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## Methademic: Drug Panic in an Age of Ambivalence

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# METHADEMIC: DRUG PANIC IN AN AGE OF AMBIVALENCE

DEBORAH AHRENS\*

## ABSTRACT

*The story of criminal sanctions in modern America is a familiar—and depressing—narrative. According to the narrative, we live in an era where the dynamics of popular politics, the practices of the media, and the (often racialized) anxieties of modern life combine to create a one-way ratchet, in which we identify perceived new threats to public order and respond unthinkingly with harsh new criminal sanctions. On the surface, the wave of concern over methamphetamine that swept the nation in the middle part of this decade followed this script, as a media panic led to substantial popular concern and significant new legislation. When one digs a little deeper, however, the story is more complicated: Instead of a singular focus on increased criminal penalties and mass incarceration, we see a multifaceted strategy focused on educating the public, limiting access to ingredients, and remediating environmental concerns raised by the manufacture of the drug.*

*Why has public and legislative concern about a drug described in terms of natural disasters and communicable deadly diseases generated cold medication restrictions and educational programs rather than extensive new criminal law? This Article—the first comprehensive examination of our legal and cultural response to methamphetamine—asks and attempts to answer that question. After providing a succinct history of modern American drug policy, the Article narrates the wave of coverage that sparked concern about a possible “Methademic” and then catalogs state and local responses to the alleged threat. It concludes by offering some informed speculation about the possible reasons for this surprisingly tepid response. After considering and rejecting or partially crediting a number of explanations—most notably that the popular identification of methamphetamine as a “white drug” muted the expected hostility to its users—the Article concludes that the public response to methamphetamine was, in fact, the first chapter in a new era of drug policy: the age of ambivalence.*

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I. INTRODUCTION

The mainstream scholarly read of criminal law and sentencing in the United States is that the nation has in modern times moved only in one direction, towards increased criminalization of behavior and lengthier sentences for crimes.<sup>1</sup> This expansion of law and creation of prison cells occurs regardless of whether crime is increasing and whether empirical studies support its need—either the public demands that the criminal law extend to cover additional conduct and legislators are only too happy to oblige, or legislators perceive political gains to be possible if they persuade the public that a given behavior is particularly socially dangerous and merits criminalization or increased punishment. In particular, in the area of illicit drugs, legislators have expanded codes and increased penalties over the course of the twentieth century—most strikingly, since the mid-1970s—in ways that have dramatically increased our prison population. At this point, the United States imprisons both the largest number of people and the highest percentage of its citizenry of any

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1. This phenomenon is sometimes referred to as a “one-way ratchet”: for political reasons, legislatures can only move in the direction of criminalization and imprisonment. See, e.g., Lynn Adelman & Jon Deitrich, Rita, *District Court Discretion, and Fairness in Federal Sentencing*, 85 DENV. U. L. REV. 51, 54 (2007) (describing the United States Sentencing Guidelines Commission’s process of creating guidelines as a “one-way ratchet” increasing sentences); Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 301 (2005) (describing Congressional adjustments to federal sentencing rules as a “one-way ratchet”); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005) (positing that the criminal code expands because politicians have a political incentive to criminalize but not to decriminalize); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1349 (2006) (describing majority rule as a “one-way ratchet” that expands the penal state); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (arguing that “all change in criminal law seems to push in the same direction—toward more liability”); Ian Weinstein, *The Revenge of Mullaney v. Wilbur: United States v. Booker and the Reassertion of Judicial Limits on Legislative Power to Define Crimes*, 84 OR. L. REV. 393, 399 (2005) (describing a “one-way ratchet” in which legislation “only begets more penal law and imposes even harsher sentences”). But see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225 (2007) (arguing that “[t]he ratchet of crime legislation turns both ways” and describing ongoing legislative efforts to decriminalize behavior).

nation in the world.<sup>2</sup> Scholars and lay commentators, seeking to explain the striking incarceration increase in modern America, often point to the widespread criminalization of drug use and, in particular, to the increased attention to and enforcement of antidrug laws as part of the “War on Drugs.”<sup>3</sup>

After the rash of media articles about methamphetamine in 2005 and 2006,<sup>4</sup> an observant student of American criminal sanctions might have expected to find, ensconced in new methamphetamine-related legislation, exponentially increased penalties, new mandatory minimum sentences, life imprisonment for multiple offenses—the sorts of changes in the law that occurred in response to a perceived epidemic of crack cocaine during the late 1980s and early 1990s.<sup>5</sup> The one-way ratchet of criminal sanctions would have turned in the direction of code expansion and punishment increase, and sellers, producers, and users of methamphetamine would have expected to find themselves incarcerated.

Those sorts of changes, however, have not broadly characterized new methamphetamine legislation. Rather, the bulk of changes have either restricted the ability of potential methamphetamine manufacturers to access the materials used to generate methamphetamine or sought to contain the effects of methamphetamine use and production on innocent bystanders who might be exposed to environmental toxins and laboratory explosions.<sup>6</sup> Certainly, some themes that we have seen with past waves of drug legislation and litigation have been repeated—in particular, the insulation of children from the effects of drug use and the expansion of Fourth Amendment exceptions

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2. The United States has increased its incarcerated population fivefold since the early 1970s. According to the Bureau of Justice Statistics, by the middle of 2007, 1,595,034 persons were incarcerated in state and federal prisons, and an additional 766,010 persons were either serving sentences in local jails or held in jail pretrial. See WILLIAM J. SABOL & HEATHER COUTURE, U.S. DEPT OF JUSTICE, PRISON INMATES AT MIDYEAR 2007, (Jun. 2008) 1, 6, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=840>; see also PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 3, 5 (2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) (finding that one in 100 adult Americans currently are incarcerated in jail or prison, and providing breakdowns of incarceration rates by race and gender). In addition, a substantial number of Americans, while not incarcerated, are under probation and parole supervision. See generally PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

3. See, e.g., MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 4 (1995) (discussing the degree to which the “War on Drugs” is responsible for the mass incarceration of African Americans); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 393 (2002) (arguing that “[t]he mass incarceration of African Americans is a direct consequence of the War on Drugs” and offering data to demonstrate more generally the connection between drug policy and increased incarceration rates).

4. See *infra* Part III.A.

5. See *infra* Part II.B.

6. See *infra* Part III.B.

to accommodate law enforcement needs.<sup>7</sup> Methamphetamine users, producers, and traffickers have been prosecuted and incarcerated,<sup>8</sup> while some states have increased the penalties for methamphetamine offenses.<sup>9</sup> However, in general, the law's response to the methamphetamine pandemic has been more tempered than recent history might project.<sup>10</sup>

What explains the difference in legislative response? Perhaps some of it has to do with race. According to some scholarship on drug control in the United States, drug prohibition tends to dovetail with cultural attitudes towards particular groups (generally defined by race, ethnicity, class, or national origin), and anxiety about particular subgroups manifests itself through draconian new criminal sanc-

7. See *infra* Part IV.

8. See, e.g., BUREAU JUST. STAT., FEDERAL JUSTICE STATISTICS 2005, BUREAU JUST. STATISTICS BULLETIN 2 (September 2008), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1104> (noting that twenty-two percent of Drug Enforcement Agency arrests in 2005 were for methamphetamine offenses).

9. See, e.g., Act of May 21, 2004, ch. 845, §§2-3, 2004 Tenn. Pub. Acts 1922, 1923 (codified at Tenn. Code. Ann. §39-17-417 (Supp. 2005)) (lowering the triggering quantity of methamphetamine for certain sentences from 100 and 1000 grams to 26 and 300 grams).

