarter of 2008. No other state was even close, according to the U.S. Drug Enforcement Administration.” *Missouri Again Leads Nation in Meth Incidents*, CHI. TRIB., June 4, 2009, at 12.

16. Christine Byers, *Union is Second U.S. City to OK Anti-Meth Law*, ST. LOUIS POST-DISPATCH, Oct. 13, 2009, at A1. Although sales of pseudoephedrine products have “plummeted” in Washington, “most local doctors were phoning in prescriptions [of pseudoephedrine products] without requiring office visits.” Christine Byers, *Town Hails Its New Meth Law*, ST. LOUIS POST-DISPATCH, Oct. 26, 2009, at A1.

17. H.R. 512, 2010 Leg., Reg. Sess. (Miss. 2010); Elizabeth Crisp, *Governor Barbour Signs Bill Restricting Some Cold Medicine*, CLARION-LEDGER (Jackson, Miss.), Feb. 12, 2010. Oregon passed a similar measure in 2006. *See* H.R. 2485, 73d Leg. Assemb., Reg. Sess. (Or. 2005).

18. Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, 120 Stat. 256 (codified as amended in scattered sections of 21 U.S.C.). Section 711 contains restrictions on the sales of pseudoephedrine products (and other products containing listed chemicals), requires the products to be located behind the store’s counter, compels stores selling such products to keep a logbook of all purchasers, and obligates the Attorney General of the United States to establish criteria for certification of each business that sells listed chemicals; § 713 allows the Attorney General to establish production quotas on pseudoephedrine products; § 715 places restrictions on the importation of pseudoephedrine products and gives the Attorney General the authority to allow importation for medical and scientific purposes; § 723 explicitly encourages U.S. law enforcement to work with the government of Mexico to prevent the smuggling of Mexican pseudoephedrine into the United States; and §§ 731–34 enhance punishments for methamphetamine production. §§ 711, 713, 715, 723, 731–34.

19. 21 U.S.C. § 801(2) (2006).

Act.<sup>20</sup> The Act requires pharmacies and convenience stores to sell no more than 3.6 grams of pseudoephedrine to any individual per day<sup>21</sup> and prohibits an individual from purchasing more than nine grams during any thirty-day period.<sup>22</sup>

As a result of the Combat Meth Act, the DEA developed mandatory training materials for employees of commercial enterprises that sell pseudoephedrine.<sup>23</sup> The materials include training regarding the daily and monthly limits on pseudoephedrine sales per customer, logbook requirements, and common street names for pseudoephedrine.<sup>24</sup> In addition to such materials, the DEA often distributes a so-called “red notice,” which informs sellers that pseudoephedrine is “used in the illicit manufacture of methamphetamine” and that it is “unlawful” to distribute pseudoephedrine “knowing, or having reasonable cause to believe,” that the pseudoephedrine “will be used to manufacture methamphetamine.”<sup>25</sup> Consequently, government prosecutors often introduce evidence of red

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20. See Combat Methamphetamine Epidemic Act of 2005 § 711.

21. 21 U.S.C. § 830(d)(1) (2006).

22. 21 U.S.C. § 844(a) (2006). Although Congress used the Combat Methamphetamine Epidemic Act to limit sales of pseudoephedrine, the 3.6 gram daily limit and 9 gram monthly limit still allow for the sale of a significant number of pseudoephedrine tablets. For example, Advil Cold & Sinus Caplets each contain 30 milligrams of Pseudoephedrine HCl. *Advil Cold and Sinus Caplets*, ADVIL, <http://www.advil.com/OurProducts/Advil-Cold-And-Sinus.aspx> (last visited Jan. 30, 2011). In order to avoid exceeding the daily purchase limit of 3.6 grams, a store could sell as many as 146 Advil Cold & Sinus tablets to an individual customer per day. See OFFICE OF DIVERSION CONTROL, U.S. DRUG ENFORCEMENT ADMIN., TRAINING REQUIRED TO SELL DRUG PRODUCTS CONTAINING EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE 13, available at [http://www.dea diversion.usdoj.gov/meth/trg\\_retail\\_081106.pdf](http://www.dea diversion.usdoj.gov/meth/trg_retail_081106.pdf). The same store could sell an individual customer as many as 366 Advil Cold & Sinus tablets per month without violating the 9 gram limit. See *id.* at 16. Assuming a quantity of twenty caplets per box, a pharmacy could sell one customer as many as eighteen boxes of Advil Cold & Sinus per month without violating the pseudoephedrine sale limits of the Combat Methamphetamine Epidemic Act. Anecdotal evidence suggests that some pharmacies are enforcing the act in a manner that is more restrictive than what is required by federal law, perhaps due to confusion. See, e.g., Candace Murphy, *New Cold Medicines Causing Headaches*, OAKLAND TRIB., Mar. 27, 2007 (a pharmacy in Oakland, CA, prohibited a customer from buying more than one box of pseudoephedrine product per day and failed to explain the legal gram limit to him); Karl Schubert Wauwatosa, Letter to the Editor, *Sudafed Regulations Silly*, CAPITAL TIMES, May 30, 2008 (“I’m treated as a criminal suspect for having a stuffy nose . . . and am limited to one box [of pseudoephedrine medicine] at Wal-Mart.”).

23. See 21 U.S.C. § 830(e)(1)(A)(vii) (2006) (requiring sellers of pseudoephedrine to train all of their employees using DEA training materials); see also OFFICE OF DIVERSION CONTROL, *supra* note 22.

24. OFFICE OF DIVERSION CONTROL, *supra* note 22.

25. OFFICE OF DIVERSION CONTROL, U.S. DRUG ENFORCEMENT ADMIN., NOTICE: COMBINATION EPHEDRINE AND PSEUDOEPHEDRINE DRUG PRODUCTS ARE USED IN ILICIT METHAMPHETAMINE MANUFACTURE (2009) [hereinafter DEA RED NOTICE], available at [http://www.dea diversion.usdoj.gov/chem\\_prog/advisories/ephedrine.pdf](http://www.dea diversion.usdoj.gov/chem_prog/advisories/ephedrine.pdf).

notices in order to argue that a particular defendant had prior knowledge that pseudoephedrine could be used to manufacture methamphetamine.<sup>26</sup>

The Combat Meth Act appeared to be a success at first: total meth lab incidents in the United States dropped from 13,403 in 2005 to 6,233 in 2007.<sup>27</sup> Nevertheless, in 2008, the number of methamphetamine lab incidents increased to 7,485.<sup>28</sup> This surge in incidents occurred in part because small-scale domestic methamphetamine production increased.<sup>29</sup> Such an increase in small-capacity labs was achieved “largely by individuals and criminal groups that circumvent pseudoephedrine sales restrictions by making numerous small-quantity purchases of products that contain pseudoephedrine for use in laboratory operations. This method of acquiring pseudoephedrine is often referred to as ‘smurfing’ . . . .”<sup>30</sup>

The DEA has also linked the escalation in domestic methamphetamine production to the relocation of Mexican drug operations into the United States.<sup>31</sup> The Combat Meth Act addressed the issue of significant methamphetamine production and smuggling from Mexico into the United States, instructing the Secretary of State to “encourage the Government of Mexico to take immediate action to reduce the diversion of pseudoephedrine.”<sup>32</sup> The Mexican government subsequently took aggressive action in 2007 by prohibiting pseudoephedrine imports into its

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26. See, e.g., *United States v. Hudspeth*, 525 F.3d 667, 671, 678 (8th Cir. 2008) (“[The defendant] was distributing pseudoephedrine, he knew it could be used in the manufacture of meth, [and] the DEA agent informed him that she was concerned about the amount of pseudoephedrine he was selling in relation to . . . other products . . . .”); *United States v. Nguyen*, 413 F.3d 1170, 1179 (10th Cir. 2005) (“[T]he undisputed evidence showed . . . [that] Nguyen learned via the red notice that the pills could be used for illicit drug manufacturing . . . .”).

27. *Maps of Methamphetamine Lab Incidents*, *supra* note 15. The number of national meth lab incidents declined steadily after 2004—reaching a low of 6,233 in 2007—but the trend reversed in 2008 as the number climbed up to 7,485. *Id.*

28. *Id.*

29. NAT’L DRUG INTELLIGENCE CTR., U.S. DEP’T OF JUSTICE, PRODUCT NO. 2008-Q0317-006, NATIONAL METHAMPHETAMINE THREAT ASSESSMENT 2009, at 1 (2008), available at <http://www.justice.gov/ndic/pubs32/32166/32166p.pdf> [hereinafter THREAT 2009].

30. *Id.* at 5. “For example, in Bowling Green, Kentucky, officials report that methamphetamine producers are recruiting needy individuals, such as single mothers and senior citizens, to visit several stores and purchase pseudoephedrine below threshold levels for use in methamphetamine production.” *Id.* at 12–13.

