Synthetic Drugs - Emergence, Legislation, and the Criminal and Legal Aftermath of Broad Regulation

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SYNTHETIC DRUGS—EMERGENCE, LEGISLATION, AND THE CRIMINAL AND LEGAL AFTERMATH OF BROAD REGULATION

Zunny Losoya*

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I. INTRODUCTION

In April 2011, an Army Sergeant and medic shot and killed his wife and then took his own life while under the influence of "bath salts."1 The couple’s five-year-old son was later found suffocated to death in their Washington home.2 Similarly, while paralyzed for hours after smoking synthetic marijuana with her friends and unable to move, a Kentucky teen could sense her friends frantically trying to rouse her, and she even

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2. Id.
overheard them contemplate throwing her body in a nearby river. In Waco, Texas, a twenty-two year old man tortured, killed, and ate his roommate's dog—all while high on "Spice."

Although these horrific and life-altering events occurred on different dates and in different parts of the United States, they were all instigated by the use of synthetic drugs, specifically synthetic marijuana (commonly known as "K2" or "Spice") and bath salts, a drug intended to mimic the effects of methamphetamines. Until recently, many of these drugs were legally obtainable and widely available; however, state and federal legislators have scrambled to ban the ingredients in these drugs to keep them off the shelves of local convenience stores and smoke shops. But widespread bans have prompted synthetic drug manufacturers and chemists to quickly formulate new variations to circumvent current prohibitions. Thus, synthetic drug manufacturers and legislators are involved in a circular struggle, wherein the drug manufacturers are persistently synthesizing unknown chemical variants to dodge illegalities, and, in response, lawmakers and government agencies are trying to stop the synthetic drug movement by implementing more bans to target these newly fabricated substances. In addition, extensive bans and crackdowns have resulted in a surge of criminal charges for synthetic drug consumers, retailers, and manufacturers. The ongoing issues surrounding synthetic drugs have not only sparked a national media frenzy, but have also destroyed and endangered thousands of lives because the side effects of these drugs are not yet fully understood and still pose a mystery to healthcare providers, paramedics, and law enforcement agents.

This Comment explores the emergence of synthetic marijuana and bath salts in the United States and focuses on the consequences that these newly created drugs have had on state and federal legislation, law enforcement, and criminal law. Part II of this Comment outlines the origins, emergence, and effects of both synthetic marijuana and bath salts—the
two designer drugs primarily responsible for widespread state and federal bans and legislation. Part III provides an overview of recent federal regulatory and legislative actions implemented to suppress and counteract the proliferation of these drugs. Part III also exposes the consequential legal liability and criminal repercussions brought about by newly enacted state and federal prohibitions and discusses recent and currently developing case law involving synthetic marijuana and bath salt products. Finally, Part IV evaluates these sweeping regulatory implementations in light of their criminal and legal aftermath, and also exposes the drawbacks and shortcomings of overly ambitious state and federal endeavors to control and eradicate designer drugs.

II. TRACING THE ORIGINS OF DESIGNER DRUGS: SYNTHETIC MARIJUANA AND BATH SALTS

Relying on mere technicalities to skirt regulatory drug laws is not a new concept. In fact, this process first appeared around the 1920s when drug manufacturers opted to sell a chemically similar variation of morphine to avoid penalties under the International Opium Convention of 1925. Synthetic drugs are often called “designer drugs” because they do not exist naturally, unlike tetrahydrocannabinol (“THC”), the active compound in the Cannabis (marijuana) plant. By contrast, designer drugs are purposely created when “underground ‘chemists’ slightly alter—or design—molecules of existing banned drugs to evade the law and sell abusable drugs.” These manmade variations are referred to as analogues, and although inspired by the molecular structure of preexisting recreational drugs and controlled substances, they have an “ever-changing ingredient list,” which makes them dangerous to ingest and difficult to track and regulate. Also, many designer drugs sold today are disguised as household products and carry a label that reads “not for human consumption”—a clever detail that complicates an already novel and quickly evolving concept by creating confusion about whether these substances should be identified as legal products or as psychoactive drugs that should be regulated, banned, or criminalized. To truly capture the far-reaching social and legal impact of synthetic drugs, it is important to understand their origins, side effects, and the process of their manufacture and sale.

12. See Duckworth, supra note 5, at 32.
13. Id.
14. See id.
16. See Duckworth, supra note 5, at 32.
17. White House Fact Sheet, supra note 6.
A. Synthetic Marijuana

Marijuana analogues were initially the outcome of scientific and pharmaceutical research in the 1960s aimed at manipulating THC molecules to separate marijuana’s negative effects from its medically beneficial uses.18 However, the sale and recreational use of synthetic marijuana was first noticed in November 2008, when U.S. Customs and Border Protection encountered suspicious substances that were identified as “synthetic cannabinoids” by the Drug Enforcement Administration’s (“DEA”) forensic department.19 These synthetic concoctions were not created for the purpose of scientific study or medical research; rather, they were designed and mass-produced for commercial sale and were branded with names like “K2” and “Spice,” which are currently the most common street names for synthetic marijuana products.20

Synthetic marijuana is often marketed and advertised as herbal incense, and consists of loose herbs or dried leaves that resemble cooking spices or potpourri.21 It is typically packaged in small, square-shaped plastic bags and sold in “head shops” (stores that sell products pertaining to smoking and recreational drug use), tobacco stores, internet websites, and even gas stations and convenience stores.22 Despite their simple and unassuming exterior, these neatly packaged incense products are actually “a mixture of herbs and spices . . . sprayed with a synthetic compound chemically similar to THC, the psychoactive ingredients in marijuana.”23 Although there are over 100 types of synthetic cannabinoids, many of which are currently banned either federally or locally, Spice products commonly consist of JWH-018 (the most popular synthetic cannabinoid formulation),24 JWH-073, HU-210, or HU-211.25

Much like users of actual marijuana, users of Spice often smoke the product in a pipe or use rolling papers to make joints or cigarettes.26 Spice users hope to achieve the same effects brought about by marijuana, such as “euphoria, relaxation, and sociability,” yet the unfortunate reality is that these drugs have induced a laundry list of harmful reactions because they are not regulated, have no quality control, and are often sup-

18. See Duckworth, supra note 5, at 34.
19. WHITE HOUSE FACT SHEET, supra note 6.
20. See id.
22. See id.; see also Dan Quan, Legal Drugs of Abuse, 32 EMERGENCY MED. REP. 237, 239 (2011).
23. See K2 FACT SHEET, supra note 21.
26. See id.
Synthetic Drugs

implemented with random filler ingredients. The reported physical, neurological, and psychological side effects are a serious cause for concern: “tachycardia, hypertension, and chest pain or myocardial infarction . . . parasthesias, anxiety, psychosis, paranoia, confusion, tremors, seizures, hallucinations, and excited delirium . . . suicidal ideation, self-mutilation, and highly aggressive behavior.” The effects of synthetic marijuana can last between one and six hours and vary from person to person, with some users reporting a positive or even unremarkable reaction, whereas others end up in the emergency room with complaints of panic, body aches, and racing heartbeats. Also, like many controlled substances, Spice can be addictive or habit-forming, and because the trend of recreational synthetic marijuana use is relatively new, the research relaying its side effects is not yet exhaustive, and there is no guide about what constitutes safe or tolerable dosages.

Another major issue involves the marketing tactics of synthetic drug manufacturers, who capitalize on the idea that the drug is a legal alternative to natural marijuana. Thus, Spice has become extremely popular amongst teenagers and young adults who can now easily satisfy their desire to experiment with recreational drugs by purchasing an over-the-counter product at a local head shop or convenience store. The Office of National Drug Control Policy reports that in a 2011 synthetic drug study “11.4 percent of 12th graders used Spice or K2 in the past year, making it the second most commonly used illicit drug among [high school] seniors.” Furthermore, the American Association of Poison Control Centers reported that “2,906 calls relating to human exposure to synthetic marijuana were received in 2010. Twice that number (6,959) were received in 2011, and 639 had been received as of January 2012.”