10. For recent works that note this surprising trend, see DORIS MARIE PROVINI, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 165-66 (2007) (citing evidence about methamphetamine policy and concluding that, when it comes to drug policy, there seem to be "signs that something may have been learned from past experience"); Michael B. Cassidy, *Examining Crack Cocaine Sentencing in a Post-Kimbrough World*, 42 AKRON L. REV. 105, 133-34 (2009) ("Perhaps a better indicator of Congress' willingness to change is its handling of the dramatic rise of methamphetamine, which some have termed the 'new crack.' In 2006, Congress enacted the first comprehensive methamphetamine law, which, surprisingly, focuses less on tougher penalties and more on cutting off access to the ingredients used to manufacture the drug."); see also Maureen P. Smith, Comment, *America's Methamphetamine Crisis: Solving One of America's Leading Drug Problems Through Child Abuse and Nuisance Laws*, 57 CATH. U. L. REV. 605, 612 (2008) (advocating the use of nuisance and, to a lesser extent, child abuse laws as primary tools for fighting methamphetamine despite offering a hyperbolic account of current problems caused by the drug).

The academic literature on our cultural and legal response to methamphetamine is still in its infancy. The leading sociologists and criminologists who study drug policy have thus far been surprisingly silent about methamphetamine. A few law journals have published scattered pieces—often student works—cataloging and critiquing some meth-related legislations. See, e.g., Maureen P. Smith, Note, *Cooking Up Solutions to a Cooked Up Menace: Responses to Methamphetamine in a Federal System*, 119 HARV. L. REV. 2508 (2006); see also Elizabeth E. Joh, *Imagining the Addict: Evaluating Social and Legal Responses to Addiction*, 2009 UTAH L. REV. 175 (comparing media coverage of and legal response to methamphetamine addiction with the very different response to tobacco addiction). The Sentencing Project, an academically-inclined advocacy organization, has published one significant study: RYAN S. KING, *THE SENTENCING PROJECT, THE NEXT BIG THING? METHAMPHETAMINE IN THE UNITED STATES* (2006), available at [http://www.sentencingproject.org/doc/publications/dp\\_nextbigthing\\_meth.pdf](http://www.sentencingproject.org/doc/publications/dp_nextbigthing_meth.pdf). Popular commentators have shown a bit more interest. See, e.g., DIRK JOHNSON, *METH: THE HOME-COOKED MENACE: HOW A LETHAL DRUG IS DEVASTATING OUR COMMUNITIES AND WHAT'S BEING DONE ABOUT IT* (2005) (offering a hyperbolic account of meth use and its consequences); NICK REDING, *METHLAND: THE DEATH AND LIFE OF AN AMERICAN SMALL TOWN* (2009) (offering a more nuanced portrait of meth use and its consequences, one that largely portrays meth use as an effect—rather than a cause—of the decline of rural America).

tions.<sup>11</sup> A common interpretation of the harsh response to crack cocaine, for example, is that the perceived epidemic coincided with anxiety about urban crime and racially-tinged animosity against what were perceived as mostly African-American users and sellers; the resulting expansive sanctions reflected racism against African Americans.<sup>12</sup> Perhaps the comparatively sanguine reaction to methamphetamine results from the fact that the majority of users are white.<sup>13</sup>

Relatedly, perhaps the fact that the majority of methamphetamine users are white has changed the incentives for press, police, and politicians. If past drug hysteria was fueled by racialized bias and anxiety, and the press, public, and law enforcement officials have—due to the race of most methamphetamine users—tempered their responses and couched descriptions of the perceived methamphetamine epidemic in less florid language than they have used in the past, they may have produced a climate in which there is simply less demand for a draconian legal response.<sup>14</sup> Alternatively, the pressure for legislative change might flow from legislators and executives themselves: representatives and administrators might cynically perceive that they can increase personal or institutional power by persuading the public that there exists a serious problem with a particular substance or a group that might be linked to that substance. Perhaps officials believe that they have less to gain with harsh rhetoric and legislation where a drug-linked group is Caucasian.

These theories go some distance, perhaps, in explaining the difference between past legislative responses to drug use and the current response to the use, sale, and manufacture of methamphetamine, but they are insufficient to provide a full account. To the contrary, there is increasing evidence that something bigger is going on: careful and contextual examination of our cultural and legislative response to methamphetamine suggests that public attitudes towards drug regulation more generally seem to be changing. There is increasing evidence that the current legislative climate seems generally hostile to ratcheting up criminal sanctions for drug crimes and that the public appetite for harsh sanctions has begun to wane.<sup>15</sup> The “one-way rat-

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11. See, e.g., JAMES B. BAKALAR & LESTER GRINSPOON, DRUG CONTROL IN A FREE SOCIETY 69 (1998) (“Attitudes toward minorities, work, worldly success and failure, or sex and family life sometimes turn out to be the real issues in a controversy about drugs. Drugs are symbols charged with cultural tensions.”).

12. For discussion of the role that race played in fueling the legislative and cultural response to crack cocaine, see *infra* Part II.B and the works cited therein.

13. For data on the racial composition of those using or selling methamphetamine, see *infra* notes 115-16 & 210 and accompanying text.

14. See *infra* Part V.A.2.

15. For a discussion of this trend in the context of methamphetamine, see *infra* Part III. For some recent high-profile incidents in which the trend has played out more broadly, see, for example, Theo Emery, *Will Crack Cocaine Sentencing Reform Help Current Cons?*, TIME, Aug 7, 2009, available at <http://www.time.com/time/nation/article/0,8599,1915131,00.html>

chet” as applied to drug offenses is beginning, in some high-profile instances, to spin in the opposite direction.

In Part II of this Article, I offer a brief overview of drug policy in the United States, focusing on the link between sanctions for drug offenses and the subgroups against which those sanctions have been targeted. In particular, I focus on the literature surrounding the crack cocaine pandemic of the late 1980s and the legislative response to concern expressed by the public and by the media. In Part III, I provide a synopsis of state and federal legislative responses to methamphetamine. In Part IV, I analyze ways in which these responses resemble and depart from past responses to perceived epidemics of drug use. Finally, in Part V, I provide explanations for why these responses are more tempered than what history might have predicted.

President Barack Obama’s administration recently, and with little fanfare, declared that the “War on Drugs” has come to a close.<sup>16</sup> While that announcement—and the policy shifts it represents—do not signal that we have entered an era of drug legalization, they do suggest that we have entered a new era in drug policy. As it turns out, the American appetite for criminalization and incarceration is not insatiable.

## II. A (RELATIVELY) BRIEF HISTORY OF AMERICAN DRUG POLICY

The application of criminal sanctions to the use, sale, and manufacture of various drugs is a relatively modern phenomenon. Until the twentieth century, American criminal law did not encompass what we would now think of as illicit drugs; substances such as opium and cocaine were in fact commonly available in products manufactured legally and designed for mass consumption.<sup>17</sup> In Subpart A,

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(quoting President Obama, the Assistant Attorney General in charge of criminal law issues, and the Chair of Federal Sentencing Commission on the need to eliminate the infamous crack-powder cocaine sentencing disparity, citing legislative progress on such reform, and predicting that “this may be the year” that the disparity is eliminated); Gary Fields, *White House Czar Calls for End to “War on Drugs,”* WALL ST. J., May 14, 2009, at A3 (quoting new federal Drug Czar Gil Kerlikowske’s repudiation of the language, and some of the policies, of the so-called “War on Drugs”); see also *Kimbrough v. United States*, 552 U.S. 85 (2007) (allowing judges discretion to sentence individuals convicted of crack cocaine crimes to lesser terms based on judges’ personal disapproval of crack/powder disparity).