31. *Id.* at 5. Low-capacity laboratories—also referred to as small-capacity—are defined as those “capable of producing less than 1 pound of methamphetamine per production cycle.” *Id.*

32. Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, § 723(b)(3), 120 Stat. 256, 269 (codified as amended in scattered sections of 21 U.S.C.). For a general description of Mexican meth trafficking trends, see *Methamphetamine*, *supra* note 7. *The Oregonian* lamented in 2005 that “America’s methamphetamine crisis is now rooted in Mexico,” noting that Mexico’s imports of pseudoephedrine were “roughly double what the country needs to meet the legitimate demands of cold and allergy sufferers.” Steve Suo, *The Mexican Connection*, OREGONIAN, June 5, 2005, at A1.

borders as of 2008.<sup>33</sup> As a result, Mexican methamphetamine production declined substantially, leading to a decrease in the drug's availability on the U.S. market and a subsequent increase in Mexican drug trafficking organizations operating from within the United States.<sup>34</sup>

Due to a new method of methamphetamine production commonly called "shake and bake" meth or "one pot" meth, small, legal quantities of pseudoephedrine are now enough to produce methamphetamine on a small scale.<sup>35</sup> Using pseudoephedrine purchased at stores in legal amounts by so-called "smurfs," methamphetamine users are able to create their addictive product on their own "at nearly any location."<sup>36</sup> The National Drug Intelligence Center confirmed these trends when it reported in its 2009 *Methamphetamine Threat Assessment* that "small-scale methamphetamine producers are . . . increasingly using the one-pot method of production."<sup>37</sup> The shake and bake technique of meth production is spreading rapidly throughout parts of the United States, changing the face of methamphetamine production.<sup>38</sup>

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33. THREAT 2009, *supra* note 29, at 2.

34. *Id.* at 1, 3.

35. *Id.* at 12–13.

36. *Id.* "Producers often use the one-pot cook while traveling in vehicles and dispose of waste components along roadsides." *Id.* at 13.

37. *Id.* at 27; *see also id.* at 12, 23; NATIONAL DRUG INTELLIGENCE CENTER, PRODUCT NO. 2009-S0787-007, SITUATION REPORT: PSEUDOEPHEDRINE SMURFING FUELS SURGE IN LARGE-SCALE METHAMPHETAMINE PRODUCTION IN CALIFORNIA 1 (2009), available at <http://www.justice.gov/ndic/pubs36/36407/36407p.pdf> ("Pseudoephedrine smurfing has become increasingly organized and widespread in California, particularly since 2007, fueling an increase in the number of large-scale methamphetamine laboratories in the state." (footnote omitted)).

38. Justin Juozapavicius, *New Meth Formula Avoids Anti-Drug Laws*, HERALD (Rock Hill, S.C.), Aug. 25, 2009, at 2A. "An Associated Press review of lab seizures and interviews with state and federal law enforcement agents found that the new [shake and bake] method is rapidly spreading across the nation's midsection and is contributing to a spike in the number of meth cases after years of declining arrests." *Id.* *See also* Larry Ballard, *Meth Mixed in 2-Liter Bottles Makes Its Way into Iowa*, DES MOINES REG., Sept. 21, 2009, at 1 ("[E]vidence of hand-held meth production has shown up in Muscatine and Webster counties, where narcotics officers have made roadside discoveries of empty plastic containers lined with the toxic byproduct of the meth process."); Melanie Brandert, *Stickney Meth Lab Used New Technique*, DAILY REPUBLIC (Mitchell, S.D.), Oct. 8, 2009 (noting the first detection of shake and bake meth by law enforcement in South Dakota); Amber Craig, *Meth Labs Found in Home Day Care*, MISS. PRESS, Nov. 5, 2009, at A1 (shake and bake meth lab found in home that doubled as a day care center); Editorial, "Shake and Bake" Method Prevalent, OKLAHOMAN, Sept. 16, 2009, at 8A (describing the increase in shake and bake methamphetamine production in Oklahoma and noting that "Tulsa already has hit an all-time high for meth busts this year at 216").

## II. THE PSEUDOEPHEDRINE STATUTE

In order to punish individuals who engage in methamphetamine production in the United States, Congress imposed a statutory minimum of ten years' imprisonment for the production of "50 grams or more of methamphetamine . . . or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine."<sup>39</sup> Furthermore, in order to attack those who supply methamphetamine producers with pseudoephedrine, Congress criminalized the act of "possess[ing] or distribut[ing] a listed chemical knowing, or *having reasonable cause to believe*, that the listed chemical will be used to manufacture a controlled substance."<sup>40</sup> In recent years, federal circuit courts have split on how to interpret "having reasonable cause to believe" within the language of the pseudoephedrine statute.<sup>41</sup> To date, they have fallen into five camps,

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39. 21 U.S.C. § 841(b)(1)(A)(viii) (2006). The pseudoephedrine statute allows for a maximum sentence of life in prison. *Id.*

40. 21 U.S.C. § 841(c)(2) (2006) (emphasis added). Because of its centrality to this Note, the relevant text of section 841(c)(2) is provided below for reference:

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally . . .

(2) possesses or distributes a listed chemical *knowing, or having reasonable cause to believe*, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter . . .

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

*Id.* (emphasis added). The 100th Congress amended the Controlled Substances Act of 1970 and thereby applied it to pseudoephedrine sales by criminalizing the possession or distribution of a "listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance." Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 6055(a), 102 Stat. 4181, 4318. Prior to the passage of the Anti-Drug Abuse Act of 1988, the equivalent language of the United States Code punished a person who "possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine." 21 U.S.C. § 841(d)(2) (1982) (current version at 21 U.S.C. § 841(c)(2) (2006)). Phencyclidine—commonly known as "PCP" or "angel dust"—is a controlled substance in crystalline powder form that acts as a "dissociative anesthetic," causing reactions that include sedation, immobility, and amnesia. *Drugs and Chemicals of Concern: Phencyclidine*, U.S. DRUG ENFORCEMENT ADMIN. OFFICE OF DIVERSION CONTROL (Apr. 2010), [http://www.deadiversion.usdoj.gov/drugs\\_concern/pcp.htm](http://www.deadiversion.usdoj.gov/drugs_concern/pcp.htm). Following a decline in use during the 1980s and 1990s, phencyclidine "has re-emerged as a drug of abuse." *Id.*

41. *See infra* notes 43–111 and accompanying text. This Note does not focus on the "knowing" aspect of the pseudoephedrine statute, as the majority of cases regarding the statute take issue with the proper interpretation of "having reasonable cause to believe." The Eighth Circuit does not even include a specific definition of "knowing" in its model jury instructions. *See* JUDICIAL COMMITTEE ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 463 (2009), available at [http://www.juryinstructions.ca8.uscourts.gov/crim\\_man\\_2009.pdf](http://www.juryinstructions.ca8.uscourts.gov/crim_man_2009.pdf). Instead, it states that "[i]ntent or knowledge may be



divided by their views on whether a conviction based on “reasonable cause to believe” requires a subjective or objective examination of the defendant’s state of mind at the time of the alleged crime.<sup>42</sup>

### A. *The Subjective Inquiry*

In *United States v. Saffo*, the Tenth Circuit held that the “reasonable cause to believe” standard of the pseudoephedrine statute “involves a subjective inquiry that looks to whether the particular defendant accused of the crime knew or had reasonable cause to believe the listed chemical would be used to manufacture a controlled substance.”<sup>43</sup> In other words, an evaluation must occur “through the lens of this particular defendant, rather than from the prospective [sic] of a hypothetical reasonable man.”<sup>44</sup> Through its interpretation, the Tenth Circuit created a subjective standard that views reasonable cause to believe as something “akin to actual knowledge.”<sup>45</sup>

The *Saffo* court reached such a conclusion in part by looking to the New Jersey case of *State v. Smith*,<sup>46</sup> which involved statutory interpretation of language that contains some similarities to the pseudoephedrine statute.<sup>47</sup> In the course of its decision, the *Smith* court

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proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of the defendant’s knowledge or intent.” *Id.* at 468 (citation omitted). Other courts have “recognized deliberate ignorance of criminal activity as the equivalent of knowledge.” *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000) (quoting *United States v. Arias*, 984 F.2d 1139, 1143 (11th Cir. 1993)).