Moreover, many uninformed and impressionable youths equate the drug’s technically legal status and widespread availability with the notion that the drug is a milder, less dangerous version of marijuana. Synthetic marijuana also largely appeals to many of its users because it often goes undetected in routine drug tests or urinalyses required by employers since basic drug tests merely detect traces of actual THC, but not synthetic cannabinoids. Despite its convenience or perceived legality, synthetic marijuana is a dangerous substance that has contributed to several deaths and injuries across the United States.

27. See Duckworth, supra note 5, at 35.
28. Id.
29. See id. at 35–36.
30. See id. at 35.
31. See White House Fact Sheet, supra note 6.
32. See id.
33. Id.
34. Id.
36. See id.
37. See id. (reporting that synthetic marijuana has been the culprit of “hundreds of emergency room visits and a handful of fatalities,” including the death of a twenty-six-year-
B. Bath Salts

In many aspects, bath salts mirror the origins, prevalence, and manufacturing methods of synthetic marijuana because both are designer drugs intended to produce "'legal' highs" without the interference of legislative or regulatory control. One major difference is that synthetic marijuana is considered by its users to be "'fake weed,'" whereas bath salts are known as legal ecstasy (MDMA) or cocaine. Although the growing prevalence of synthetic marijuana generated feelings of caution, curiosity, and concern, the emergence of bath salts amplified this sentiment into a public uproar that fully captured the attention of the media, state and federal legislators, and the entire nation. Bath salts became a media sensation due to a gruesome and highly publicized crime that occurred in Miami, Florida, on May 26, 2012, involving a "[b]ible-toting 31-year-old" man named Rudy Eugene. Eugene, who was presumed to be under the influence of bath salts, shed all of his clothing and not only ruthlessly attacked a homeless man, but also began tearing away parts of the man's face and eating his flesh. A stunned police officer encountered the cannibalistic scene and fatally shot Eugene after ordering him to stop, but Eugene simply growled at the officer and continued his attack. Toxicology reports later confirmed that Eugene had no traces of bath salts in his system (only traces of natural marijuana) at the time of the crime, but the news of zombie attacks resulting in violence and cannibalism solidified the idea that synthetic drugs are not merely innocent concoctions—they are serious chemicals that pose a substantial threat to their users and the general public.

In the world of designer drugs, bath salts have no relation to the therapeutic products sold in health stores or beauty and spa salons. Rather, "bath salts" is a street name for a designer drug that emerged in the

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38. See WHITE HOUSE FACT SHEET, supra note 6.

39. Compare K2 FACT SHEET, supra note 21, with DEA, DRUG FACT SHEET: BATH SALTS OR DESIGNER CATHINONES (2011) [hereinafter BATH SALTS FACT SHEET], available at http://www.justice.gov/dea/druginfo/drug_data_sheets/Bath_Salts.pdf (noting that the DEA reports that both drugs are advertised with similar purposes and are sold in the same retail markets).


41. See Sullum, supra note 40.


43. See id.


45. See Quan, supra note 22, at 241.
United States in 2008 that is often composed of “analogues” of cathinone, a derivative of the khat plant [that was] used as a stimulant for hundreds of years throughout the Middle East and Africa.” Like THC, cathinone is also listed as a Schedule I drug, and the most common bath salt ingredients—mephedrone (4-MMC), methylone, and methylenedioxypyrovalerone (MDPV)—are all currently under a federal ban. Before the ban, bath salts could commonly be purchased at head shops, at convenience stores, and via the Internet under names like “Bilss, Blue Silk . . . Snow Leopard, Stardust, Vanilla Sky . . . [and] White Lightening.” In addition to selling synthetic drugs as commonplace products like bath salts, manufacturers are also marketing the drug as plant food, pond cleaners, insect repellants, and vacuum fresheners.

With regards to the drug’s effects, bath salts are reported to induce sensations akin to controlled stimulants like cocaine, ecstasy (MDMA), amphetamines, and LSD, and the drug can come in the form of a pill or a “white, off-white, or slightly yellow-colored powder.” Like cocaine, synthetic cathinones are ingested by snorting, but they can also be injected, smoked, or swallowed. Users of the drug often seek to achieve feelings of “increased arousal, sociability, . . . euphoria[,] . . . increased mental focus, stimulation, and physical energy.” Although the drug is chemically similar to illicit drugs that promote high energy and an upbeat mood, bath salts can actually induce an array of extremely serious side effects on the body, mind, and cardiovascular system, such as “tachycardia, hypertension, hyperthermia[,] . . . peripheral vasoconstriction[,] . . . insomnia, depression, hallucinations, anxiety, psychosis, paranoia, confusion, and excited delirium.” Since the ingredients in bath salts are constantly changing, its effects can be unpredictable, but many users experience a high for about thirty minutes to two hours, with a “come down’ phase” usually lasting between two and four hours. Another dangerous aspect of bath salts is that, like cocaine and other stimulants, they are highly addictive and induce serious withdrawals, adding an additional threat to its consumers—many of whom are young, uninformed, or simply seeking a quick thrill. Recent data from the American Association

46. Duckworth, supra note 5, at 32–33.
48. See Duckworth, supra note 5, at 33.
50. BATH SALTS FACT SHEET, supra note 39.
51. See WHITE HOUSE FACT SHEET, supra note 6.
52. See Duckworth, supra note 5, at 32.
53. BATH SALTS FACT SHEET, supra note 39.
54. See id.
55. Duckworth, supra note 5, at 33.
56. Id.
57. Id.
58. See id.
of Poison Control indicates that the drug has not simply caused a few adverse reactions, but has negatively affected thousands of consumers nationwide: "the number of calls related to bath salt exposure received by poison control centers across the country increased by more than 20 times in 2011 alone, up from 304 in 2010 to 6,138."59

C. EARLY ATTEMPTS OF SYNTHETIC DRUG REGULATION AND THE "NFHC" LABEL

The present danger is that Spice and bath salts, which are basically analogous in form and function to marijuana and cocaine, have become legally sold and easily attainable.60 The federal government has long been aware of the existence of designer drugs and of the ability of chemists to create various analogues, and Congress specifically attempted to subdue the problem by enacting the Controlled Substances Analogue Enforcement Act (AEA), which was added to the Controlled Substances Act (CSA) in 1986.61 The AEA states: "[a] controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I."62 Thus, although the AEA seemingly offers widespread legislative regulation for the threat of synthetic drugs, the innocuous phrase "to the extent intended for human consumption"63 created a technical loophole in a sweeping federal regulation that soon allowed synthetic drug manufacturers to weasel their way around the law and capitalize on a $5 billion-per-year industry.64

To bypass U.S. Food and Drug Administration ("FDA") regulations and the CSA, synthetic drug manufacturers have devised creative marketing tactics wherein they literally package their chemicals as everyday retail items such as herbal incense, potpourri, or bath salts—products that also conveniently share similar outward appearances to synthetic marijuana, cocaine, and ecstasy.65 To loosely justify the notion that these items are indeed household goods, manufacturers simply add a "not for human consumption" ("NFHC") label on their product packaging.66 Therefore, "[t]he loophole through which many designer drugs slip is the fact that, unless specifically banned, chemical substances labeled as 'not for human consumption' are not considered drugs at all."67 The fact that American

59. White House Fact Sheet, supra note 6.
60. See id.
63. See id.
64. See Bath Salts: The Synthetic Scare, supra note 40; see also Rose, supra note 35 (noting that "sales in the synthetic drug industry seem to be growing—to roughly $5 billion a year, according to Rick Broider, president of the North American Herbal Incense Trade Association").
65. See White House Fact Sheet, supra note 6; see also Duckworth supra note 5, at 32-34.
66. See Duckworth, supra note 5, at 32.
67. Id.
Poison Control Centers have been flooded with calls regarding synthetic drugs proves that many of its consumers treat their adverse reactions as poison exposure rather than drug overdoses.\textsuperscript{68} Despite the covert methods employed by drug manufacturers, the reality remains that these products are not sold in salons or mainstream supermarkets. Instead, they are found in tobacco stores and head shops, alongside smoking products and pipes, with tag lines like “‘[n]ever lets you down’ and ‘lab certified.’”\textsuperscript{69} Furthermore, synthetic marijuana has even been sold in the form of “prerolled cigarettes,” which casts a large shadow of doubt and absurdity on the marketing schemes of synthetic drug manufacturers and their shoddy NFHC warnings.\textsuperscript{70}