16. See Fields, *supra* note 15.

17. See LESTER GRINSPOON & JAMES B. BAKALAR, COCAINE: A DRUG AND ITS SOCIAL EVOLUTION 28 (1976) (noting that cocaine-containing Coca-Cola was essential in putting drugstore soda fountains at the center of 1890s culture); LESTER GRINSPOON & PETER HEDBLUM, THE SPEED CULTURE: AMPHETAMINE USE AND ABUSE IN AMERICA 185-86 (1975) (listing over-the-counter medications available at the end of the nineteenth century, such as the morphine-laced Dr. Grove’s Anodyne for Infants and Dr. Moffett’s Teething Compound); Craig Reinerman & Harry G. Levine, *Punitive Prohibition in America*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 323 (Craig Reinerman & Harry G. Levine, eds., 1997) (noting that Coca-Cola, advertised as a temperate “soft drink” alternative to alcohol, contained cocaine, and groceries vended opium-based medications).

I offer a short history of legislative decisions to criminalize and increase penalties attendant to trade and possession of various substances, viewed through the lens of the most common explanation for the growth of such policies, which sees them as an attempt to mark and constrain racial and other minorities who threaten the peace or self-image of traditional majorities. In Subpart B, I focus on the literature surrounding legislative responses to crack cocaine, the most high-profile and thoroughly-dissected recent chapter in American drug policy.

#### A. *The Twentieth Century and Drug Policy Development*

What we now think of as illicit drugs were once widely available in the United States and untouched by criminal law.<sup>18</sup> The various legislative developments attaching criminal sanctions to illicit drugs are creatures of the twentieth century, and those developments have corresponded, per many academic commentators, with periods of concern about population groups associated with those substances.<sup>19</sup> According to perhaps the most common critical narrative of United States drug policy, changes in the criminal law as applied to illicit drugs come not at times of actual increases in drug use or drug-related social problems; rather, at times of anxiety about particular disfavored social groups, the panicking public develops drug laws to regulate and punish the use and sale of drugs stereotypically associated with the disfavored group.<sup>20</sup> While the substances described

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18. See, e.g., DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL*, 1-2 (3d ed. 1999) (describing the popularity of opium use medically and recreationally during the nineteenth century and noting that opium use and trade was restricted only by tariff until 1909).

19. For some of the academic works central to establishing this narrative, see generally MUSTO, *supra* note 18; TROY DUSTER, *THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGMENT* (1970); JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1963). For a more recent work that effectively summarizes and updates this narrative, see PROVINI, *supra* note 10; see also Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 486-512 (1997) (summarizing the history of American drug policy in terms largely consistent with these works and with this Article).

20. This thesis has not gone unchallenged. For works that are at least skeptical of the idea that drug policy has primarily been about attacking disfavored social groups, see, for example, BAKALAR & GRINSPOON, *supra* note 11, at 68-72 (discussing forces that have contributed to modern drug control policies and emphasizing the fact that “drugs are not just symbols; they are substances with distinct chemical properties and physical and psychological effects”); GRINSPOON & BAKALAR, *supra* note 17, at 39-40 (“Naturally, then, many people think that racial prejudice inspired the hostility toward cocaine . . . . But we suspect that racial prejudice was ancillary.”); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1255-56 (1994) (critiquing scholarship and a then-recent court decision equating crack-powder cocaine disparity with racial targeting of African-Americans and arguing that police indifference to effects of crime on African-American communities is a bigger problem and a more virulent form of racism).

here doubtlessly can be dangerous for personal use and lead to negative social consequences for the communities in which users<sup>21</sup> live, the policy responses to those dangers and consequences are perhaps not those that rational legislatures would devise.

### 1. *The Temperance Movement*

While antidrug movements and legislation are twentieth-century developments, they were predated by a temperance movement against alcohol. Temperance advocates linked alcohol consumption to immigrant groups (particularly Irish and Italian immigrants) who were also at the time racialized as nonwhite.<sup>22</sup> Advocates blamed alcohol consumption among these groups for a host of social ills, including domestic abuse, thievery, and violent crime.<sup>23</sup> In examining the temperance movement's reasons for drawing a connection between alcohol use and these social problems, Joseph Gusfield has argued that temperance "was one way in which a declining social elite tried to retain some of its social power and leadership."<sup>24</sup> The politics of temperance was focused on reinforcing both the distinction between the rural, middle-class, native Protestant and the poor urban immigrant and the social dominance of the former.<sup>25</sup> Still, in terms of operationalizing its goals, the temperance movement sought "regulatory prohibition"—preventing persons from accessing alcohol through civil and administrative rules, rather than through the use of criminal law. While temperance advocates sought to eliminate the use of alcohol, individual use was never criminalized.<sup>26</sup> In other words, while the temperance movement wished to limit consumption of alcohol, and cast its arguments in moral terms, it did not seek to bring to bear the severe social stigma associated with criminal conviction and punishment.<sup>27</sup>

21. I refer throughout this Article to substance users, rather than substance addicts or abusers. As discussed below, not all persons who use drugs recreationally use them often or otherwise exhibit signs of addiction and abuse.

22. The classic account of the racial and ethnic politics at the heart of the temperance debate is GUSFIELD, *supra* note 19; cf. MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865* (1981) (examining the milieu in which the American temperance movement first emerged and locating its impulse in a complex web of ethnic, class, and religious animosities). For two provocatively titled accounts of the ways in which American culture and politics once racialized particular European ethnic groups, see NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1996); DAVID ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICAN IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* (2006).

23. See, e.g., Reinerman & Levine, *supra* note 17, at 323.

24. GUSFIELD, *supra* note 19, at 5-6 (arguing that temperance was essential to distinguishing the middle class, the hard worker, and the native American from the lower class, the layabout, and the immigrant).

25. *Id.* at 6, 55-57.

26. See Reinerman & Levine, *supra* note 17, at 323.

27. The Temperance Movement did enjoy short-lived success in the form of the Volstead Act and the Twenty-First Amendment. See U.S. CONST. amend. XVIII (1919), repealed by U.S. CONST. amend. XXI (1933); National Prohibition Act (Volstead Act), 41 Stat.

## 2. *The Racialization of Opiates and Narcotics*

Early efforts to restrict access to substances such as opium, cocaine, and marijuana similarly involved regulatory prohibition rather than the use of criminal law. Preliminary state laws required prescriptions for or otherwise limited the ability of consumers to purchase opium and cocaine.<sup>28</sup>

The linkage between concern about particular social groups and increased regulations of substances associated with that group, first noted with regard to the Temperance Movement, manifested itself in new ways during the early twentieth century. As David Musto argues, during that era, drug addiction became associated with “foreign groups and internal minorities who were already actively feared and the objects of elaborate and massive social and legal restraints.”<sup>29</sup> In particular, drug use was tied to Chinese immigrants and African Americans. Americans associated opium smoking, for example, with Chinese immigrants, against whom they were already mobilizing other restrictive legal tools (particularly immigration controls).<sup>30</sup>

Initially, the response to increased concern about drug use was once again regulatory. For example, the Harrison Narcotics Act,<sup>31</sup> adopted by Congress in 1914, required producers and distributors to register with the government, track transactions, and pay special taxes for handling drugs; unregistered persons could purchase drugs only by prescription or for medical use.<sup>32</sup> Still, unlawful possession of a drug was not criminalized; it might furnish evidence that the tax and regulatory schemes had been violated, but it did not subject the

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305 (1919), repealed by U.S. CONST. amend. XXI (1933). States retain wide latitude to regulate alcohol under the Twenty-First Amendment, but the great bulk of jurisdictions permit the sale of alcohol and limit themselves to time, place, and manner restrictions (such as laws confining sales to particular days, hours, or locations, limiting the ability of buyers to purchase small, inexpensive “minibottles,” prohibiting overservice, restricting drinking for persons under the age of twenty-one, preventing restaurants from serving alcohol on Sundays, or prohibiting public drunkenness). Even jurisdictions that prohibit the sale of intoxicating liquors do not criminalize “responsible” use of alcohol by persons over the age of twenty-one.