42. See *infra* notes 43–111 and accompanying text.

43. 227 F.3d 1260, 1268 (10th Cir. 2000). The *Saffo* case entailed a complicated conspiracy to sell pseudoephedrine for the production of methamphetamine. *Id.* at 1263–67. The operation occurred on a massive scale: Saffo and her co-conspirators sold over 197 million tablets of pseudoephedrine in one year alone. *Id.* at 1266. By comparison, the *Saffo* court notes that the pharmaceutical company Warner-Lambert sold 38 million caplets of Sudafed nationwide during the same time period. *Id.*

44. *Id.* at 1268–69. The Tenth Circuit is the only federal circuit to date that has employed a fully subjective standard to evaluate the “reasonable cause to believe” language within the pseudoephedrine statute. See *infra* notes 64–104 and accompanying text for a discussion of the analysis performed by other circuits in regard to the pseudoephedrine statute.

45. *Id.* at 1269. Although the Tenth Circuit established a new and subjective standard for how to interpret the “reasonable cause to believe language” of the pseudoephedrine statute, the court ultimately held that Saffo had “actual knowledge” that the pseudoephedrine she sold was purchased for the purpose of methamphetamine production. *Id.* The court reached its decision because the trial jury found Saffo guilty of money laundering under a statute that criminalizes the act of conducting a financial transaction “knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity.” *Id.* (quoting 18 U.S.C. § 1956(a)(1) (date of code not provided)) (emphasis added by the *Saffo* court) (internal quotation marks omitted).

46. 123 A.2d 369 (N.J. 1956).

47. See *Saffo*, 227 F.3d at 1269 (quoting *Smith*, 123 A.2d at 372). The defendants in *Smith* were charged in part with violating a voting fraud statute that punished a person for voting in a primary

commented, “[g]uilt is personal; the determinant here is the reasoned conviction of the mind of the accused, a *subjective* inquiry, not a theoretical, vicarious belief of the hypothetical reasonable man, as the State and the accused would have it.”<sup>48</sup> The *Saffo* decision’s conclusion echoes *Smith*, holding that the pseudoephedrine statute requires a subjective standard of scienter that should not be based on the perspective of “a hypothetical reasonable man.”<sup>49</sup>

Five years later, the Tenth Circuit reaffirmed and strengthened its subjective inquiry analysis in *United States v. Truong*.<sup>50</sup> In *Truong*, the defendant lacked full proficiency in English<sup>51</sup> and claimed he did not even know the word “methamphetamine” until he was arrested.<sup>52</sup> Nevertheless, he was charged under the pseudoephedrine statute after selling thousands of pseudoephedrine pills to certain buyers on a regular basis during his employment at a Texaco gas station convenience store.<sup>53</sup> Noting that Truong “told the police he did not know the purpose to which the pseudoephedrine he sold would be put,” the Tenth Circuit reversed the appellant’s conviction as a result of a lack of evidence that he knew or had reasonable cause to believe that the products he sold would be manufactured into methamphetamine.<sup>54</sup>

At trial, the government established that Truong clandestinely sold pseudoephedrine for cash after his store closed and that he hid the pseudoephedrine tablets in styrofoam cups.<sup>55</sup> Despite such potentially incriminating evidence, the Tenth Circuit concluded that the “unusually specific *mens rea* requirement of [the pseudoephedrine statute] requires more.”<sup>56</sup> The court reached this conclusion in part by reaffirming *Saffo*’s holding that a reasonable cause to believe is something “akin to actual

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while “knowing or having reason to believe himself not entitled to so vote.” *Smith*, 123 A.2d at 369 (quoting N.J. STAT. ANN. § 19:34-22 (year not provided)).

48. *Smith*, 123 A.2d at 371 (emphasis added).

49. *Saffo*, 227 F.3d at 1268–69. Scienter is a “degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission.” BLACK’S LAW DICTIONARY 635 (3d pocket ed. 2006).

50. 425 F.3d 1282 (10th Cir. 2005).

51. *Id.* at 1287, 1290.

52. Brief of Appellant at 9, *United States v. Truong*, 425 F.3d 1282 (10th Cir. 2005) (No. 04-5094).

53. *Truong*, 425 F.3d at 1284–88.

54. *Id.* at 1290–91.

55. *Id.* at 1290.

56. *Id.* at 1291.

knowledge.”<sup>57</sup> The Tenth Circuit also referenced its *Buonocore* decision, in which it held that because “the reasonable cause to believe inquiry ‘is *entirely subjective*, the inquiry is not to be viewed from the perspective of a hypothetical reasonable person.”<sup>58</sup> As a result, the court determined that in order to convict Truong, the prosecution would need to present evidence that would allow the jury to decide that Truong “had actual knowledge, or something close to it.”<sup>59</sup>

In addition to its own precedent, the *Truong* court also looked to congressional intent to determine which standard of scienter the Tenth Circuit should use to evaluate the pseudoephedrine statute:

Presumably because of the large-scale legitimate use of pseudoephedrine as a cold remedy, and a concern about not imposing unreasonable duties or risk of criminal liability on the pharmacies and convenience stores that sell this common product, Congress limited the reach of 21 U.S.C. §§ 841 . . . to sellers with the actual knowledge or intent (or, in this Circuit, something “akin to actual knowledge”) that it would be used to manufacture methamphetamine.<sup>60</sup>

The court concluded that Truong could have believed that his customers were addicted to pseudoephedrine itself, or that he and the purchasers were simply avoiding taxes by conducting the transactions in cash and without record keeping.<sup>61</sup> Although such intentions did not “redound to Mr. Truong’s credit,” the court held that he could not be punished under the pseudoephedrine statute based on these facts alone.<sup>62</sup> Using a subjective

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57. *Id.* at 1289 (quoting *United States v. Saffo*, 227 F.3d 1260, 1269 (10th Cir. 2000)) (internal quotation marks omitted).

58. *Id.* (emphasis added) (quoting *United States v. Buonocore*, 416 F.3d 1124, 1133 (10th Cir. 2005)). The Tenth Circuit released the *Buonocore* opinion three months before *Truong* was decided.

59. *Id.* The *Truong* court did not explicitly define what it meant by “actual knowledge, or something close to it,” but noted that “[o]rdinarily, the government satisfies this burden by introducing evidence that the defendant had received an official notification or warning regarding the substance.” *Id.* For example, as proof of notice, the government might establish that the defendant had received a red notice. *Id.* at 1289–90 (quoting *United States v. Nguyen*, 413 F.3d 1170, 1175 (10th Cir. 2005)); see also DEA RED NOTICE, *supra* note 25. For an additional example of proof used by the government to prove its burden, see *Truong*, 425 F.3d at 1290 (quoting *Buonocore*, 416 F.3d at 1126) (“DEA recorded controlled buy in which purchaser said ‘the meth cooks must be cookin like crazy’ and ‘I must have had a run, there’s a bunch of meth cooks in town, that’s what their [sic] using them for.’”).

60. *Truong*, 425 F.3d at 1291.

61. *Id.*

62. *Id.* In its decision, the *Truong* court stressed that the government offered no proof that the defendant had been warned of the dangers of methamphetamine production from pseudoephedrine and that the testimony it did offer indicated that Truong might not have understood such an instruction in

standard of scienter and noting the common legal use of pseudoephedrine as a cold remedy, the court overturned Truong's conviction.<sup>63</sup>

### B. *The Objective Understanding Approach*

Other circuits have denounced the Tenth Circuit's subjective inquiry and adopted a more objective approach that applies the defendant's knowledge to a reasonable person test.<sup>64</sup> For example, in *United States v. Galvan*, five years after *Saffo*, the Eighth Circuit criticized the *Saffo* opinion when a defendant requested a jury instruction that would equate "reasonable cause to believe" with a standard that was "akin to actual knowledge."<sup>65</sup> The defendant Galvan was charged with one count of violating the pseudoephedrine statute after law enforcement observed him purchasing pseudoephedrine products and discovered pseudoephedrine pills in his car.<sup>66</sup> On appeal, the Eighth Circuit affirmed Galvan's conviction and sentence.<sup>67</sup> The court briefly noted that the proposed *Saffo*-style jury instruction would "render the 'reasonable cause to believe' phrase redundant."<sup>68</sup> Ultimately, the Eighth Circuit affirmed the defendant's conviction by concluding that the district judge "did not err" when she delivered jury instructions "using only the language of the [pseudoephedrine] statute."<sup>69</sup>

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English even if it were provided to him. *Id.* at 1290. In addition, the court observed that during Truong's trial, a police officer testified to the fact that "not everyone knows of the relationship between [pseudoephedrine and methamphetamine]." *Id.*

63. *Id.* at 1291. Two recent law review comments discuss the circuit split regarding the pseudoephedrine statute: one argues in favor of the Tenth Circuit's subjective standard, while the other concludes an objective standard should be adopted. Compare Brian Walsh, Comment, *Circuits Split as to Statutory Interpretation of the Mens Rea Requirement in 21 U.S.C. § 841(c)(2): The Tenth Circuit Provides the Correct Answer*, 48 DUQ. L. REV. 123 (2010), with Jonathan L. Hood, Comment, *What is Reasonable Cause to Believe?: The Mens Rea Required for Conviction Under 21 U.S.C. § 841*, 30 PACE L. REV. 1360 (2010). This Note reaches a different conclusion. See *infra* notes 126–62 and accompanying text.