In addition to improper marketing and labeling issues, government and law enforcement agencies must also worry about the evolving science of designer drug development.\textsuperscript{71} Just as the NFHC label enables drug companies to legally sell designer drugs in head shops and convenience stores, these companies have also resiliently found ways to circumvent any drug bans enacted by state or federal authorities.\textsuperscript{72} Physicians and DEA chemists have described the struggle to stop manufacturers and ban their newly minted substances as “‘a cat and mouse game’” and as “‘playing whack-a-mole.’”\textsuperscript{73} Essentially, each time legislators implement temporary bans on particular synthetic drug ingredients, chemists quickly substitute the banned ingredients with newly created analogues, thus allowing them to thwart the law and continue business as usual.\textsuperscript{74} As a result, chemists and “‘narcopharmacologists are always a few steps ahead of the authorities.’”\textsuperscript{75} Furthermore, newly implemented bans inflame the growing problems of regulating synthetic drug sales via the Internet and the constant influx of unknown overseas ingredients while the DEA, U.S. Customs and Border Protection, and other law enforcement agencies, chemists, and forensic specialists wrestle with the challenge of identifying unknown and mysterious substances.\textsuperscript{76}


\textsuperscript{70} See Duckworth, supra note 5, at 34.

\textsuperscript{71} See White House Fact Sheet, supra note 6.

\textsuperscript{72} See Knopf, supra note 8.

\textsuperscript{73} See id. (quoting H. Westley Clark, M.D., who described the synthetic drug war as “‘a cat and mouse game’”); see also Synthetic ‘Bath Salts’ An Evolving Problem for DEA, NPR (June 30, 2012, 4:23 PM), http://www.npr.org/2012/06/30/156048262/synthetic-bath-salts-an-evolving-problem-for-dea (quoting Arthur Berrier, a senior research chemist for the DEA, who compared the problem to playing “‘whack-a-mole’”).

\textsuperscript{74} See Rose, supra note 35.

\textsuperscript{75} Knopf, supra note 8 (quoting H. Westley Clark, M.D.).

\textsuperscript{76} See White House Fact Sheet, supra note 6; see also Rose, supra note 35.
To worsen matters, these newly created analogues, which are made in laboratories that have no regard for consistency, oversight, or quality standards, have resulted in synthetic drugs that are much more potent and dangerous than natural THC and the conventional stimulants these drugs intend to mimic. While chemists attempt to avoid the restrictions of governmental agencies, they are creating potentially hazardous, and even lethal, new compounds. This unsettling fact has also put police and healthcare providers on edge, as there is "no 'antidote'" for overdoses, and users of synthetic drugs are prone to hallucinations and increased energy as well as violent, agitated, and unpredictable behavior. Moreover, physicians and emergency room staff are faced with the same problem as government officials of trying to predict and identify what synthetic ingredients a patient may have ingested since many analogues are not readily detectable in standard drug tests.

III. CURRENT STATE OF THE LAW

Synthetic drugs have not only instigated a surge of media speculation and nationwide concern, but also pose an undeniable risk to public health and safety, which leaves state and federal legislators with a very daunting task: fixing the problem. As of 2012, it was clear that the Analogue Enforcement Act and the Controlled Substances Act were insufficient to control the rapidly evolving nature of designer drugs and the underhanded tactics of its manufacturers. This Part chronicles current state and federal regulatory initiatives and their effect on criminal law due to the ongoing legal backlash amongst legislators, the DEA, synthetic drug retailers, manufacturers, and consumers.

A. THE RACE TO BAN SYNTHETIC ANALOGUES

The NFHC label has allowed synthetic drug manufacturers and retailers to supersede government oversight and establish an enormous, yet surprisingly legal, designer drug empire. Although it is not possible to automatically halt synthetic drug production, both the U.S. government and the DEA have worked to enact legislation that aims to counteract and control the recent designer drug boom. In addition to dodging CSA

77. See Rose, supra note 35 ("Christine Stork, the clinical director of the Upstate New York Poison Control Center, says that she's seen a steady stream of synthetic marijuana users turn up in emergency rooms over the past few years and that "synthetic marijuana can be 20 times as potent as real marijuana."); see also WHITE HOUSE FACT SHEET, supra note 6.
78. Quan, supra note 22, at 239–40.
79. See Duckworth, supra note 5, at 36.
80. See id. at 32.
81. See WHITE HOUSE FACT SHEET, supra note 6.
82. See id. (outlining federal government efforts to enact legislation and temporarily classify identified synthetic analogs as Schedule I drugs).
83. See Bath Salts: The Synthetic Scare, supra note 40.
84. See WHITE HOUSE FACT SHEET, supra note 6; see also News Release, Office of Nat’l Drug Control Policy, White House Drug Policy Director Convenes Federal Agencies
laws, the synthetic drug industry has capitalized on the fact that enacting federal legislation is a colossal and slow-moving process that allows retailers to still make profits in the interim of governmental regulatory attempts; however, federal efforts have resulted in the adoption of the Synthetic Drug Abuse Prevention Act of 2012 (SDAPA)—a powerful legislative tool that offers nationwide control and hopes to end the synthetic drug “cat and mouse game.”

The U.S. government first encountered the issue of K2 and Spice in November 2008, which was much too early to predict its widespread future repercussions and actualize adequate oversight. As a result, there were no state or federal regulations in place that controlled or impeded the production of synthetic cannabinoids or bath salts before 2010. The most adequate combative measure was to place currently identified analogues under a temporary ban so that the government could at least curtail any identified ingredients in Spice and bath salts. The DEA is largely in charge of controlling drug trafficking and enforcing the CSA, which classifies drugs as controlled substances by categorizing them as Schedule I through Schedule V. Schedule I means “high potential for abuse . . . no currently accepted medical use,” and “a lack of accepted safety for use of the drug . . . under medical supervision,” while Schedule V means there is “low potential for abuse” compared to the Schedule I-IV drugs and “a currently accepted medical use . . . in the United States,” together with little chance of “physical or psychological dependence.” Temporary drug bans are made possible through the Comprehensive Crime Control Act of 1984, which amended the CSA to allow the Attorney General to “temporarily place a substance into Schedule I of the CSA for one year” if such action is needed to “avoid imminent hazard to the public safety.” These emergency bans have the possibility of being extended from the one-year limit for an extra six months if there are current proceedings pending to permanently schedule the substance under 21 U.S.C. § 811(a)(1).