For a new and interesting take on the relationship between alcohol and drug regulation, see GEORGE FISHER, *MARRIED TO ALCOHOL: THE DRUG WAR’S MORAL ROOTS* (forthcoming).

28. See GRINSPOON & BAKALAR, *supra* note 17, at 40 (as of 1912, fourteen states had established school-based drug education to warn about cocaine and opium; as of 1914, forty-six states had some restrictions on cocaine purchases, and twenty-nine states had some restrictions for opium purchases).

29. MUSTO, *supra* note 18, at 5.

30. See *id.* at 3; GRINSPOON & HEDBLUM, *supra* note 17, at 185 (noting a shift in public attitudes about opiates from a sympathetic association with white, wounded, morphine-addicted Civil War soldiers to negative associations with opium-using Chinese laborers).

31. Pub. L. No. 63-223, 38 Stat. 785 (1914).

32. See GRINSPOON & BAKALAR, *supra* note 17, at 41 (describing the Act).

violation to criminal sanctions. And to the extent that states prohibited narcotics distribution, enforcement was lax.<sup>33</sup>

By 1931, the landscape had changed. As of 1931, thirty-six states made unauthorized possession of cocaine a criminal offense, and in 1951, federal law began to impose mandatory prison sentences for cocaine possession.<sup>34</sup> While this shift to criminal regulation has never been fully explained, it does correlate with an explosion of racialized imagery and a deepening of social anxiety about minority groups. During this era, concern about the large Chinese labor force in western states hit a fever pitch. Stories about Chinese immigrants using opium to lure white women into sexual slavery proliferated. Similar complaints about the use of opium by other “inferior” and “debased” people—Italian, Jewish, and central European immigrants—began to appear; such individuals were thought to be engaging in behaviors “contrary to white supremacy and white morality.”<sup>35</sup> By the end of World War II, heroin had largely supplanted opium as the opiate of choice, and “racial and social prejudices” against black and Hispanic users “helped solidify national attitudes” against heroin and opium use.<sup>36</sup>

After years of being considered a health tonic, American opinion of cocaine turned to one of censure, as cocaine use became associated in the popular mind with various disfavored social groups,<sup>37</sup> in particular African Americans.<sup>38</sup> Fear of cocaine-using African Americans came at a time when lynching, disenfranchisement, and legally-enforced segregation were still central features of the American landscape.<sup>39</sup> Some whites envisioned horrific encounters in which African Americans cocaine-users would develop violent, superhuman strength and would foil law enforcement attempts to subdue them; some stories went so far as to suggest that such cocaine users would act as if invulnerable to bullets.<sup>40</sup> Narratives abounded about cocaine-fueled

33. See MUSTO, *supra* note 18, at 9 (explaining that states generally lacked sufficient manpower to enforce narcotics restrictions).

34. See GRINSPOON & BAKALAR, *supra* note 17, at 42 (cataloging these changes).

35. GRINSPOON & HEDBLUM, *supra* note 17, at 185.

36. *Id.* at 188.

37. See GRINSPOON & BAKALAR, *supra* note 17, at 39; see also *Preface to the Expanded Edition* of MUSTO, *supra* note 18, at x (noting that cocaine, once viewed as “an ideal tonic,” was reconstructed as “the most dangerous of all drugs” by 1900).

38. See generally MUSTO, *supra* note 18, at 43-44 (noting the association between African Americans and cocaine in a variety of sources). Ironically, African Americans did not in fact use cocaine in numbers greater than, or even equal to whites. See GRINSPOON & BAKALAR, *supra* note 17, at 40 (arguing that African Americans probably had less access to cocaine because of their relative poverty, and noting that the best documented cocaine addiction cases were white professional men, particularly doctors); see also MUSTO, *supra* note 18, at 8.

39. See MUSTO, *supra* note 18, at 7.

40. See GRINSPOON & BAKALAR, *supra* note 17, at 39.

men raping Caucasian women.<sup>41</sup> It is with regard to cocaine that the now-familiar narrative first became explicit: we must prohibit and criminalize drug possession to prevent dangerous people from accessing dangerous substances.<sup>42</sup>

### 3. Marijuana (and LSD)

Marijuana legislation similarly dovetailed with prejudice. As marijuana use became linked with Mexican immigrants, government concern and expanded sanction followed apace.<sup>43</sup> During the 1930s, for example, the Federal Bureau of Narcotics conducted a racially-tinted educational campaign describing marijuana as such a potent criminological agent that a single use could transform an upstanding citizen into a violent criminal.<sup>44</sup>

The history of marijuana regulation nicely illustrates that the disfavored subgroup theory is not uniformly about race, ethnicity, or immigration. In the 1960s and early 1970s, a new round of drug regulation followed quickly<sup>45</sup> as some drugs—marijuana and LSD, in particular—became associated with a band of political and cultural dissenters.<sup>46</sup> Drug use became an axis on which dissenters explicitly set themselves apart and drug policy served as a mechanism through which the cultural majority reinforced its status as the embodiment of moral norms.<sup>47</sup> Through this lens, attention to drug use in the

41. See *id.* at 38-39 (detailing how cocaine was linked in media articles to African-American convicts, lower economic classes, Jewish vendors, prostitutes, and poorly-behaved soldiers).

42. See *id.* at 40. Like with marijuana, see *infra* notes 43-47 and accompanying text, the cultural anxieties that spawned the crackdown on cocaine transcended race. Grinspoon and Bakalar argue that racial prejudice was probably ancillary to a general desire to keep cocaine out of the hands of all potentially “dangerous” persons, including white women who might be seduced or corrupted by exposure to cocaine. See *id.*

43. On the association of marijuana with Mexican immigrants, see, for example, H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800-1980* 93-94 (1981). For the story of the passage of the first significant federal law regulating marijuana and the climate of panic that facilitated that legislation, see HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 135-46 (1973).

44. See BECKER, *supra* note 43, at 135-46; GRINSPOON & HEDBLUM, *supra* note 17, at 182. Grinspoon and Hedblom note that no data support or supported this assertion. *Id.* at 183.

45. The most famous (and probably the most draconian) laws adopted during this era were New York’s so-called “Rockefeller Drug Laws,” which (until their recent amendment) imposed significant mandatory prison sentences for relatively minor drug infractions. See, e.g., Act of May 8, 1973, ch. 276 §§220.21, 220.43, 1973 N.Y. Laws 371, 380-81 (codified as amended in N.Y. Penal Law) (classifying criminal possession of two or more ounces of a controlled substance and criminal sale of one or more ounces of a controlled substance as Class A-I felonies).

46. See Reinerman & Levine, *Crack in Context*, in *CRACK IN AMERICA*, *supra* note 17, at 7-8 (arguing that marijuana in the 1960s and 1970s became associated with youthful rebellion against achievement and opposition to the Vietnam War, creating a “dangerous” youth class and “a useful symbol in an essentially political conflict between cultures and generations.”). This analysis draws upon the earlier work of Professor Becker. See generally BECKER, *supra* note, 43.