64. See *infra* notes 65–75 and accompanying text.

65. *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005) (citing *United States v. Saffo*, 227 F.3d 1260, 1268–69 (10th Cir. 2000)).

66. *Id.* at 955. Following arrest, Galvan offered to reveal the location of methamphetamine labs in exchange for no prison time. *Id.*

67. *Id.*

68. *Id.* at 957. The Tenth Circuit in *Truong* made only momentary reference to the Eighth Circuit's disapproval of *Saffo* in a footnote that observed, "The Eighth Circuit has criticized our interpretation." *United States v. Truong*, 425 F.3d 1282, 1289 n.3 (10th Cir. 2005) (citing *Galvan*, 407 F.3d at 957). Despite acknowledging the criticism, the *Truong* court did not respond to it explicitly. *Id.*

69. *Galvan*, 407 F.3d at 957. The *Galvan* court based its opinion in part on the reasoning of the Ninth Circuit *Kaur* opinion, *id.*, which held that "reasonable cause to believe would be superfluous if it meant knowledge." *United States v. Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004).

In addition to criticizing the *Saffo* decision, the Eighth Circuit has constructed its own standard for purposes of interpreting the pseudoephedrine statute, employing a more objective inquiry than the *Saffo* court.<sup>70</sup> In *United States v. Bewig*, the court concluded that the pseudoephedrine statute “does not punish the inadvertent sale of a listed chemical to an illegal drug manufacturer, but instead punishes only those sales where the seller *understands, or should reasonably understand, that the chemical will be used illegally.*”<sup>71</sup> This language by itself does not create a cogent standard,<sup>72</sup> but the court attempted to clarify its position by stating that “[t]he statute does not require a defendant to read a purchaser’s mind.”<sup>73</sup> Nevertheless, the court obfuscated the issue by holding that “[a] reasonable person would understand what conduct is prohibited by this standard.”<sup>74</sup> The Eighth Circuit ultimately affirmed Bewig’s conviction in part because the defendant “told investigators he knew pseudoephedrine was used in the production of methamphetamines.”<sup>75</sup>

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70. Compare *United States v. Bewig*, 354 F.3d 731, 737–38 (8th Cir. 2003), with *Saffo*, 227 F.3d at 1268.

71. *Bewig*, 354 F.3d at 737 (emphasis added). In *Bewig*, the defendant was convicted of conspiracy to distribute pseudoephedrine, “having reasonable cause to believe” that it would be used to make the controlled substance methamphetamine. *Id.* at 734–35. The defendant ordered unusually large quantities of pseudoephedrine for the gas station convenience store that he owned and managed, causing his supplier to contact the DEA. *Id.* at 734. Citing Bewig’s knowledge of pseudoephedrine’s role in methamphetamine production, as well as other factors, the Eighth Circuit ultimately affirmed his twenty-year prison sentence. *Id.* at 734–35.

72. For example, a question arises as to what the *Bewig* standard would dictate in the following hypothetical situation: convenience store worker Jack Pseudo—just hired and new to town—sells a package of pseudoephedrine to John Meth, who is widely known in the community as a meth producer. The *Bewig* court would not punish Jack Pseudo for an “inadvertent sale” of pseudoephedrine to Meth, but would do so if he should have reasonably understood the illegal use of the chemical contemplated by Meth. See *Bewig*, 354 F.3d at 734–35. If the court does not expect Jack Pseudo to read the mind of John Meth and ascertain his unlawful intentions, see *id.* at 737, then one might conclude that Pseudo should be found not guilty under the *Bewig* test. Unfortunately, the *Bewig* court never defines an “inadvertent sale.” See *id.* This lack of definition is problematic because it leaves open the question of whether an inadvertent sale occurs when the seller himself is unaware of the purchaser’s intentions, or when the seller is reasonably unaware of the purchaser’s intentions.

73. *Id.* at 737.

74. *Id.* at 738. The court claims that a “reasonable person would understand” the statute, *id.*, but the circuit courts themselves cannot agree on how the statute should operate, let alone the hypothetical reasonable person. See generally *supra* notes 43–73 and accompanying text; *infra* notes 75–111 and accompanying text.

75. *Bewig*, 354 F.3d at 734–35; see *supra* note 71.

### C. The Objective “Reasonable Person” Approach

In contrast to the Eighth Circuit’s “reasonable understanding” approach to the pseudoephedrine statute, the Eleventh Circuit has adopted a reasonable person standard. In *United States v. Prather*, the court determined that it must look to the plain meaning of the pseudoephedrine statute in order to interpret its language correctly.<sup>76</sup> The *Prather* court agreed with a prior Seventh Circuit decision that involved PCP/piperidine instead of methamphetamine/pseudoephedrine.<sup>77</sup> *United States v. Green* stated that “Congress intended to impose a *broad prohibition* against the manufacture of PCP, criminalizing both the actual manufacture of PCP as well as the possession of piperidine (an essential ingredient of PCP) when knowing or having reasonable cause to believe the piperidine would be used to manufacture PCP.”<sup>78</sup>

With congressional intent in mind, the Eleventh Circuit upheld the judge’s wordy jury instruction that declared, “[T]he question is what would a reasonable person reasonably have believed based on the evidence known to the defendant.”<sup>79</sup> When the jury requested a clarification of the instruction, the district court judge explained that the pseudoephedrine statute was asking, “[B]ased on what [the defendant] did know, would a reasonable person, an abstract reasonable person have cause to believe that the pseudoephedrine . . . would be diverted [to manufacture methamphetamine].”<sup>80</sup> In essence, the trial court asked the jury to inject the knowledge of the defendant into the mind of a hypothetical reasonable

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76. 205 F.3d 1265, 1269 (11th Cir. 2000).

77. *Id.* (citing *United States v. Green*, 779 F.2d 1313 (7th Cir. 1985)).

78. *Green*, 779 F.2d at 1319 (emphasis added). The *Green* case involved a conviction stemming from the sale of piperidine, where the defendant knew or had reasonable cause to believe that it would be manufactured into phencyclidine. *Id.* at 1314.

79. *Prather*, 205 F.3d at 1271 (alteration in original) (quoting the jury instructions used at trial).

80. *Id.* (quoting the jury instructions used at trial). According to *Prather*’s brief, the trial court judge admitted that he was “perplex[ed]” by the pseudoephedrine statute, as was the jury—it requested clarification of the jury instructions after more than a day of deliberation. Brief for Appellant at 14–15, *Prather*, 205 F.3d 1265 (No. 98-9094). Despite the confusion of the judge, the jury convicted the defendant in part under 21 U.S.C. § 841(d)(2), *Prather*, 205 F.3d at 1267, which is the prior location of the statutory language that currently resides under 21 U.S.C. § 841(c)(2). See 21 U.S.C. § 841(d)(2) (1994) (current version at 21 U.S.C. § 841(c)(2) (2006)). It is important to note that the *Prather* court reviewed the jury instructions under a plain error standard, which requires a reversal if the challenged jury instruction is “a plainly incorrect statement of the law and: ‘that it was probably responsible for an incorrect verdict, leading to substantial injustice.’” *Prather*, 205 F.3d at 1271 (quoting *Montgomery v. Noga*, 168 F.3d 1282, 1294 (11th Cir. 1999)). Therefore, it is possible that the court might have reached a different conclusion if the defense counsel had objected to the jury instructions during the actual trial, thereby triggering a stricter standard of review.

person.<sup>81</sup> The jury was then instructed to determine whether such a person would have had cause to believe that the pseudoephedrine sold by the defendant was purchased for the purpose of producing methamphetamine.<sup>82</sup>

Although its initial inquiry focused on the meaning of “reasonable cause to believe,” the Eleventh Circuit ultimately held that “overwhelming evidence” indicated that Prather had “*actual knowledge*” of methamphetamine production resulting from his sales of pseudoephedrine.<sup>83</sup> By concentrating on the defendant’s actual knowledge of methamphetamine production, the *Prather* court was able to avoid a more thorough analysis of the “reasonable cause to believe” language contained within the pseudoephedrine statute.<sup>84</sup> Instead, the court found that the judge’s complicated definition of reasonable cause to believe did not result in plain error, and based its decision in large part on the fact that the jury convicted Prather under a theory of actual knowledge on nine out of ten counts.<sup>85</sup>

#### *D. The Objective-Subjective Hybrid Approach*

The Ninth Circuit has taken a more concrete position than the Eleventh, by means of a hybrid analysis of the scienter requirements within the pseudoephedrine statute.<sup>86</sup> In *United States v. Kaur*, the trial court instructed the jury that the pseudoephedrine statute included a hybrid standard of scienter consisting of “both subjective and objective elements. . . . [T]he government had to prove that [the defendant] either

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81. *Prather*, 205 F.3d at 1271.