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86. See WHITE HOUSE FACT SHEET, supra note 6.
87. Id.
88. See id.
93. Id.
Although there was no regulatory enforcement as of 2010, on November 24, 2010, the DEA Administrator initiated the temporary ban process by filing a notice of intent to classify five synthetic cannabinoids as Schedule I drugs.\textsuperscript{94} The DEA's action to ban the five synthetic substances became a final order on March 1, 2011, and was published in the Federal Register to inform the public that "the manufacture, distribution, possession, importation, and exportation of these synthetic cannabinoids" would result in the same "criminal, civil and administrative penalties" imposed for Schedule I drugs.\textsuperscript{95} The emergency ban was considered a catalyst against the synthetic drug war, though it would take larger legislative efforts to aid the states in subduing the use of a popular product, whose industry was allowed to thrive due to its long-held status of being in "legal limbo."\textsuperscript{96} Also, on September 7, 2011, the White House Drug Policy Director Gil Kerlikowske acknowledged that designer drugs were a subject of national concern and met with federal agency representatives from the DEA, the FDA, the Centers for Disease Control, the Department of Homeland Security, and prominent drug-control organizations to address the serious impacts of synthetic drugs on national health and safety.\textsuperscript{97} The DEA's mission against bath salts materialized on October 21, 2011, when a final order was issued to temporarily classify three types of synthetic cathinones as Schedule I drugs: mephedrone, methylone, and MDPV.\textsuperscript{98}

The eminence of synthetic drugs and the keen, steadfast nature of its manufacturers increased national tension to the point that "[l]ocal police agencies . . . called on Congress to make it easier for the DEA to quickly ban substances because it's so easy for drug manufacturers to switch chemicals. Currently, it can take years for the DEA to permanently ban a substance."\textsuperscript{99} On December 8, 2011, Congress began laying the groundwork for SDAPA when the U.S. House of Representatives approved H.R. 1254 (with a 317-98 vote), which sought to ban bath salts, K2, and other synthetic compounds, and proposed to further increase the DEA's temporary ban authority by extending the ban period from its regular one-year period (with a possible six-month extension) to a three-year period, in hopes of giving the DEA more time to study and regulate possible harmful substances.\textsuperscript{100} Although H.R. 1254 was never adopted into

\begin{footnotes}
\footnote{94. See id. (intending to temporarily classify JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol as Schedule I drugs).}
\footnote{95. Id.}
\footnote{97. White House Drug Policy Press Release, \textit{supra} note 84.}
\footnote{100. See Synthetic Drug Control Act of 2011, H.R. 1254, 112th Cong. (2011); Jim Abrams, \textit{House Votes to Ban Synthetic Drugs Sometimes Marketed as 'Bath Salts' and...}
law, the U.S. Senate soon followed suit and organized its own proposals to combat designer drugs. On May 24, 2012, with a nearly unanimous vote of 96-1, the Senate approved the FDA Safety and Innovation Act, which contained an amendment that was the precursor to SDAPA, and, like H.R. 1254, it intended to classify various synthetic substances as Schedule I drugs and increase the length of emergency bans. The House and Senate eventually abridged their differing proposals and agreed to criminalize twenty-six types of synthetic marijuana and cathinone formulations and increase the DEA's regulatory authority by broadening the duration of temporary bans. A congressional consensus was finally attained on June 26, 2012, when the House also approved the FDA Safety and Innovation Act, which was subsequently signed into law by President Obama on July 9, 2012.

After months of national concern, media speculation, and political strategizing, Congress and the President unveiled the Synthetic Drug Abuse Prevention Act of 2012, a law that largely counteracted synthetic drugs by classifying popular analogues that were already under former DEA emergency bans into the Schedule I category. Before the implementation of SDAPA, the DEA placed eight analogues under a temporary ban: five types of synthetic cannabinoids commonly found in Spice products, and three synthetic cathinones, which at the time were the most popular ingredients in bath salts. Furthermore, the DEA planned to initiate proceedings pursuant 21 U.S.C. § 811(a)(1) to extend the synthetic cannabinoid bans by the statutory six-month period; however, SDAPA rendered these attempts unnecessary since it broadly placed many of the substances that the DEA hoped to outlaw into the Schedule I category. With regards to its specific legislative changes, SDAPA adds a new section entitled "Cannabimimetic Agents" under the CSA's list of Schedule I substances, wherein the new list names fifteen different analogues cited by chemical composition and includes the most often-abused variations of synthetic marijuana. SDAPA also adds eleven chemical compounds to a section entitled "Other Drugs," which includes

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4. See DEA News Release 2, supra note 11.
7. Id.
8. See id.
mephedrone and MPDV, the main additives found in bath salts. However, methylone, a prominent analogue used in bath salts, was not permanently labeled within the Schedule I list like the other twenty-six substances but was added to a temporary ban list, which was effectuated by final order on January 04, 2013. Lastly, SDAPA amends the CSA’s temporary ban provision to increase emergency bans from one year to a new baseline period of two years, with the possibility of a one-year extension, therefore instituting a maximum temporary ban period of three years.

Although advocates and legislators anticipated that the SDAPA would be a powerful regulatory weapon against popular drugs that allure, captivate, and threaten the American public, there is still ample concern that the quickly adapting nature of designer drugs has caused lawmakers to again remain one step behind the crafty chemists that formulate these drugs. While some members of Congress are confident that widespread prohibitions will promote public safety and allow the law to “‘stay[ ] one step ahead of the criminals,’” others feel as though the law is practically null and void. In fact, media reports outlining public skepticism were already flourishing in the days before and after the SDAPA’s effectuation: “A federal ban on synthetic drugs, signed into law by President Obama . . . was obsolete before the ink of his signature dried. Drug formulations not covered by the law’s language, and almost certainly synthesized in direct response to legal pressure, are already on sale.” The SDAPA does not instill fear or caution into those straddling the boundaries of legality; rather, synthetic drug retailers and their advocates continue to defy federal efforts and even boastfully point out the SDAPA’s shortcomings. Moreover, law enforcement officials, politicians, and DEA agents have already expressed exasperation and worry that the SDAPA will result in yet another legislative misfire due to its narrow reg-

110. Id. at 1131–32.
115. See Rose, supra note 35.
118. See Smith, supra note 113.
ulation of bath salt ingredients.\textsuperscript{119} During negotiations, the DEA proposed a list of forty-one substances that it hoped would be classified as Schedule I drugs, including seventeen bath salt ingredients.\textsuperscript{120} Nevertheless, the SDAPA selectively encompasses twenty-six substances, only two of which are bath salt ingredients and which were already controlled under the temporary bans anyway.\textsuperscript{121} Despite finalized regulations and public criticism, legislators and designer drug supporters still perpetuate their battles as they both project marked optimism on their opposing stances, with New York Senator Charles Schumer touting the SDAPA as "the final nail in the coffin for the legal sale of bath salts," whereas scientists continue to verify the existence of similar chemical concoctions that would still legally escape the SDAPA's grasp\textsuperscript{122}—facts that create further uncertainty about the future of synthetic drugs.

\section*{B. SYNTHETIC DRUGS AND CRIMINAL LAW: LEGAL TODAY, ILLEGAL TOMORROW}

In the midst of federal legislative undertakings, several states have also prompted their own drug bans and have not only taken an active regulatory role in eradicating the prevalence of these drugs, but have also joined forces with federal agencies to aggressively target and prosecute synthetic drug retailers, consumers, and distributors.\textsuperscript{123} When the DEA initially placed five synthetic cannabinoids under a temporary ban in March 2011, roughly sixteen states had taken action against certain synthetic chemicals.\textsuperscript{124} As of November 2012, forty-five states plus Puerto Rico had enacted bans targeting certain types of synthetic cannabinoids, synthetic cathinones, or both.\textsuperscript{125} The constant modification of designer drug formulations has instigated an avalanche of individual state bans that have also been changing in scope and substance to squelch the problem.\textsuperscript{126} Thus, synthetic drugs have created a legal cataclysm within the areas of commercial and criminal law, sparking national raids and condemnatory lawsuits, as well as the arrests of retailers and consumers, many of whom assumed the substances were legal at the time of their

\begin{footnotesize}
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\begin{footnote}{See id.}
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\begin{footnote}{See Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, § 1152, 126 Stat. 993, 1130–32 (listing twenty-six compounds as Schedule I, with Mephedrone and MPDV being the only prohibitions affecting bath salts); see also Goldman, supra note 119.}
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\begin{footnote}{See Keim, supra note 117 (noting that a toxicologist personally tested two synthetic drug compounds, UR-144 and XLR-11, which are currently available for public sale as herbal incense products, and also quoting a U.S. Senator's opinion on the SDAPA).}
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\begin{footnote}{See DEA News Release 1, supra note 9.}
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alleged crimes.\textsuperscript{127}