47. See Reinerman & Levine *supra* note 46.

1960s and early 1970s was less about reducing the possible personal or social harm associated with drug use than it was about reinforcing the majority's status; like in the periods preceding and following, drug legislation during this era was often a proxy for cultural contestation between competing social groups.

### B. *Crackademic: The 1980s and Beyond*

The crack cocaine panic of the late 1980s probably has received the most attention, in the scholarly press and in the popular media, of any of the various drug panics of the past century. Sociologists Craig Reinerman and Harry Levine have documented exhaustively and persuasively the press coverage of the crack cocaine "epidemic," the timing of that coverage relative to documented trends in crack cocaine use, the extent to which press coverage reflected accurate information about crack cocaine effects, and the effects of press and public response on crack cocaine litigation and legislation.<sup>48</sup> During the late 1980s and early 1990s, the "one way ratchet" turned with a vengeance. The resulting system of crack cocaine laws persists into the present: lengthier terms of imprisonment, mandatory minimum sentences, parole and probation ineligibility, and penalties that escalate with increased numbers of convictions.<sup>49</sup>

Cocaine was not a new drug when coverage of a purported epidemic of crack cocaine use began. Cocaine, as discussed earlier, had been used throughout the twentieth century, and its use had long violated criminal law.<sup>50</sup> In surveying cocaine use in the United States as of 1976, Lester Greenspoon and James Bakalar observed that cocaine "is rapidly attaining unofficial respectability . . . . It is accepted as a relatively innocuous stimulant, casually used by those who can afford it to brighten the day or the evening . . . . Use of cocaine is gradually spreading in the upper middle class."<sup>51</sup> Greenspoon and Bakalar noted that at the time that they were writing, "[w]ith a few minor exceptions, no one contends that coca causes any significant crime [or] violence."<sup>52</sup>

Whatever Greenspoon and Bakalar might have predicted about the trajectory of social attitudes towards cocaine in the mid-1970s, by the mid-1980s, the trajectory clearly changed, at least with respect to

48. See generally Craig Reinerman & Harry G. Levine, *Crack in the Rearview Mirror: Deconstructing Drug War Mythology*, 31 SOC. JUST. 182 (2004); *CRACK IN AMERICA*, *supra* note 17.

49. See, e.g., Reinerman & Levine, *supra* note 17, at 321-22 (arguing that such escalating sanctions have typified the U.S. response to drugs and quoting government documents that demonstrate the intentionality of such a regime).

50. See *supra* Part II.A.2.

51. GRINSPOON & BAKALAR, *supra* note 17, at 64.

52. *Id.* at 218.

one particular form of cocaine—crack.<sup>53</sup> Smoking cocaine to obtain a high was not new—cocaine users had for some time used cocaine by “freebasing.”<sup>54</sup> What was new was the attention to and panic about smokable cocaine.

The media coverage of crack cocaine began in earnest in 1986, and was promptly distinguished by both its volume and its remarkable levels of hyperbole and disinformation.<sup>55</sup> *Newsweek* quoted an expert who described crack as a drug that produced an “instantaneous addiction” more severe than any other;<sup>56</sup> the *New York Times* and *Newsweek* compared crack cocaine to an epidemic or plague;<sup>57</sup> and media sources generally described the wildfire spread, epidemic use, plague proportions, and addictive properties of crack cocaine<sup>58</sup> in ways that their own later coverage found factually incorrect.<sup>59</sup> Crack cocaine was linked to violent crime.<sup>60</sup> As Reinerman and Levine ar-

53. Crack cocaine is a smokeable form of cocaine produced by “cooking down” a mixture of powder cocaine, water, and baking powder. While cocaine has long been present in this country and has been smoked extensively since at least the early 1970s, the diluted, relatively inexpensive “cooked down” cocaine that came to be known as “crack” emerged in urban areas in 1984 and 1985. See Reinerman & Levine, *supra* note 46, at 1, 2 (explaining the emergence of “crack”). As Professors Reinerman and Levine explain “Crack was not a new drug . . . Crack was a marketing innovation.” *Id.*

54. See Beverly Xaviera Watkins & Mindy Thompson Fullilove, *The Crack Epidemic and the Failure of Epidemic Response*, 10 TEMP. POL. & CIV. RTS. L. REV. 371, 377 (2001) (describing 1979 testimony before Congress warning of the dangers of “free-base cocaine”).

55. Reinerman and Levine describe the press coverage of crack cocaine as a “media frenzy,” noting that in July of 1986, “the three major TV networks offered seventy-four evening news segments on drugs, half of these about crack.” Reinerman & Levine, *The Crack Attack: Politics and Media in the Crack Scare*, in CRACK IN AMERICA, *supra* note 17, at 19-22. See generally JIMMIE L. REEVES & RICHARD CAMPBELL, CRACKED COVERAGE: TELEVISION NEWS, THE ANTI-COCAINE CRUSADE, AND THE REAGAN LEGACY (1994) (cataloging and critiquing television coverage of drugs during the 1980s and early 1990s); cf. MARTIN TORGOFF, CAN’T FIND MY WAY HOME: AMERICA IN THE GREAT STONED AGE, 1945–2000, 350-57 (2004) (narrating the key mileposts of the press coverage and explaining how press portrayal played into themes of a larger culture war).

56. See Reinerman & Levine, *supra* note 46, at 3 (citing *Kids and Cocaine* NEWSWEEK, Mar. 1, 1986, at 58-59).

57. See *id.* at 3-4; see also Reinerman & Levine, *supra* note 55, at 24 (citing New York Times/CBS News polling data that indicated that in January of 1985, 1% of Americans considered drugs to be the most important problem facing the United States; by September of 1989, that figure had risen to 64%).

58. See Reinerman & Levine, *supra* note 55, at 20-22 (describing in depth the nature and timeline of mass media coverage of crack cocaine and noting that “plague,” “epidemic,” and “crisis” were descriptors commonly employed in press coverage).

59. See Reinerman & Levine, *supra* note 46, at 4 (noting that, by 1989 or 1990, many major news outlets were running stories quietly critical of their own initial coverage of “crack”).

60. See, e.g., Paul J. Goldstein, et al., *Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence*, in CRACK IN AMERICA, *supra* note 17, at 113, 122-24 (noting media coverage and political rhetoric about “crack-related murders” and finding, based on 1988 homicide data from New York City, that while a majority of drug-related homicides in New York City did involve cocaine or crack cocaine, most of the homicides had to do with the risks of the illicit drug market, as opposed to the psychopharmacological effects of cocaine or crack cocaine); Watkins & Fullilove, *supra* note 54, at 375 (noting media coverage

gue, the overwhelming majority of young people in the United States, during the time of hysterical coverage, were not using crack cocaine, and the overwhelming majority of people who had used crack cocaine had not continued to use it with any frequency.<sup>61</sup> By most measures, in the late 1980s, drug use generally—and cocaine use specifically—was in decline.<sup>62</sup> Despite the fact that fewer Americans were using drugs, by 1989, the majority of Americans polled identified the most important problem facing the United States as “drugs.”<sup>63</sup>

Crack cocaine also produced headlines and prosecutions related to an alleged “crack baby” epidemic, where, per the media and other sources, crack cocaine caused large numbers of infants to suffer severe, irreversible health problems resulting from maternal use of crack cocaine. In 1985 and 1986, major news outlets began reporting that crack cocaine-exposed babies might comprise a “biological underclass” suffering from, among other things, permanent mental retardation, deviance, and an inability to perform basic self-care tasks.<sup>64</sup> The idea of a permanent underclass of crack-cocaine-ruined children captured the public imagination.<sup>65</sup> Reports on the “crack baby” phenomenon proved medically unfounded—cocaine exposure affects newborns, but does not create a particular “crack baby” syndrome with the terrifying symptoms and developmental debilitation

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of crack cocaine in 1985 and 1986 that, focusing on violence, described crack cocaine addiction as “growing at alarming rates” and creating “an authentic national crisis.”)