82. *Id.*

83. *Id.* (emphasis added). The defendant Prather sold over 830 million pseudoephedrine tablets to 173 customers via a mail-order wholesale business, despite the fact that most of his customers lacked proper business licenses. *Id.* at 1268. In addition, Prather continued selling pseudoephedrine tablets to customers whom he knew had been investigated by law enforcement; he also received an attorney’s opinion letter indicating that his business activities “might be considered prima facie evidence of an intent to violate the law.” *Id.* After his company’s offices were raided by the DEA, Prather’s company persisted in its pseudoephedrine business while simultaneously increasing its prices. *Id.*

84. I do not mean to imply that the Eleventh Circuit intentionally avoided further analysis of the “reasonable cause to believe” language in order to skirt the issue, even though that was the effect of its decision. Rather, I mean to suggest that the *Prather* court likely would have engaged in a more thorough analysis of such language if the court had decided the case based upon whether the defendant had a “reasonable cause to believe,” instead of actual knowledge.

85. *Prather*, 205 F.3d at 1271; see Brief for Appellant at 4, *Prather*, 205 F.3d 1265 (No. 98-9094).

86. See *United States v. Johal*, 428 F.3d 823 (9th Cir. 2005); *United States v. Kaur*, 382 F.3d 1155 (9th Cir. 2004).

*knew, or knew facts that would have made a reasonable person aware,* that the pseudoephedrine would be used to make methamphetamine.”<sup>87</sup> Attempting to determine congressional intent, the court concluded that “the statute clearly presents knowledge and reasonable cause to believe as two distinct alternatives.”<sup>88</sup> At first glance, the Ninth Circuit appeared to reject *Saffo* when it held that “reasonable cause to believe would be superfluous if it meant knowledge.”<sup>89</sup> Nevertheless, the *Kaur* decision ultimately observed that the *Saffo* holding—i.e., that reasonable cause to believe is something akin to knowledge—was not incompatible with the proffered jury instruction given at trial.<sup>90</sup>

In the shadow of these conflicting statements, the Ninth Circuit clarified its position one year later in *United States v. Johal*.<sup>91</sup> Johal owned a grocery store in Spokane, Washington, where he sold large quantities of pseudoephedrine tablets to undercover DEA agents; one of the agents told Johal that “he was a cook and wanted to make ‘crystal.’”<sup>92</sup> Convicted under the pseudoephedrine statute, Johal argued on appeal “that the statute . . . put[s] unwitting store clerks at risk of going to prison simply for selling legal cold medications.”<sup>93</sup> In affirming Johal’s conviction, the Ninth Circuit concluded that the pseudoephedrine statute “requires that a defendant subjectively know facts that either cause him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs.”<sup>94</sup> The court reasoned that such a standard helps prevent a defendant from being “prosecuted for mere inadvertent conduct.”<sup>95</sup>

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87. *Kaur*, 382 F.3d at 1157–58 (emphasis added).

88. *Id.* at 1157.

89. *Id.*

90. *Id.* at 1158 n.5. It is hard to reconcile these different conclusions within the same opinion. The *Kaur* court preferred a hybrid standard of scienter that incorporates subjective and objective elements (i.e., what would a reasonable person in the defendant’s situation with his knowledge believe), but also believed that if the standard becomes too subjective, then it transforms “reasonable cause to believe” into an unnecessary phrase. See *id.* at 1157–58.

91. 428 F.3d 823 (9th Cir. 2005).

92. *Id.* at 826. “Crystal” is a street name for methamphetamine. *Methamphetamine*, *supra* note 7, at 1.

93. *Johal*, 428 F.3d at 827.

94. *Id.* This is a subjective-objective hybrid standard, essentially taking the defendant’s subjective knowledge and inserting it into the mind of a reasonable person to see whether it would cause him to believe that the pseudoephedrine he sold would be used in the production of methamphetamine. See *id.*

95. *Id.* To prevent an incorrect conviction, some courts also look to the defendant’s proficiency in English. The Tenth Circuit observed that Truong had some difficulties understanding English. *United States v. Truong*, 425 F.3d 1282, 1290 (10th Cir. 2005). In the case of *United States v. Chon*, the defendant was acquitted by a jury of two counts of distribution of pseudoephedrine for methamphetamine production after claiming that, as a Korean native, he lacked an understanding of



### E. Circumvention

The Seventh Circuit has avoided delving into the fray by noting the circuit split without joining it.<sup>96</sup> In *United States v. Khattab*, the defendant was charged under the pseudoephedrine statute and convicted in a bench trial after attempting to purchase one hundred boxes of pseudoephedrine tablets from a DEA informant.<sup>97</sup> On appeal, the court observed that the district judge used the “more stringent standard of the Tenth Circuit” in his decision, finding that “Khattab *knew* that the pseudoephedrine he attempted to purchase would be used to manufacture methamphetamine.”<sup>98</sup> As a result of the defendant’s actual knowledge of methamphetamine production, the court concluded that “this case is not the proper vehicle for us to weigh in on the circuit split regarding the proper *mens rea* standard for 21 U.S.C. § 841(c)(2).”<sup>99</sup>

Although the *Khattab* court failed to take a position within the circuit split regarding the pseudoephedrine statute, it did address a clever argument of the defendant relating to his *mens rea*.<sup>100</sup> Many incriminating statements of Khattab introduced by the prosecution appeared to indicate that he understood that methamphetamine is produced from pseudoephedrine.<sup>101</sup> Khattab argued that this evidence alone did not “sufficiently prove” that he knew “that he or the people he planned to

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English sufficient to understand that the pseudoephedrine he sold would be used to produce methamphetamine. *United States v. Chon*, 291 F. App’x 877, 879 (10th Cir. 2008). Despite his defense, Chon ultimately was convicted of one charge of possession of pseudoephedrine in violation of the pseudoephedrine statute. *Id.* at 878.

96. See *United States v. Khattab*, 536 F.3d 765, 769 (7th Cir. 2008).

97. *Id.* at 766. A DEA agent testified at trial that the one hundred boxes sought after by Khattab amounted to 57,600 pseudoephedrine tablets, which would be enough to treat two thousand people with respiratory problems for a week. *Id.* at 767.

98. *Id.* at 769 (emphasis added).

99. *Id.* Compare *Khattab*, 536 F.3d at 769, with *United States v. Prather*, 205 F.3d 1265, 1271 (11th Cir. 2000) (both courts looked to evidence of actual knowledge to decide their respective cases, but the *Khattab* court was more of a spectator, noticing the subjective *Saffo*-like standard of the district judge and concluding that it would not stake out a position on the circuit split, whereas the *Prather* court observed the hybrid standard employed by the district judge and found it to be without plain error). A difference in time of decision also explains the reason why the *Khattab* court explicitly announced it would avoid the circuit split while the *Prather* court made no such pronouncement—*Prather* was decided in early 2000 before the Tenth Circuit released *Saffo*, while *Khattab* was issued in August 2008. See *Khattab*, 536 F.3d 765; *United States v. Saffo*, 227 F.3d 1260 (10th Cir. 2000); *Prather*, 205 F.3d 1265.

100. See *Khattab*, 536 F.3d at 770.

101. *Id.* For example, the government recorded telephone conversations and an in-person meeting with a potential seller of pseudoephedrine; Khattab told the seller that individuals extract substances from the pseudoephedrine to make a narcotic and that “they sniff it.” *Id.* at 767 (quoting transcript of the meeting) (internal quotation marks omitted).

distribute [the pseudoephedrine] to *would* use it to make methamphetamine.”<sup>102</sup> Khattab contended that if the Seventh Circuit affirmed his conviction, it would mean that “any individual who purchased Sudafed and knew it *could* be used to manufacture methamphetamine would be guilty under the statute.”<sup>103</sup> In its quick dismissal of Khattab’s argument, the court concluded that the DEA agent’s testimony at trial “reveal[ed] the criminality underlying the transaction,” which, in turn, proved that Khattab had knowledge that the pseudoephedrine he sold would be processed into methamphetamine.<sup>104</sup> Consequently, the *Khattab* court did not address the meaning of “reasonable cause to believe.”<sup>105</sup>

#### F. A State of Split

The federal circuits thus fall into one of five camps with respect to the scienter requirements of the pseudoephedrine statute. The Eighth Circuit looks objectively to what the distributor of pseudoephedrine should reasonably understand;<sup>106</sup> the Eleventh Circuit approves of using an objective reasonable person test;<sup>107</sup> the Tenth Circuit searches for a subjective standard similar to knowledge;<sup>108</sup> the Ninth Circuit uses a hybrid standard of subjective and objective elements;<sup>109</sup> and the Seventh Circuit circumvents the issue.<sup>110</sup> Many of the major cases analyzed in this section have been appealed to the Supreme Court, but none has been granted certiorari.<sup>111</sup> Despite the Court’s silence on the issue, an analysis

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102. *Id.* at 770.