To retaliate, state and federal authorities have focused on subduing what many consider a primary stronghold in the synthetic drug arena: retailers and manufacturers.\textsuperscript{128} Excluding the Internet, convenience stores and head shops are the primary vendors of herbal incense and bath salt products.\textsuperscript{129} In addition to legislative pressures, the National Association of Convenience Stores ("NACS") warned 148,000 of its participating retailers to stop selling synthetic drug products, though many retailers did not heed this advice.\textsuperscript{130} Furthermore, in July 2012, New York Attorney General Eric Schneiderman began his own crusade against local retailers when he sued twelve different head shops for allegedly violating New York's labeling statutes by selling deceptively packaged drugs.\textsuperscript{131} Though some of the decisions are currently pending, Schneiderman's efforts procured several injunctions against the retailers, forcing them to cease selling all improperly labeled drug products.\textsuperscript{132} For example, following an undercover investigation, a $15,000 fine and a permanent injunction were issued against the owner of two New York head shops for violating labeling laws by selling ambiguously packaged synthetic drugs with NFHC labels posing as air fresheners and products used to make whipping cream.\textsuperscript{133} The order was issued by Justice Kevin K. Ryan, who likened the sale of improperly labeled designer drugs to engaging in fraudulent activity, and further stated: "[I]t staggers the imagination to believe [the products] were not intended to be consumed . . . . Simply put, the respondent offered over the counter drugs for sale without providing the consumer with much of the information required by law."\textsuperscript{134}

The sale of synthetic drugs can result in varied civil and criminal allegations that are far more complex than the usual charges of mere possession or possession with intent to distribute substances that violate state or fed-

\begin{itemize}
\item \textsuperscript{129} See DEA News Release 1, \textit{supra} note 9.
\item \textsuperscript{130} See \textit{Nationwide Crackdown Commences on Synthetic Drugs}, NACS ONLINE (Jul. 27, 2012), http://www.nacsonline.com/NACS/News/Daily/Pages/ND0727122.aspx.
\item \textsuperscript{131} See Schneiderman Press Release, \textit{supra} note 128.
\item \textsuperscript{132} See id.
\item \textsuperscript{134} See Schneiderman Press Release, \textit{supra} note 128.
\end{itemize}
eral drug statutes. For example, on March 4, 2012, in Atlanta, Georgia, David Burnett found his sixteen-year-old son, Chase, dead in their backyard hot-tub. An open bag of synthetic marijuana consisting of AM-2201 was found next to the boy, and an autopsy showed that the boy died from consuming the drug. The product was branded as potpourri called "Mojo Diamond Extreme 100x," and it also had a NFHC label. The Burnetts filed a complaint against the product manufacturer, Omerta Labs, LLC, and Lunar Labs, LLC, and its owner, Peyton Palaio, wherein they stated that the defendants' negligence was the proximate cause of their son's death. They further asserted claims of strict liability, negligence per se, and a violation of the Georgia racketeering statute.

Similarly, two men in Houston have been charged for selling synthetic marijuana products that resulted in the deaths of two teen boys in North Dakota. Specifically, the complex importation of the drugs has been traced to China, Canada, and Great Britain, with the drugs eventually being sold via the Internet to dealers, who in turn sold the dangerous substances to the two deceased teenagers.

Following the passage of the SDAPA, the DEA heightened its strategy by joining forces with state, local, and federal agencies to stage an attack against synthetic drug retailers, wholesalers, and manufacturers. On July 26, 2012, the DEA celebrated a victory when it executed a sweeping synthetic drug raid called Operation Log Jam. This noteworthy operation was the first antisynthetic drug crime enforcement scheme ever to take place on a national scale and was made possible through an expansive collaboration involving U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection, the U.S. Postal Inspection Service, the FBI, the IRS, the FDA, and several state and local crime enforcement units from 109 cities across the country. After executing over 265 search warrants, 29 of which were for manufacturing facilities, Operation Log Jam resulted in 91 nationwide arrests and an astounding array of seizures—4.8 million packets of synthetic cannabinoids and the products to produce nearly 13.6 million more, as well as 167,000 packets of synthetic cathinones, and the products to produce an additional

136. See id. at 9.
137. Id. at 10, 16.
138. Id. at 10–13.
139. Id. at 28.
140. Id. at 51, 63, 73–76.
142. See id.
143. Id.
144. See DEA News Release 1, supra note 9.
145. Id.
146. Id.
392,000 [and] . . . $36 million dollars in cash, 53 guns, and almost $6 million in assets.”¹⁴⁷

The recent outpouring of state bans has confused consumers and created a realm of uncertainty where possession of the legally ambiguous substances can be permissible one day, yet rendered a felony offense the next.¹⁴⁸ For example, in State v. Nickel, a North Dakota Supreme Court case, Nickel was charged with various counts of violating the state's Uniform Controlled Substances Act due to his possession of synthetic substances that were outlawed pursuant to a recent emergency interim rule banning seven synthetic substances, including certain cannabinoids and mephedrone.¹⁴⁹ Nickel was charged with violations occurring in May, July, and August of 2010, and although the ban had an effective date of February 26, 2010, the final rule had not been properly publicized and was not added to the state's Administrative Code until October 2010.¹⁵⁰ The trial court granted Nickel's motion to dismiss, concluding that the rule was invalid at the time of Nickel's crimes because the North Dakota Board of Pharmacy (the “Board”) failed to follow the proper procedure required to adequately notify the public; the North Dakota Supreme Court affirmed.¹⁵¹ To effectuate adequate notice of emergency rules, the state statute simply directs that an “agency shall take appropriate measures to make interim final rules known to every person who may be affected by them.”¹⁵²

The Board argued its compliance based on the fact that the state Attorney General held a press conference after the rule’s adoption. Although several news outlets heavily publicized the ban, neither the media nor the state ever publicized a complete list of the exact seven substances that were criminalized until the October 2010 state code publication.¹⁵³ Additionally, the Board claimed that several of its agents informed businesses in nine different cities about the new rule, but none of the businesses were given documentation of the rule’s scope or technicalities, and the Board had even failed to give a copy of the rule to the state's criminal investigation unit.¹⁵⁴ Though the court acknowledged that media publications informed the public about how to obtain a copy of the rule, it also recognized that none of the sources pointed out the very important fact that the rule was presently in effect.¹⁵⁵ In concluding that the state failed to meet its burden, the court rightfully reasoned that the “rule imposed grave consequences on the general public” and

¹⁴⁹ Id. at 156–57.
¹⁵⁰ Id. at 157.
¹⁵¹ Id. at 156–57.
¹⁵² Id. at 158 (citing N.D. CENT. CODE ANN. § 28-32-03(5) (West 2009)).
¹⁵³ Id. at 159.
¹⁵⁴ Id. at 157, 159.
¹⁵⁵ Id. at 159.
“turned any person’s purchase, sale or possession of lawful products into felony level offenses overnight.”\(^\text{156}\)

By contrast, comparable facts brought about a very different outcome in *Haag v. State*, which is also a North Dakota Supreme Court case.\(^\text{157}\) In *Haag*, the defendant hoped to achieve an outcome similar to *Nickel* after he petitioned for post-conviction relief on the grounds that he pled guilty to a crime that was unenforceable at the time.\(^\text{158}\) Specifically, on November 12, 2010, Christopher Haag was arrested for possession and intent to distribute a synthetic cannabinoid (JWH-018) that was banned under North Dakota’s emergency ruling in October 2010; Haag pled guilty in May 2011.\(^\text{159}\) In making his claim, the defendant mistakenly argued that the Board’s emergency interim rule was rendered void under *State v. Nickel*.\(^\text{160}\) The North Dakota Supreme Court rejected this argument and denied post-conviction relief, stressing that the issue in *Nickel* was whether the Board adequately alerted the public of the ban—an issue that was resolved in October 2010—when the emergency rule became permanent and the illicit formulations were publicized in the Administrative Code.\(^\text{161}\) Conversely, the pertinent issue in *Haag* was simply whether the crimes were committed prior to October 2010.\(^\text{162}\) But because Haag’s violations occurred in November 2010, the court determined that he had to endure the full extent of the law despite the fact that these convictions could have been dodged had they occurred just a short time prior to the rule’s finalization.\(^\text{163}\)

Apart from issues concerning time-sensitive convictions and adequate public notice of new bans, synthetic drugs have also brought up questions of statutory interpretation and even constitutional law.\(^\text{164}\) In *State v. Beaudette*, a Louisiana case, Cody Beaudette appealed the district court’s denial of his motion to quash a conviction for possession of JWH-210, a synthetic cannabinoid that was not specifically listed as a Schedule I drug at the time of his offenses on March 16 and March 24, 2011, respectively.\(^\text{165}\) Nevertheless, the relevant state statute broadly criminalized the possession or distribution of any Schedule I controlled substances or analogues of Schedule I substances, wherein an “analogue” was vaguely defined as any compound that shares a “substantially similar” chemical.