61. See Reinerman & Levine, *supra* note 48, at 186 (noting that during the period of the crack cocaine scare into the early 2000s, fewer than five percent of eighteen to twenty-nine year olds ever tried crack, and of those who had tried it, 80% had not used crack cocaine within the past year and over 90% had not used it within the past month); *id.* at 188 (noting that crack cocaine usage “did not spread far beyond the most marginalized and vulnerable segments of society”); *id.* at 189 (noting that per National Institute on Drug Abuse surveys, the use of crack cocaine among high school seniors declined every year from 1986 through 1991, while media articles were writing about the “epidemic” spread of crack cocaine use).

62. See Reinerman & Levine, *supra* note 55, at 18, 27-28 (surveying drug use data to conclude that by the time crack cocaine coverage began in earnest, drug use generally and cocaine and crack cocaine use specifically were in decline, and noting that 1982 was the high water mark for lifetime cocaine use among young Americans). Moreover, during the period in which media articles about crack cocaine proliferated, most cocaine users were “sniffing, rather than smoking,” the drug. *Id.* at 28.

63. See *id.*, *supra* note 55, at 24 (citing New York Times/CBS News polling data).

64. See generally Reinerman & Levine, *supra* note 48, at 192 (describing the content of articles and features in *Newsweek*, the *Washington Post*, and on CBS Evening News); Loren Siegel, *The Pregnancy Police Fight the War on Drugs*, in *CRACK IN AMERICA* at 249, 255, *supra* note 17, (summarizing late-1980s media articles about the “crack baby” phenomenon).

65. Chapters of Children Requiring a Caring Kommunity (C.R.A.C.K.) can be found in several major cities; the program pays women who are addicted to drugs \$200 to undergo sterilization or use long-term birth control such as IUDs. See generally Adam B. Wolf, *Note, What Money Cannot Buy: A Legislative Response to C.R.A.C.K.*, 33 U. MICH. J.L. REFORM 173 (1999) (arguing for legislation to prevent C.R.A.C.K. from offering money in exchange for permanent sterilization or long-term birth control). The majority of women who have utilized the program are women of color. *Id.* at 178 (sixty-three percent of women who have participated in the C.R.A.C.K. program are African-American or Latina).

initially described.<sup>66</sup> Rather, many of the health problems found with babies born to mothers who had used crack were attributable to lack of prenatal care, poor nutrition and personal care, and co-existing substance use such as tobacco and alcohol.<sup>67</sup> The “crack baby” image has, however, endured, and has left in its wake legislative changes and creative prosecution strategies designed to apply criminal sanctions to women who expose developing fetuses to crack.<sup>68</sup>

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66. See, e.g., Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613, 1619 (2001) (effects of prenatal cocaine exposure are indiscernible once tobacco and alcohol exposure are controlled); L.C. Mayesm, et al., *Commentary: The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 JAMA 406-08 (1992) (arguing, fairly soon after height of “crack baby” scare, that popular fears were likely overstated); Patrick Zickler, *NIDA Studies Clarify Developmental Effects of Prenatal Cocaine Exposure*, 14 NAT'L INST. ON DRUG ABUSE NOTES (Sept. 1999), available at [http://archives.drugabuse.gov/NIDA\\_Notes/NNVol14N3/Prenatal.html](http://archives.drugabuse.gov/NIDA_Notes/NNVol14N3/Prenatal.html) (summarizing the position of the National Institute on Drug Abuse that cocaine delays motor skill and intellectual development, but that such effects are “not as profound” as early reports indicated and that it is difficult for researchers to isolate the effects of cocaine from those of poor prenatal care, poor self-care, coexisting drug use, and other factors known to negatively affect development); *Cocaine Pharmacology, “Crack Babies,” Violence: Hearings Before the U.S. Sent’g Comm’n*, (Feb. 25, 2002) (statement of Deborah Frank, M.D.), reprinted in 14 FED. SENT’G REP. 191, 196 (2002) (concluding, based on ten years of study at a National Institute on Drug Abuse project following developmental and behavioral outcomes for crack cocaine exposed babies, that crack cocaine does not affect babies differently than powder cocaine; that the effects of the drug are similar to those caused by tobacco; that there is no “crack baby” syndrome; and that early studies identifying such a syndrome were deeply flawed); see also 846 ANNALS OF N. Y. ACAD. SCI., John A. Harvey & Barry E. Kosofsky, eds., COCAINE: EFFECTS ON THE DEVELOPING BRAIN, at xi (1998) (making similar arguments).

Dr. Ira Chasnoff, whose early anecdotal observations of babies born to crack-using mothers helped fuel the medial coverage, concluded after further research that he had “never seen a ‘crack kid.’ ” Ira J. Chasnoff, *Missing Pieces of the Puzzle*, 15 NEUROTOXICOLOGY & TERATOLOGY 287, 288 (1993). Dr. Deborah Frank, a leading expert in children’s failure to thrive, concluded that the public outcry for the punishment of substance-using mothers and the disenfranchisement of their children as an unsalvageable, almost demonic “biological underclass . . . rest[s] not on scientific findings but upon media hysteria fueled by selected anecdotes.” Deborah A. Frank, *Commentary: Children Exposed to Cocaine Prenatally: Pieces of the Puzzle*, 15 NEUROTOXICOLOGY & TERATOLOGY 298, 299 (1993).

67. See Ira Glasser & Loren Siegel, *When Constitutional Rights Seem Too Extravagant to Endure: The Crack Scare’s Impact on Civil Rights and Liberties*, in CRACK IN AMERICA, *supra* note 17 at 229, 241-42.

68. Prosecutors have employed existing child abuse statutes to prosecute women who test positive for drug use during pregnancy or whose newborn infants test positive for illicit drug use, particularly cocaine use. Prosecution strategies have ranged from coercive (designed to convince a drug-using pregnant woman to seek treatment or face prosecution and incarceration) to directly punitive (criminally sanctioning women who use drugs while pregnant). See LAURA E. GÓMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 78 (1997).

These strategies generally have not survived scrutiny from reviewing courts. See, e.g., Siegel, *supra* note 64, at 249 (describing cases in North Carolina, Virginia, and New York where prosecutors initially charged women who ingested cocaine while pregnant with assault with a deadly weapon with intent to kill, felony child neglect, and endangering the welfare of a child; these indictments, as well as most similar indictments, were dismissed). In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), for example, the United States Supreme Court re-

Crack cocaine was portrayed and perceived as something far more addictive and far more menacing than powder cocaine or any other drug. The legislative reaction to public and media concern about crack cocaine was swift and severe.<sup>69</sup> States enacted new mandatory minimum sentences requiring offenders to serve prison time; increased available statutory maximums; and in some cases, provided mandatory life without parole for crack-cocaine offenses.<sup>70</sup> At the federal level, Congress included among its responses the now-infamous “100:1 ra-

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jected one such program, a cooperative effort between the Medical University of South Carolina, the Charleston, South Carolina Solicitor’s Office, the Department of Social Services, the County Substance Abuse Commission, and the local police. 532 U.S. at 71, 81-82. Per this program, pregnant patients suspected of illicit drug use were subjected to urine drug screens. *Id.* at 71. Patients who tested positive for cocaine use prior to 28 weeks could be charged with simple possession of cocaine; after 28 weeks, to possession and distribution to a person under the age of 18; and at delivery, with the additional offense of unlawful neglect of a child. *Id.* at 71-72. The Supreme Court held that this program comprised a Fourth Amendment search that did not comport with the special needs exception from the generalized requirement of a warrant and probable cause. *Id.* at 81-82.