103. *Id.* at 770 (emphasis added) (quoting Brief of Appellant at 15, *United States v. Khattab*, 536 F.3d 765 (7th Cir. 2008) (No. 07-2522)) (internal quotation marks omitted).

104. *Id.* See *supra* note 72 and accompanying text. The evidence at trial indicated that Khattab knew that his customers extracted something from the pseudoephedrine, that “they sniff[ed] it,” and that they preferred unpackaged pills over blister packs (indicative of methamphetamine production), but no evidence referred to by the Seventh Circuit indicated that Khattab actually knew that the pseudoephedrine was to be used for methamphetamine production. See *id.* Nevertheless, the court determined that Khattab possessed the requisite knowledge for conviction under the pseudoephedrine statute. *Id.* In *Truong*, the Tenth Circuit used similar facts to reach a different conclusion: “For all we know from the evidence presented . . . [the defendant] may have thought that . . . pseudoephedrine [is itself] subject to abuse or that his purchasers were addicted to over-the-counter medications.” *United States v. Truong*, 425 F.3d 1282, 1291 (10th Cir. 2005).

105. See *Khattab*, 536 F.3d at 769–70.

106. See *supra* Part II.B.

107. See *supra* Part II.C.

108. See *supra* Part II.A.

109. See *supra* Part II.D.

110. See *supra* Part II.E.

111. See, e.g., *United States v. Johal*, 428 F.3d 823 (9th Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006); *United States v. Galvan*, 407 F.3d 954 (8th Cir. 2005), *cert. denied*, 546 U.S. 967 (2005);

of other federal statutes with similar language provides helpful insight into the language of the pseudoephedrine statute, as well as congressional intent.<sup>112</sup>

### III. “HAVING REASONABLE CAUSE TO BELIEVE”—OTHER FEDERAL STATUTES

Six other criminal statutes in Titles 18 and 21 of the United States Code contain the phrase “having reasonable cause to believe” and provide an opportunity to compare how courts have interpreted the scienter standard in such instances.<sup>113</sup> For example, in the Eighth Circuit case *United States v. Iron Eyes*, the defendant was convicted under the firearms chapter of the U.S. Code for “knowing or having reasonable cause to believe that the firearm . . . was stolen.”<sup>114</sup> At trial, Iron Eyes contended that although he was carrying stolen firearms within two suitcases at the time of his arrest, he was drunk and did not know that the suitcases contained stolen firearms.<sup>115</sup> The court first looked to the more objective, reasonable man approach of *Prather* and rejected it, holding instead that the subjective *Saffo* approach was supported by “[t]he language of the statute itself.”<sup>116</sup> The *Iron Eyes* court found that “the better reading . . . requires proof that a defendant possessed a gun that it would have been reasonable for him or her, in particular, to believe was stolen.”<sup>117</sup>

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United States v. Saffo, 227 F.3d 1260 (10th Cir. 2000), cert. denied, 532 U.S. 974 (2001); United States v. Prather, 205 F.3d 1265 (11th Cir. 2000), cert. denied, 531 U.S. 879 (2000).

112. See *infra* Part III.

113. See 18 U.S.C. § 842(h) (2006) (forbidding transport/possession of stolen explosive materials); 21 U.S.C. § 843(a)(6)–(7) (2006) (concerning equipment used for the purposes of manufacturing controlled substances); 18 U.S.C. § 844(o) (2006) (prohibiting the transfer of explosive materials for criminal purposes); 21 U.S.C. § 864(a) (2006) (laws regarding anhydrous ammonia); 18 U.S.C. § 922 (2005) (relating to unlawful acts involving firearms); 21 U.S.C. § 960(d) (2006) (penalties for import/export of controlled substances). In addition to the pseudoephedrine statute, the Controlled Substances Act contains the language “having reasonable cause to believe” elsewhere within Title 21. See 21 U.S.C. § 843(a)(6)–(7); 21 U.S.C. § 864(a); 21 U.S.C. § 960 (d)(3). For example, § 843 prohibits the distribution of “any three-neck round-bottom flask” if a person has reasonable cause to believe that the flask will be used in the production of controlled substances. 21 U.S.C. § 843(a)(7).

114. *United States v. Iron Eyes*, 367 F.3d 781, 783 (8th Cir. 2004) (alteration in original) (quoting 18 U.S.C. § 922(j) (2000)) (internal quotation marks omitted).

115. *Id.* The Eighth Circuit noted within its decision that the “suitcases” were in fact rifle cases. *Id.*

116. *Id.* at 784.

117. *Id.* (citing *United States v. Saffo*, 227 F.3d 1260, 1268–69 (10th Cir. 2000)). In a similar case, the Third Circuit noted that “[w]e have not addressed the meaning of ‘reasonable cause to

At trial, the district judge read the words of § 922(j) as jury instructions, informing the jury that “in order to convict it must find that ‘Iron Eyes knew or had reasonable cause to believe the firearm was stolen.’”<sup>118</sup> On appeal, the Eighth Circuit found this language to be acceptable, noting that judges in its circuit do not need to define “knowing” because the term is widely known.<sup>119</sup> However, the court did not address whether “reasonable cause to believe” is also a subject of common knowledge.<sup>120</sup> Instead, the court affirmed the defendant’s conviction, finding that no error had occurred that would trigger a reversal of the jury’s verdict.<sup>121</sup>

Despite its decision not to define “reasonable cause to believe” within Titles 18 and 21 of the U.S. Code, Congress was not silent in all statutes using the phrase. For instance, Title 15 prohibits a person from reporting false consumer information to a consumer reporting agency “if the person *knows or has reasonable cause to believe* that the information is inaccurate.”<sup>122</sup> The previous version of the statute prior to amendment in 2003 stated: “[I]f the person *knows or consciously avoids knowing* that the information is inaccurate.”<sup>123</sup> The change appears to indicate a desire on the part of Congress to broaden the scope of the statute.<sup>124</sup> The current statute defines “reasonable cause to believe” as “having specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.”<sup>125</sup> This definition echoes the *Prather* standard quoted

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believe’ in the context of § 922(j) or a similar statute. Only the Eighth Circuit has discussed the language meaningfully.” *United States v. McBane*, 433 F.3d 344, 349 n.9 (3d Cir. 2005) (citing *Iron Eyes*, 367 F.3d at 785).

118. *Iron Eyes*, 367 F.3d at 785 (quoting the district judge’s instructions to the jury).

119. *Id.* See *supra* note 41.

120. See *Iron Eyes*, 367 F.3d at 785. In light of the court’s discussion and observance of a circuit split regarding the meaning of “reasonable cause to believe,” it is unlikely that it would find such a term to be “common knowledge.” See *id.* at 784.

121. *Id.* at 784, 787. Although the defendant’s drunkenness might have caused him to be mistaken as to the contents of the “suitcases” in question, the Eighth Circuit concluded that the jury instructions were “adequate” and therefore upheld the verdict. *Id.* at 783, 785. The court noted that “we are confident that the jury understood what the law was. The jury simply rejected Mr. Iron Eyes’s defense on the facts.” *Id.* at 785. The *Iron Eyes* court did not present much explanation for its decision to use a subjective standard akin to that of the Tenth Circuit. See *id.* at 784–85.

122. 15 U.S.C. § 1681s-2(a)(1)(A) (2006) (emphasis added).

123. 15 U.S.C. § 1681s-2(a)(1)(A) (2000) (emphasis added), amended by Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, § 312(b)(1), 117 Stat. 1952, 1990.

124. By changing the statutory language from “knows or consciously avoids” to “knows or has reasonable cause to believe,” Congress relaxed the scienter standard required to prove liability under the statute. See *supra* notes 121–22 and accompanying text.