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156. *Id.*
158. *See Haag*, 823 N.W.2d at 750.
159. *Id.*
160. *See id.* at 750-51.
161. *Id.*
162. *Id.*
163. *Id.* at 752.
structure with a Schedule I or Schedule II drug.166 The defendant made three claims: First, they claimed that the district court misinterpreted Louisiana statute § 40:966(A)(1) by labeling JWH-210 an illegal substance without regard for whether it was a Schedule I drug, and second, they claimed that because JWH-210 was not listed as Schedule I at the time of the offense (but was subsequently listed as Schedule I on July 15, 2011), the defendant suffered an ex post facto conviction in violation of his state and federal constitutional rights.167 Although the court highlighted that an expert witness (an organic chemist) verified that JWH-210 was indeed an analogue to Schedule I drug JWH-018, the defendant further argued that the expression “substantially similar” was “unconstitutionally vague” since the statute failed to outline quantifiable definitions and “the necessary relationship between the chemical structure and the effect of the parent drug and its alleged analogue.”168 Beaudette also claimed that broad blanket terms in the state statute led to one-sided convictions, and the fact that an organic chemist was required to classify the drug proved that the general public would have no way of discerning the illegality of the substance.169 The court quickly dismissed the defendant’s arguments and held that the law was not retroactively applied since the statute’s mention of “analogues” encompassed JWH-210.170 While the court conceded that the phrase “substantially similar” was not defined in the statute, it still denied the constitutional law claim on the vulnerable conclusion that the statute did offer proper public notice, and that criminalization of certain types of synthetic marijuana would allow citizens to easily deduce the illegality of other comparable products.171 Although controlling case law involving synthetic drugs is still being carved out, Nickel, Haag, and Beaudette currently confirm that the outcomes of criminal cases involving synthetics can be as unpredictable and varied as the substances themselves.

IV. ANALYSIS

Since their 2010 debut, designer drugs have not only sparked national curiosity, outrage, and concern, but they have also instigated colossal regulatory feats, such as the SDAPA and Operation Log Jam.172 Additionally, these drugs have forged a plethora of legal and criminal liabilities. Despite widespread regulatory commotion, designer drugs—much like the original drugs they intend to mimic—still remain a lingering problem.173

166. See id. (referencing LA. REV. STAT. ANN. § 40:961(8) (2012)).
167. See id. at 602–03. The court notes that “ex post facto laws are prohibited by Article I, sections 9 and 10 of the United States Constitution and Article I, section 23 of the Louisiana Constitution.” Id. at 603.
168. Id. at 604.
169. Id. at 603.
170. Id.
171. Id. at 604.
172. See WHITE HOUSE FACT SHEET, supra note 6; DEA News Release 1, supra note 9.
173. See Keim, supra note 117; see also Kelley, supra note 127.
A. Are Blanket Bans a Problem or a Solution?

Congress and state and federal law enforcement agencies have expressed that bans and legislation are the solutions to the nation's designer drug problem. While these dangerous and addicting substances do necessitate regulatory action, there are still those who oppose the strategic counter-tactic of simply imposing rampant and vaguely-worded bans that aim to encompass any new or unknown analogue that might materialize—a measure that could bring about legal injustices and other significant consequences.

For example, the DEA viewed Operation Log Jam as a triumphant move against the synthetic drug industry—a collaborative and heroic operation that resulted in the nationwide crackdown of criminals and drug dealers. On the other hand, critics consider the event to be nothing more than an act of hasty arrests and reckless government overreaching. While the criminal outcome of this raid has yet to be sorted out, a DEA Press Release concerning Operation Log Jam concedes that many of the confiscated substances were not expressly scheduled in the CSA. Nevertheless, the DEA stated that it intends to criminally prosecute these alleged offenders under the Analogue Enforcement Act (AEA), which would allow the DEA to treat the substances as criminal “if they are proven to be chemically and/or pharmacologically similar to a Schedule I or Schedule II” drug. Interestingly, the DEA Log Jam Press Release mysteriously makes no mention of the SDAPA, which was passed only a few days prior to the raid, nor does it mention whether any of the substances were covered under the SDAPA legislation. The DEA's release relies solely on AEA provisions in hopes of successful convictions, which might be yet another indirect indicator that the SDAPA is indeed already obsolete. Moreover, Spencer Siegel, a criminal defense attorney who has organized a group of lawyers and scientists to advocate for Operation Log Jam defendants, predicts that many of the charges will be dismissed in court. Specifically, he claims that UR-144, a compound used in many of the seized herbal incense products, was in fact legally compliant at the time of the raid because the compound differs in both structure and effect from the scheduled drugs listed in the AEA. Just as State v. Nickel acknowledged that widespread bans can immediately

174. See DEA News Release 1, supra note 9; see also Sen. Coons News Release, supra note 114.
175. See Kelley, supra note 127.
176. See Log Jam Press Conference, supra note 147.
177. See Kelley, supra note 127.
178. DEA News Release 1, supra note 9.
180. See DEA News Release 1, supra note 9.
181. See id.
182. See Smith, supra note 113.
183. See Kelley, supra note 127.
184. See id.
morph lawful behavior into felony violations, critics and head shop owners also wonder whether the DEA simply intends to condemn retailers and entrepreneurs as dangerous and morally reprehensible drug-pushers. It is undeniable that synthetic drugs have sparked controversy and chaos, and that state and federal governments rightfully wish to exercise their police powers to hold people legally accountable, but the persecution of newly developed and technically legal synthetics further raises the issue of whether law enforcement agents are simply conflating what is illegal with what is immoral and socially unethical. Therefore, it is up to the judiciary to take the utmost care in analyzing these cases to ensure that any convictions are firmly grounded in the law—an analysis that will necessitate scientific experts, meticulous statutory scrutiny, and special attention to the wording and descriptions of the bans.

Additionally, blanket bans trigger serious and time-sensitive criminal penalties, which require extensive inquiry into the specificity of the ban and whether the public had adequate knowledge of these newly criminalized substances. Thus, the “cat and mouse” struggle is further perpetuated in the courtroom when states and law enforcement agencies lobby for the condemnation and conviction of synthetic drug possessors, who they consider to be criminals and lawbreakers, while defendants counterargue that they are lawful entrepreneurs or consumers who simply fell prey to abrupt criminalization. There is also the important caveat of adequate notice, since many consumers were under the belief that the substances they purchased were legal at the time (and many if not all of the substances were legal at some point)—an issue that is further muddled by NFHC labels.