State courts have similarly rejected prosecutions of women for child abuse based on drug use during pregnancy. *See, e.g.*, *State v. Martinez*, 137 P.3d 1195, 1198 (N.M. Ct. App. 2006) (refusing to extend state’s child abuse statute to cover fetuses). Though prosecutors have attempted to utilize a wide variety of statutes—including child abuse, child endangerment, and delivery of a controlled substance—most state courts similarly have declined to read existing statutes as holding drug-using pregnant women criminally responsible for the potential exposure of their fetuses. *See, e.g.*, *Reinesto v. Superior Court of Ariz.*, 894 P.2d 733, 737 (AZ. Ct. App. 1995) (rejecting use of child abuse statute); *People v. Hardy*, 469 N.W. 2d 50, 55 (Mich. Ct. App. 1991) (rejecting use of delivery of cocaine charge); *State v. Gray*, 584 N.E.2d 710, 713 (Ohio 1992) (rejecting child endangerment charge); *State v. Dunn*, 916 P.2d 952, 956 (Wash. App. 1996) (rejecting use of mistreatment of child statute); *cf. State v. Deborah J.Z.*, 596 N.W.2d 490, 496 (Wis. Ct. App. 1999) (rejecting use of reckless homicide and related charges against mother who was drunk when she delivered a stillborn fetus). South Carolina, on the other hand, has permitted women to be prosecuted for offenses based on fetal exposure to maternally ingested drugs. *See State v. McKnight*, 576 S.E.2d 168, 174-75 (S.C. 2003) (permitting woman to be prosecuted for homicide by child abuse where woman had used cocaine during pregnancy and fetus was stillborn); *Whitner v. State*, 492 S.E. 2d 777, 782 (1997) (permitting child endangerment prosecution where pregnant woman ingested cocaine); *see also* Ellen Marrus, *Crack Babies and the Constitution: Ruminations About Addicted Pregnant Women After Ferguson v. City of Charleston*, 47 VILL. L. REV. 299, 301-02 (2003) (describing various state strategies for prosecuting pregnant drug-using women and noting that courts generally have rejected such strategies). Women not charged specifically with offenses related to ingesting drugs while pregnant may face stiffer sentences from judges who believe that jail or prison might ensure that pregnant women stop using drugs. *See Siegel, supra* note 64, at 250-51.

Legislative efforts to create new statutes to permit specifically the prosecution of drug-using pregnant women, while popular, never led to specific sanctions against drug-using pregnant women. *See* Lynn M. Paltrow et al. *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs, Part 1*, WOMEN’S LAW PROJECT AND NAT’L ADVOCATES FOR PREGNANT WOMEN (Oct. 2000), available at [http://www.drugpolicy.org/library/governmental\\_response\\_p1.cfm](http://www.drugpolicy.org/library/governmental_response_p1.cfm).

69. *See Reinerman & Levine, supra* note 55, at 21 (noting that in 1986, “overwhelming majorities of both houses of Congress voted for new antidrug laws with long mandatory prison terms, death sentences, and large increases in funding for police and prisons”).

70. *See, e.g., Harmelin v. Michigan*, 601 U.S. 957, 1028 (1991) (rejecting an Eighth Amendment challenge to a Michigan law providing for a mandatory life sentence for possession of a relatively minor amount of cocaine).

tio”—the United States Sentencing Guidelines require 100 grams of powder cocaine to trigger the same mandatory minimum sentence as one gram of crack cocaine, and this ratio is included in the Guidelines generally for cocaine and crack-cocaine offenses.<sup>71</sup> These legislative responses to crack cocaine, which treated it as a new and more serious drug than powder cocaine, may explain some of the racial differences in incarceration rates.<sup>72</sup> What the legislative response to crack cocaine did not include was much by way of a public health response; government “focused less on standard public health practice and . . . more on the courts, the police, and the prisons.”<sup>73</sup>

If by the time legislation and media articles were appearing, however, crack cocaine use—never particularly widespread—was on the decline, how can we explain the dramatic legislative response, which suggested that crack cocaine abuse was both rampant and on the rise?

Probably the most common explanation provided for the disconnect between the reaction to and the reality of crack cocaine has been that of race—white Americans were panicking about African Americans, particularly young urban African-American men.<sup>74</sup> Crack cocaine use and trade was linked through media articles and legislative debates to violent offenses, degradation of urban centers, family breakdown, and a host of other social problems.<sup>75</sup> A lack of sympathetic identification on the part of Caucasian legislators and voters may have facilitated this linkage as well as the decision to deal with this constellation of perceived problems through incarceration and criminal control.

Whether or not enforcement of drug laws is racist in design or intent, the argument goes, the War on Drugs has been in operation a war on African-Americans.<sup>76</sup> For many scholars and civil rights lead-

71. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841 (1994)).

72. See, e.g., Troy Duster, *Pattern, Purpose, and Race in the Drug War*, in CRACK IN AMERICA, *supra* note 17, at 265-66 (describing differences in federal sentencing for powder and crack cocaine offenses and noting that various federal sentencing laws related to crack cocaine contribute to a pattern of longer sentences for African-American defendants).

73. Watkins & Fullilove, *supra* note 54, at 385-86.

74. In addition to the works of Reinerman & Levine, collected in CRACK IN AMERICA, *supra* note 48, see the sources cited *infra* notes 76-77.

75. See *supra* notes 55-60 and accompanying text.

76. See, e.g., Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time to Restore the Balance*, 16 FED. SENT'G REP. 87, 87 (2003) (noting that the crack: powder sentencing differences are “particularly distressing because crack defendants are primarily black and powder defendants are primarily white and Hispanic, so the differential treatment can too easily be seen as a manifestation of racial discrimination”); Duster, *supra* note 72, at 264-65 (citing statistics to the effect that while in the early 1990s, African-Americans comprised 15-20% of drug users, in most urban areas, they comprised half to two-thirds of persons arrested for drug offenses and attributing racial imbalances in arrest and prosecution rates to “the selective aim of the artillery in the drug war”); Glasser & Siegel, *supra* note 67, at 241 (arguing that “fears about crack merged easily with racial fears”); cf. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47

ers, late twentieth century drug policy was “[t]he [n]ew Jim Crow.”<sup>77</sup> Civil rights activists particularly decried the differences in the federal sentencing guidelines for powder cocaine and crack cocaine, depicting this dual sentencing scheme as a transparent attempt to punish African-American criminality more harshly than its white counterpart.<sup>78</sup> (Many scholars concur, arguing that the current racial imbalances in incarceration rates are substantially attributable to efforts to combat crack cocaine.)<sup>79</sup>

Some people who have looked at the responses of government bodies and the public in general to crack cocaine have theorized that part of the reaction was not only about race, but about the intersection between race and gender. Prosecutions of drug-using women have primarily been aimed at African-American women,<sup>80</sup> although drug use is fairly level among pregnant women of all races.<sup>81</sup> The gender/race linkage has perhaps reflected a desire to control African-American women who are considered undesirable mothers and to prevent them

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STAN. L. REV. 1283 (1995) (arguing that evidence is overwhelming that race is instrumental in explaining crack/powder cocaine disparity and faulting existing equal protection doctrine for not coming to same conclusion).