125. 15 U.S.C. § 1681s-2(a)(1)(D) (2006).

earlier: “[T]he question is what would a reasonable person reasonably have believed based on the evidence known to the defendant.”<sup>126</sup>

#### IV. ATTACKING METHAMPHETAMINE PRODUCTION WITH STATUTORY LANGUAGE BETTER SUITED FOR THE CURRENT THREAT

##### A. *New Challenge, Old Problem*

The government of the United States faces a new challenge to an old problem: reported methamphetamine incidents are on the rise after years of decline.<sup>127</sup> Methamphetamine production is becoming harder to target, in part because the new shake and bake method requires “an amount [of pseudoephedrine] easily obtained under even the toughest anti-meth laws that have been adopted across the nation . . . .”<sup>128</sup> If Congress is to reduce methamphetamine production, it must find a new way to attack the supply or demand of pseudoephedrine and methamphetamine.<sup>129</sup>

The new shake and bake method of methamphetamine production further complicates the issue of how to interpret the pseudoephedrine statute. In light of the fact that small and otherwise legal purchases of pseudoephedrine can be used to create methamphetamine, it may become harder for juries and courts to determine what should constitute knowledge or a reasonable cause to believe that a purchase of pseudoephedrine is for the purpose of producing methamphetamine. For example, suppose a customer attempts to purchase one six-pack of beer and one box of Sudafed (2.36 grams of pseudoephedrine) at his local pharmacy.<sup>130</sup> The pharmacist has never seen the customer prior to the encounter, but notices that he has trouble paying attention and that some of his teeth are missing

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126. *United States v. Prather*, 205 F.3d 1265, 1271 (11th Cir. 2000) (quoting the trial judge). *See supra* text accompanying notes 80–82.

127. Juozapavicius, *supra* note 38.

128. *Id.*

129. Other than a proposed amendment to the pseudoephedrine statute, this Note does not address other ways in which Congress could attack the domestic supply of and demand for pseudoephedrine and methamphetamine.

130. For reference, Sudafed is sold in packages of 24, 48, and 96 tablets. *Sudafed Congestion*, SUDAFED, <http://www.sudafed.com/products/adult/sinus-congestion/sudafed-congestion> (last visited Jan. 30, 2011). Each Sudafed tablet contains 30 milligrams of pseudoephedrine HCl. *Sudafed Congestion*, SUDAFED, <http://www.sudafed.com/products/adult/sinus-congestion/sudafed-congestion> (follow “Ingredients” hyperlink) (last visited Jan. 30, 2011). According to the DEA, a box of 146 30 milligram pseudoephedrine tablets contains 3.6 grams of actual pseudoephedrine. OFFICE OF DIVERSION CONTROL, *supra* note 22. Therefore, one box of 96 Sudafed tablets should contain approximately 2.36 grams of pseudoephedrine.

or rotting.<sup>131</sup> In addition, the customer has a few red marks on his face and looks to be about thirty-five years old, even though the birth date on his driver's license indicates he is twenty-two years old.<sup>132</sup> Is the customer in question a meth addict smurf, purchasing the pseudoephedrine for purposes of small-capacity methamphetamine production, or is he simply someone with a bad cold and acne who cannot afford to see a dentist and dermatologist? And from a policy perspective, should a pharmacist or convenience store worker feel the need to profile her customers to avoid criminal charges?

If the pseudoephedrine statute remains unchanged, then the hypothetical pharmacist in the above scenario could, in theory, be subject to federal prosecution under the pseudoephedrine statute.<sup>133</sup> With the advent of the shake and bake method, it may become harder for the courts to answer the question of what constitutes "reasonable cause to believe." Since the sale of two boxes of cold medicine could lead directly to small-scale methamphetamine production in a soda bottle as the purchaser drives home, Congress must reevaluate the language of the pseudoephedrine statute and update it to reflect the changing technology of methamphetamine production.<sup>134</sup>

### *B. New Statutory Language*

In order to attack the new threat of shake and bake methamphetamine production, while simultaneously protecting the ability of pharmacy and convenience store workers to go about their business without fear of selling pseudoephedrine products, this Note proposes an amendment to the pseudoephedrine statute to read as follows:

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131. Prolonged methamphetamine usage can cause serious tooth damage and memory loss. NAT'L INST. ON DRUG ABUSE, *supra* note 9, at 1.

132. For examples of the startling disfigurement of facial features caused by prolonged methamphetamine use, see *The Faces of Meth*, OREGONIAN, May 2005, <http://www.facesofmeth.us/images/facesOFmeth.poster.pdf>. See also *Meth Mouth*, METHFREE.TN.ORG, <http://www.methfreetn.org/mediakit/files/MethMouthPoster.pdf> (last visited Jan. 30, 2011) (poster issued by the Tennessee District Attorney's Office depicting the effects of methamphetamine on human teeth).

133. Whether or not a prosecutor at present would actually decide to charge a pharmacist in such a case is irrelevant; if shake and bake methamphetamine production continues to rise in popularity among meth users, then a United States Attorney could in theory use her prosecutorial discretion to charge a pharmacist or convenience store worker under the pseudoephedrine statute in the scenario described in the text accompanying notes 130–31, *supra*.

134. See *supra* notes 35–38 and accompanying text.

(c) Offenses involving listed chemicals

Any individual within a business organization that is authorized to sell pseudoephedrine under the Combat Methamphetamine Act of 2005 who knowingly or intentionally . . .

(2) possesses or distributes pseudoephedrine in excess of the limits prescribed by the Combat Methamphetamine Epidemic Act of 2005 shall be fined in accordance with Title 18 or imprisoned not more than 5 years.

Notwithstanding Section (c)(2), any person who knowingly or intentionally distributes pseudoephedrine in compliance with the Combat Methamphetamine Epidemic Act of 2005 shall suffer no civil or criminal liability from such sale, unless the distributor had actual knowledge that the pseudoephedrine would be used to manufacture methamphetamine.<sup>135</sup>

The proposed language of the pharmacist protection statute eliminates the “reasonable cause to believe” standard and imposes strict liability on workers who sell pseudoephedrine in excess of the limits imposed by the Combat Meth Act,<sup>136</sup> but American courts have long frowned upon statutes that lack mens rea.<sup>137</sup> The idea that intent is required to perpetrate a crime “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.”<sup>138</sup> The Supreme Court “has . . . frequently expressed hostility to interpreting statutes in ways that created strict criminal liability,” but its hostility has been “intermittent and unpredictable.”<sup>139</sup>

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135. Statute proposed by author [hereinafter, the “pharmacist protection statute”]. The proposed language would not replace the current pseudoephedrine statute, but rather would apply only to the specific category of workers at places of business that are authorized to sell pseudoephedrine. In other words, the proposed legislation would not change the current statutory language as it applies to a private citizen selling pseudoephedrine to another entity for the purpose of producing methamphetamine. The circuit split cited within this Note involves convenience store and pharmacy employees who work in places where many legal sales of pseudoephedrine likely occur in any given year, as opposed to, for example, individuals buying and selling pseudoephedrine out of their basements.

136. Strict liability crimes “do not contain a mens rea requirement regarding one or more elements of the actus reus.” DRESSLER, *supra* note 4, at 143. The actus reus is the “physical or external portion of the crime.” *Id.* at 81.

137. *See id.* at 144 (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437–38 (1978)).

138. *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

139. Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 761 (2002).

Despite the longstanding legal principle requiring mens rea to prove guilt, over time the Court has recognized that Congress designed some statutes to serve as public welfare offenses, whereby it “impose[d] a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal.”<sup>140</sup> Public welfare offenses generally describe offenses as follows: “(1) public-welfare offenses are not derived from the common law; (2) a single violation . . . can simultaneously injure a great number of people . . . ; (3) the standard imposed . . . is reasonable; (4) the penalty for violation is relatively minor . . . ; and (5) conviction rarely damages the reputation of the violator.”<sup>141</sup>

In *Morissette v. United States*, the defendant was convicted of stealing used bomb casings from federal property in Michigan, even though he allegedly did not intend to steal and thought that the property was abandoned.<sup>142</sup> Affirming *Morissette*’s conviction under a public welfare statute, the Court noted that “[m]any violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize.”<sup>143</sup> The Court added that “[t]he accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.”<sup>144</sup>

Applying the language of *Morissette* to pseudoephedrine distribution, it is not a stretch of the imagination to conclude that the sale of pseudoephedrine to one smurf can cause injury to many people. For instance, a superlab is capable of producing at least ten pounds of methamphetamine per cycle and more than fifty pounds of toxic waste.<sup>145</sup> Assuming for the sake of illustration that the hypothetical addict John Meth injects himself with one gram of methamphetamine every two hours for forty-eight hours,<sup>146</sup> he would consume twenty-four grams of methamphetamine, which is the equivalent of approximately 0.0529

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140. *Staples v. United States*, 511 U.S. 600, 606 (1994). Such “penalties serve as effective means of regulation.” *Id.* (quoting *United States v. Dotterweich*, 320 U.S. 277, 280–81 (1943)).

141. *DRESSLER*, *supra* note 4, at 145.

142. 342 U.S. at 247–49.

143. *Id.* at 255–56.