Moreover, the defendant in State v. Beaudette brings up the pertinent concern that no one—not a police officer, judge, or even a chemist—can determine the illegality of a substance based on human sight or sense alone; the determination requires chemists, lab equipment, and expert

186. See Kelley, supra note 127; see also DEA News Release 1, supra note 9 (condemning the synthetic drug industry as complex, criminal drug trafficking schemes whose retailers have “‘scant regard for human life’”).
188. See United States v. Hodge, 321 F.3d 429, 437 (3d Cir. 2003) (analyzing the AEA and noting that interpreting “ambiguous criminal statutes” requires “close heed to language, legislative history, and purpose in order to strictly determine the scope of the conduct the enactment forbids”); see also State v. Beaudette, 2012-0871 (La. App. 1 Cir. 7/13/12), 97 So. 3d (requiring the use of an organic chemist to verify whether a synthetic drug qualified as a controlled substance analogue within a state statute), writ denied, 2012-2162 (La. 11/2/12), 99 So. 3d 679.
190. Rose, supra note 35.
192. See Rose, supra note 35.
knowledge.\textsuperscript{193} The \textit{Beaudette} court accepts a careless and potentially dangerous argument in holding that the defendant did indeed have "adequate notice" because consumers should assume the illegality of a substance based on the fact that similar products have also been outlawed.\textsuperscript{194} This holding is almost as ill-conceived as that of the North Dakota Board of Pharmacy in \textit{State v. Nickel}, which relies heavily on the publicity of third-party newspaper and media reports to support the conclusion that the public was adequately alerted about the criminalization of seven synthetic drugs.\textsuperscript{195} Issues of proper notice and the ability to discern a drug's illegality are echoed by Eric Vandervert, a head shop owner and former narcotics officer whose store was raided during Operation Log Jam.\textsuperscript{196} Vandervert notes that the operation was unfettered mayhem since DEA agents simply seized any and all products on site, thus attesting that there is no immediate way to discriminate between legal or illegal products.\textsuperscript{197} Therefore, "there is a problem for everybody involved in the synthetic drug crackdown: Cops don't know what they're looking at—they have to send it to the DEA lab for testing—and retailers have to make sure that what's inside their generically-branded bags is compliant."\textsuperscript{198} Vandervert states that he rigorously ensured that all his products abided with current laws or bans by periodically tracking legislation and sending samples of his incense or bath salt products to be lab-analyzed and checked for problematic ingredients.\textsuperscript{199} Though the DEA has not yet given him a clear answer as to whether or not his products were compliant, Vandervert predicts that the DEA will simply respond with yet another emergency ban, thus fueling the battle between law enforcement agencies and synthetic drug manufacturers.\textsuperscript{200}

Opposition to broad bans has been voiced by members of Congress and the scientific and medical communities, who fear that such sweeping prohibitions will negatively impact scientific research and development.\textsuperscript{201} Many of these substances may have medical value or therapeutic benefits, yet their indiscriminate criminalization will suppress any opportunity of adequate scientific study.\textsuperscript{202} For example, MDMA (commonly known as ecstasy), is currently a Schedule I drug,\textsuperscript{203} yet studies have shown that the drug has medical value in treating post-traumatic stress disorder.\textsuperscript{204} Thus, rampant emergency regulations may have far-reaching scientific and societal disadvantages: "'If you ban the whole class [of

\textsuperscript{193} See \textit{Beaudette}, 97 So. 3d at 603–04. \\
\textsuperscript{194} See \textit{id.} at 604. \\
\textsuperscript{195} See \textit{State v. Nickel}, 806 N.W.2d 155, 158–59 (N.D. 2012). \\
\textsuperscript{196} See Kelley, \textit{supra} note 191. \\
\textsuperscript{197} See \textit{id.} \\
\textsuperscript{198} Id. \\
\textsuperscript{199} See \textit{id.} \\
\textsuperscript{200} See \textit{id.} \\
\textsuperscript{201} See Knopf, \textit{supra} note 8; see also Diaz, \textit{supra} note 99. \\
\textsuperscript{202} See \textit{Knopf, supra} note 8. \\
\textsuperscript{203} 21 U.S.C. § 812(c)(1) (2006) (listed as 3,4-methylenedioxy amphetamine). \\
\textsuperscript{204} See Knopf, \textit{supra} note 8.
drugs], you would be presuming no future benefits of any of these compounds and that might be just as dangerous.’”205 This unfortunate truth also raises concerns regarding the swift regulation and classification of drugs into the Schedule I category, which requires that the drugs have “no currently accepted medical use.”206 The fact that MDMA is a Schedule I drug, yet was found to have medical benefits, at the very least raises the possibility that newly banned analogues could likewise have medical treatment benefits—a possibility that could go undiscovered without the chance of independent scientific studies.207

Moreover, swift and sweeping Schedule I legislation like the SDAPA presumes that the DEA has already adequately determined whether a newly formulated compound has medical value because its criminalization would likely halt any nongovernmental research or prolonged medical studies.208 Also, these potential issues could either be worsened or alleviated by the fact that the SDAPA expands DEA authority by enabling the DEA to issue longer emergency bans,209 which would allow the DEA more time to study any threatening substances.210 Conversely, it would also further prolong the period of time during which independent, commercial, or pharmaceutical scientific study of the banned substance would be deemed a severe criminal offense.211 Notably, when DEA and law enforcement agents expressed disappointment and disdain that the SDAPA’s probations were much too narrow, Senate Judiciary Chairman Patrick Leahy (D-Vt) responded by warning the public of the foreboding repercussions triggered by swift and widespread legislation.212 Although he was politically accused of favoring the quick adoption of mild and limited prohibitions rather than taking the time to draft and enact more drastic and all-encompassing legislation, a Senate supporter defended Leahy’s actions and pointed out very real societal consequences.213 “‘[Scheduling controlled substances is not something to be takenlightly. . . . It is not without implication to put a whole lot of chemicals on the federal drug schedule . . . . It means putting more people in jail and makes it harder to seek legitimate uses for these drugs.”214 These consequences were not exclusively voiced by a few skeptics and designer drugs supporters—but were echoed by physicians, scientists, and legislators

205. Id. (quoting H. Westley Clark, M.D.).
207. See Knopf, supra note 8.
210. See Abrams, supra note 100; see also Diaz, supra note 99.
211. See § 811(h)(2), 126 Stat. at 1132.
212. See Goldman, supra note 119 (quoting a Judiciary Committee staffer).
213. See id.
214. Id.
across the country.215

B. HISTORICAL PARALLELS AND FUTURE PERSPECTIVES

To forecast the success of constant bans and broad regulations, it is useful to look at previous political attempts to eradicate designer drugs and their rapidly emerging analogues.216 For example, in examining the regulatory schemes that were enacted to curtail the proliferation of opiates in the 1920s and 1930s, one legal scholar notes that broad national and international regulations have simply fueled supply, demand, and the creativity of drug-traffickers, thus causing an increased opiate influx within U.S. borders.217 “From the outset of drug prohibition in the 1920s, each act of suppression produced an equal and opposite criminal reaction. . . . As soon as governments slashed imports or closed opium dens, traffickers emerged to service the unmet demand.”218 This problem is already mirrored in today’s war on synthetics, with the nation’s newest designer drug threats and chemical variations tracked to overseas suppliers and underground laboratories located all over the world.219 Additionally, the issue of designer drugs was already dealt with in the 1980s—an era of emergent analogues that prompted the Controlled Substances Analogue Enforcement Act of 1986220— and also produced significant case law stressing the importance of careful judicial scrutiny in interpreting overbroad designer drug legislation.221 Also, the NFHC label and the proliferation of analogues being mislabeled and sold under the guise of household goods is a tactic that emerged as a direct consequence of the Analogue Enforcement Act,222 which supports the argument that rampant national legislation simply spawns new and equally troublesome substances, technologies, and regulatory issues.223 Moreover, the Internet has added another layer of complexity to designer drug regulation by creating an e-market of buyers and sellers who can share ideas and foster the importation and exportation of new synthetic ingredients.224

In addition, the DEA and ICE have reported incidents of rogue manufacturers, with no scientific or chemical background, who have been caught in local towns and neighborhoods, mixing and distributing their own synthetic compounds from within their own homes.225 These recent

215. See id.; see also Diaz, supra note 99; Knopf, supra note 8.
217. See id.
218. Id. at 328.
219. See WHITE HOUSE FACT SHEET, supra note 6.
220. See Duckworth, supra note 5 at 32.
222. See Duckworth, supra note 5, at 32.
223. See McCoy, supra note 216, at 327-28.
224. See Rose, supra note 35 (noting the existence of YouTube video tutorials on how to make synthetic marijuana).
225. See WHITE HOUSE FACT SHEET, supra note 6; see also News Release, ICE, 4 Federally Indicted in 'K2' Synthetic Drug Trafficking Conspiracy (May 18, 2012) [hereinafter
drug-trafficking activities present U.S. courts with serious interstate and international criminal issues such as "illegal importation, smuggling, distributing misbranded drugs and money laundering." These problems create doubts regarding the regulatory effectiveness of expending colossal state and federal legislative and judicial efforts to procure the possible convictions of a few convenience store owners or uninformed consumers. Though these defendants do pose public risks and are indeed by-products of the designer drug industry, they are not exactly the main source of the problem. Furthermore, head shops and convenience stores are establishments that will likely thrive and exist with or without the existence of synthetic drugs, mounting regulations, and DEA raids, since these establishments sell many other nondrug-related products as well. Many question congressional motives and the efficacy of federal agencies that have consistently failed to adapt and keep pace with synthetic drug chemists and manufacturers. If widespread regulation proved ineffective in the 1920s and 1930s, and again in the 1980s and also failed to eradicate the sale and use of natural THC and well-established Schedule I and Schedule II drugs, then such methods will likely prove ineffective for the designer drugs of today, which pose the exact same national threats and merely differ in chemical composition. Since the temporary bans did not solve the synthetic drug problem, then implementing permanent bans on the exact same substances are likely to have an underwhelming effect against manufacturers and consumers. Perhaps Congress and the DEA should sharpen their regulatory tactics in light of historical parallels and new international threats.

Legislators and law enforcement officers should be cautious about their broad, shotgun approach to prohibitions that could potentially render synthetic drug possession an "overnight" felony and can cause misinformed consumers to incur dire criminal repercussions and incarcerations of up to twenty years. Additionally, such uncoordinated and expansive attempts can lead to the misuse of judicial resources by carrying on lengthy trials and appeals to possibly convict misinformed consumers and convenience store owners who may or may not be selling illegal

226. See ICE News Release, supra note 225.
227. See Kelley, supra note 191.
229. See Federal Synthetic Drug Ban Filled With Future Loopholes, supra note 116; Kelley, supra note 191 (noting that the manufacturing company who produced many of the products confiscated in Operation Log Jam is still legally operating and open for business in Tampa, Florida).
230. See Rose, supra note 35.
231. See McCoy, supra note 216, at 308.
232. See Duckworth, supra note 5, at 32.
233. See Smith, supra note 113 (noting that SDAPA legislation merely permanently bans products that were already under a temporary ban).
234. See McCoy, supra note 216, at 308.
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synthetics, depending on a variety of technical and time-sensitive details. Synthetic drug convictions often require complex scientific determinations and have outcomes that strongly hinge on external factors such as the date and location of the offense, the chemical composition of the substance, the wording of the prohibition, and the level of public knowledge concerning the ban. Moreover, months of federal congressional resources were needlessly consumed in the SDAPA’s adoption—a superfluous regulation that had the underwhelming effect of merely scheduling substances that were already being regulated under the temporary bans. Some skeptics even feel that the SDAPA was a regulatory disaster—a carelessly drafted bill that was enacted without proper planning, research, or foresight, simply to create political clout and serve as a public manifestation that Congress did indeed do something to fix the problem.

Designer drugs present a multifaceted problem that is not likely to be wiped out by any one piece of legislation. Thus, state and federal law enforcement agencies should deviate from the endless and legally dangerous cycle of legislation and ban implementation, and focus on specifically targeting the source—those local and international chemists, laboratories, and manufacturers who create and mislabel dangerous products. In confronting the spread of synthetic drugs, state and federal governments have collaborated on proposing bills, drafting legislation, and even conducting national raids. Yet such overarching joint efforts may have overshadowed the efficiency of allowing individual state legislative and judiciary branches to regulate in a more localized manner, which would let the federal government tackle larger threats such as overseas importation, synthetic drug laboratories, and illegal sales via the Internet. Likewise, federal governmental agencies such as the DEA, ICE, U.S. Customs and Border Patrol, and the FBI should focus on collaborating with one another to control these threats, rather than involving state and local police forces to conduct head shop raids or exhausting resources lobbying for inefficient national legislation. For example, in

236. See id. at 156, 160 (noting that the State appealed three prior orders dismissing synthetic drug charges against Nickel, only to have the dismissal affirmed by the North Dakota Supreme Court); see also Kelley, supra note 127.
237. See Haag v. State, 823 N.W.2d 749, 750–51 (N.D. 2012) (noting the court’s analysis became a timing question to determine whether the substance was illegal on the date of the offense); Nickel, 806 N.W.2d at 158–60.
238. See Smith, supra note 113.
239. See id.
240. See Keim, supra note 117; Rose, supra note 35.
241. See Goldman, supra note 119.
242. See DEA News Release 1, supra note 9; Smith, supra note 113.
244. See WHITE HOUSE FACT SHEET, supra note 6.
245. DEA News Release 1, supra note 9.
246. See Keim, supra note 117.
State v. Brotherton, New York Attorney General Eric Schneiderman successfully won a battle against a local head shop under the state’s false labeling statute, and also filed suits against sixteen other stores. Currently, forty-five states have enacted their own bans on specific analogues and state judicial systems have shown that they are capable of addressing synthetic drug cases and enforcing civil remedies and criminal penalties for state and federal violations. One possible solution to effectively combat synthetics is to operate outside of the repetitive tactic of constant DEA bans and national legislation, which can drain local and national resources. Rather, Congress should encourage a regulatory dichotomy wherein the states can police localized issues regarding possession, distribution, and retail of illegal substances, while federal agencies combine their skills and resources to eradicate and circumvent larger national threats such as underground laboratories and synthetic drug manufacturers.

V. CONCLUSION

The emergence of synthetic drugs in the United States has created social, political, and legal complexities that do not have a simple or definite solution. Since these substances are easily synthesized and are in a constant state of metamorphosis, they have created grey areas in a political system that operates under black and white law. In response, Congress and the DEA have tried to swiftly enact all-encompassing legislation to thwart a multifaceted problem—a response that has created its own set of legal repercussions. Despite those who doubt the efficiency of swift scheduling and across-the-board regulation, recent reports actually show that the number of reported bath salt cases has been on the decline as of late 2012—a fact that is perhaps attributable to either gruesome and cautionary media coverage, recent legislation, or both; however, these sources have made no mention of the decline of Spice or synthetic marijuana cases.

Furthermore, there are still reports of law enforcement agents simply encountering new and unknown synthetics, which remain problematically


251. See Kelley, supra note 127 (predicting that many Operation Log Jam charges will be dismissed).

252. See Synthetic ‘Bath Salts’ An Evolving Problem for DEA, supra note 73; see also ICE News Release, supra note 225.

legal and unregulated. \(^{254}\) It may be too early to predict whether America’s synthetic drug problem will merely be a short-lived epidemic that will eventually be weeded out by rigorous regulations or whether it will be an ongoing issue. But history and science have shown that drugs—whether natural or synthetic—have always posed complex issues for state and federal regulators, the legal community, and the public at large. \(^{255}\) At present, designer drugs certainly pose a palpable danger, especially to curious and uninformed youths. \(^{256}\) Although rampant legislation might seemingly be a quick fix, Congress and federal agencies should realize that it is an overused strategy that has been historically ineffective \(^{257}\) and presents its own set of social and legal pitfalls. \(^{258}\) Ultimately, legislators and the courts must aim to adapt to the reality of synthetics and grapple with an industry that poses both a slippery slope and a fine line between the legally permissible and drastically criminal.

\(^{254}\) See Keim, supra note 117.

\(^{255}\) See McCoy, supra note 216, at 307–98, 327–28; Keim, supra note 117.

\(^{256}\) See WHITE HOUSE FACT SHEET, supra note 6.

\(^{257}\) See McCoy, supra note 216, at 308 (noting that the U.S. Government “anticipates a simple, direct connection between repression and results”).

\(^{258}\) See Goldman, supra note 119; see also Knopf, supra note 8.