144. *Id.* at 256.

145. *THREAT 2007*, *supra* note 14, at 8 n.4. See *THREAT 2010*, *supra* note 11, at 7 (explaining five to seven pounds of toxic waste are generated for each pound of methamphetamine produced).

146. This calculation assumes that the superlab produced ten pounds of meth in a production cycle. A user of methamphetamine may “inject as much as a gram of the drug every 2 to 3 hours over several days until [the user] run[s] out of meth.” *Methamphetamine*, *supra* note 7.



pounds. A superlab could supply 189 meth addicts with enough methamphetamine for the same injection rate and time period as John Meth.<sup>147</sup>

The convenience store or pharmacy worker is “in a position to prevent” such injuries from happening.<sup>148</sup> And, as mentioned above, federal law already mandates educational training materials for workers that sell pseudoephedrine in order to alert them to legal sale limits.<sup>149</sup> Therefore, convenience store and pharmacy workers occupy a unique position from which they can prevent sales of pseudoephedrine above the legal limit, and by doing so, they can help prevent injury to the public.

Although the sale of pseudoephedrine to one methamphetamine producer has the potential to harm many people, the proposed pharmacist protection statute may be criticized for its five-year prison term. Some might argue that five years’ incarceration is too low.<sup>150</sup> Others may contend that a five-year sentence is not “relatively small,”<sup>151</sup> and therefore does not qualify as punishment for a public welfare offense.<sup>152</sup> Nevertheless, “courts have [recently] become more willing to justify strict liability, even though incarceration is implicated.”<sup>153</sup> For example, the Eighth Circuit affirmed a one-year incarceration in connection with a strict liability offense in *United States v. Flum*.<sup>154</sup> The Third Circuit reached a similar conclusion in *United States v. Engler*, in which it noted “a formidable line of cases imposing strict liability in felony cases without proof of scienter” and ultimately held that a two-year incarceration stemming from a strict liability offense was not unconstitutional.<sup>155</sup> This Note proposes a five-year term because “[t]he constitutionality of acts of Congress should not be determined by . . . tight mathematical formulas

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147. For the basis of these calculations, see *supra* notes 7, 14.

148. See *Morissette*, 342 U.S. at 256.

149. See *supra* note 21 and accompanying text; see also *United States v. Truong*, 425 F.3d 1282, 1290 (10th Cir. 2005) (citing Brief of Appellant at 13, *Truong*, 425 F.3d 1282 (No. 04-5094)) (holding that the eponymous defendant could have concluded that purchasers were “up to no good,” even though he claimed to have never heard of the word methamphetamine).

150. The current maximum punishment under the pseudoephedrine statute is twenty years incarceration. See 21 U.S.C. § 841(c)(2) (2006).

151. *Morissette*, 342 U.S. at 256.

152. See *supra* note 135 and accompanying text.

153. DRESSLER, *supra* note 4, at 145 n.14.

154. *Id.* (citing *United States v. Flum*, 518 F.2d 39 (8th Cir. 1975)). The defendant Flum attempted “to board an aircraft while having about his person a concealed dangerous and deadly weapon.” *Flum*, 518 F.2d at 39.

155. *United States v. Engler*, 806 F.2d 425, 433 (3d Cir. 1986).

derived from a pocket calculator or a computer spreadsheet.”<sup>156</sup> Of course, Congress could tinker with the exact range of incarceration if it feared that five years would not stand up to judicial scrutiny.<sup>157</sup>

Finally, incarceration under the pharmacist protection statute will not likely cause damage to the reputation of the offender under the Supreme Court’s rubric. In *Morissette*, the Court noted that although proof of mens rea is usually required for conviction under criminal law, “[e]xceptions came to include sex offenses, such as rape, in which the victim’s actual age was determinative despite defendant’s reasonable belief that the girl had reached age of consent.”<sup>158</sup> If the conviction and punishment of a man for the rape of a minor is allowed under strict liability, then, a fortiori, strict liability for selling pseudoephedrine should also be allowed, as it is hard to imagine that a drug conviction would cause worse damage to a person’s reputation than a conviction for a sexual offense.<sup>159</sup>

Although a public welfare offense makes sense in connection with sales of pseudoephedrine in quantities above the legal limits established by the Combat Meth Act, it would not be appropriate for sales within the legal limits. The hypothetical sales clerk in the earlier example—who serves the customer with deteriorating teeth as he purchases one box of Sudafed—should not be held strictly liable for the sale, even if a reasonable person in his place might have suspected a methamphetamine-related end use of the product. Punishment for an otherwise legal sale of 3.6 grams of pseudoephedrine per day and 9 grams per month should be

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156. *Id.* at 434. A five-year maximum sentence was specifically chosen for the pharmacist protection statute because a higher sentence would likely trigger serious constitutional concerns that the punishment was not “relatively small,” but any lesser sentence might fail to deter would-be criminals. *See id.*; *see also supra* text accompanying note 140. Federal judges are required by statute to consider certain factors when determining a defendant’s sentence (for example, “to promote respect for the law,” “to provide just punishment for the offense,” and “to afford adequate deterrence to criminal conduct”). 18 U.S.C. § 3553(a)(2) (2006). A five-year (sixty-month) sentence would likely satisfy these considerations, and is relatively close to the current median methamphetamine sentence of seventy-two months. *See* U.S. SENTENCING COMMISSION, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at fig.J, [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2009/figj.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/figj.pdf).

157. For example, Congress could choose to impose two years’ incarceration since that has already been deemed constitutional for a public welfare offense. *See Engler*, 806 F.2d at 433.

158. *Morissette v. United States*, 342 U.S. 246, 251 n.8 (1952).

159. *See* Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1202 (1999) (“Having one’s criminal sexual offense history made public and being labeled a ‘repetitive sex offender,’ or the like, plainly calls into question one’s ‘good name, reputation, honor, or integrity.’ Indeed, being labeled an ‘active shoplifter,’ . . . or an alleged alcoholic . . . pales in comparison, given society’s acute disdain for sex offenders, as manifest in the repeated acts of vigilantism experienced by registrants subject to community notification.” (footnote omitted)).

reserved only for those workers who have *actual knowledge* of methamphetamine production linked to the sale. Enough judicial resources have already been spent on the question of what constitutes a “reasonable cause to believe,” and courts are still split as to its proper meaning.<sup>160</sup>

From a policy perspective, pharmacy and convenience store workers should not have to worry about whether a sale of pseudoephedrine within the legal limits of the Combat Meth Act constitutes a violation of the pseudoephedrine statute. It would be unreasonable to ask workers to act as *de facto* judges each time they make a small sale of pseudoephedrine product, whereby they are evaluated by courts in hindsight as to whether the customer had given any signs that a reasonable worker should understand as indicating that methamphetamine production would result from the sale.<sup>161</sup> Therefore, the pharmacist protection statute imposes no liability in such situations, unless the worker had “actual knowledge that the pseudoephedrine would be used to manufacture methamphetamine.”<sup>162</sup> This standard will likely mean that very few prosecutions will ever occur from sales within the legal limits imposed by the Combat Meth Act, but the standard will allow the worker to function as a sales clerk and not a judge, while still allowing for prosecution in the most egregious cases.<sup>163</sup>

## V. CONCLUSION

Unfortunately, methamphetamine production and addiction will likely continue no matter how precisely Congress chooses its statutory language. In order to make the war on meth more effective and reduce confusion among the federal circuit courts, Congress should remove the “reasonable cause to believe” language from the pseudoephedrine statute and impose strict liability upon sales clerks who sell pseudoephedrine above the legal limits prescribed by the Combat Meth Act. Although the Supreme Court may eventually choose to resolve the circuit split, so long as “reasonable cause to believe” remains in the statute, pharmacy and convenience store workers with no knowledge of a customer’s criminal intent could face criminal liability for selling pseudoephedrine within otherwise legal

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160. See *supra* Part II.

161. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“The ‘reasonableness’ of a particular use of force [by police] must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”).

162. Pharmacist protection statute, *supra* text accompanying note 135.

163. For example, a sales clerk could still be prosecuted for selling a box of Sudafed to a customer after learning from the customer that he intends to produce methamphetamine from the product.

limits.<sup>164</sup> The proposed revisions to the pseudoephedrine statute would protect pharmacists and convenience store employees from the possibility of criminal prosecution when they sell pseudoephedrine within the limits prescribed by the Combat Meth Act and have no knowledge of the customer's intent to engage in methamphetamine production. Congress should rewrite the pseudoephedrine statute in order to resolve conflicting interpretations of scienter among the courts of appeals, adapt to changing methamphetamine production technologies, and deter sales of illegal quantities of pseudoephedrine as defined by the Combat Meth Act.

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164. See *supra* text accompanying notes 129–32.

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