Some go even further in assessing the relationship between race and the governmental response to crack cocaine. Nkechi Taifa, currently a Senior Policy Analyst at the Open Society Policy Center, argues that the federal approach to crack cocaine investigation, prosecution, and sentencing “is not only a direct reflection of the institutionalization of racism in the criminal justice system, but of systematic genocide, generally, against Black people as well.” Nkechi Taifa, *Beyond Institutionalized Racism: The Genocidal Impact of Executive, Legislative & Judicial Decision-Making in the Crack Cocaine Fiasco*, NAT’L B. ASS’N MAG., Sept./Oct. 1996, at 13, 14-16 (arguing that crack cocaine sentences are not supported by empirical evidence and denote a “racially discriminatory drug enforcement policy,” and describing the federal crack: powder cocaine sentencing differences as “apartheid-type”). *But see* Kennedy, *supra* note 20, at 1267 (arguing that African Americans are harmed by under- rather than over-enforcement of drug laws); John P. Walters, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 107, 144 (arguing that enforcement of drug laws has not reflected racism or produced racially disparate results).

77. *See, e.g., Symposium, U.S. Drug Laws: The New Jim Crow?*, 10 TEMP. POL. & CIV. RTS. L. REV. 303 *passim* (2001); Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 723 (2000).

78. *See, e.g., Powder Cocaine, Crack Cocaine, and Race, Hearing Before the U.S. Sent. Comm’n*, (Feb. 25, 2002) (Statement of Wade Henderson, Executive Director of the Leadership Conference on Civil Rights) (arguing that federal drug policy disproportionately affects African Americans because of the heightened penalties for crack cocaine as compared to powder cocaine—as well as racism in criminal investigation and prosecution, and calling for Guidelines changes that would reduce disparities), *reprinted* in 14 FED. SENT’G REP. 204, 205 (2002).

79. *See, e.g.,* Blumstein, *supra* note 76, at 87; Duster, *supra* note 72, at 265 (noting that in Virginia, in 1983, 63% of new prison admits for drug offenses were white; by 1989, 34% were white).

80. *See* Glasser & Siegel, *supra* note 67, at 242.

81. *See* Ira J. Chasnoff, Harvey J. Landress, & Mark E. Barrett, *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (Apr. 26, 1990) (finding that in Pinellas County, Florida, while among pregnant women screened, 15.4% of white women and 14.1% of African-American women tested positive for drugs, African-American women were ten times more likely to be reported for substance abuse); Siegel, *supra* note 64, at 251.

from continuing to reproduce.<sup>82</sup> For example, critiques of the “Children Requiring a Caring Kommunity” or “Project Prevention” program (“CRACK”), which offers drug-addicted women two hundred dollars in exchange for sterilization, have argued that the program is an attempt to regulate “bad” mothers—largely poor, African-American women.<sup>83</sup>

Not all critiques of U.S. crack cocaine policy center on race. William Stuntz, for example, has described the response to crack cocaine in terms of class.<sup>84</sup> Poor people are easier to spot using and trading drugs—they do so in public, on street corners, and in densely-populated city centers where police may easily patrol, observe, and make arrests. More affluent citizens can conceal illicit activity with suburban remoteness, rolling lawns, and spacious homes. Poor people are reliant on appointed, indigent counsel, while affluent citizens can hire a choice of counsel and put up greater roadblocks to prosecution. The cost and effort of pursuing poor people, who are more likely to use and trade in crack cocaine, versus wealthier people, who might be more likely to use other drugs, makes the poor a more attractive target for law enforcement and prosecutors.<sup>85</sup>

The response to crack cocaine has thus been the subject of numerous academic critiques. At the center of most has been the thesis that the reaction to crack cocaine, publicly and legislatively, was overreaction fueled by panic and deeply embedded in volatile patterns of race, class, and gender.

### III. METHAEMIC!

Methamphetamine is not a recent drug innovation; the substance has been around for ninety years and has been the subject of varying amounts of media coverage and legislative action for some time. Beginning in 2004 and 2005, however, legislators, media outlets, and private citizens began paying increased attention to methampheta-

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82. See, e.g., Deleso Alford Washington, “*Every Shut Eye, Ain’t Sleep*”: Exploring the Impact of Crack Cocaine Sentencing and the Illusion of Reproductive Rights for Black Women from a Critical Race Feminist Perspective, 13 AM. U. J. GENDER SOC. POL’Y & L. 123, 133-36 (2005).

83. See, e.g., Renee Chelian, *Remarks on the “CRACK” Program: Coercing Women’s Reproductive Choices*, 5 J.L. SOC’Y. 187, 193-94 (2003) (describing C.R.A.C.K.’s outreach to various social service providers and agencies and arguing that the program targets poor, minority women); Sheila C. Cummings, *Foreword: Is CRACK the Cure?* 5 J. L. SOC’Y 1, 5-6 (2003) (describing the C.R.A.C.K program); Dana Hirschenbaum, Note, *When CRACK Is the Only Choice: The Effect of a Negative Right of Privacy on Drug-Addicted Women*, 15 BERKELEY WOMEN’S L.J. 327, 327-28 (2000) (noting that advertisements for the C.R.A.C.K. program are, by design, placed primarily in poor urban neighborhoods).

84. William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1795 (1998).

85. See *id.*; see also Glasser & Siegel, *supra* note 67, at 235 (noting that, during the 1980s, large-scale, aggressive drug sweeps focused on poor, minority, urban neighborhoods, “where drug dealing tended to be open and easy to detect”).

mine as a social problem, and all fifty states adopted new legislation related to methamphetamine. It is this period which I refer to as a “methademic,”<sup>86</sup> a period of public and political panic about a perceived, raging new epidemic of drug abuse.

In this Part, I provide an overview of methamphetamine’s history and a synopsis of recent legislative responses to this perceived epidemic of methamphetamine addiction. In Subpart A, I briefly explain the characteristics of methamphetamine, media coverage of methamphetamine, and trends in methamphetamine use and abuse. In Subpart B, I summarize the legislative response to methamphetamine from 2004 forward—particularly, the enactment of prevention-based laws designed to curtail methamphetamine use and production by discouraging people from experimenting with the drug and curtailing the availability of the drug’s ingredients.

#### A. *Methamphetamine Use as an “Epidemic”*

Methamphetamine, also referred to in its various forms as “ice,” “crystal,” “crank,” “speed,” and a variety of other slang terms,<sup>87</sup> is a stimulant drug that acts on the central nervous system to produce a chemical high by stimulating the release of dopamine.<sup>88</sup> Depending on its form, methamphetamine can be snorted, injected, ingested, or smoked, and the method of use affects the rapidity with which the body processes the drug and the onset of the user’s high.<sup>89</sup> Methamphetamine can be physiologically addictive according to medical definitions of addiction,<sup>90</sup> and repeated usage of the drug is associated with impaired dopamine production and other side effects.<sup>91</sup> Me-

86. References to the purported methamphetamine epidemic as a “methademic” have been fairly frequent. See, e.g., Jim Lynch, *County Combats Growing Meth Crisis: Authorities in Pierce County, Wash. Say the Easily Made Drug Poses Crime, Health and Environmental Threats*, OREGONIAN, Aug. 20, 2000, at A21.

87. Many articles catalog methamphetamine slang. For one particularly colorful list, see Douglas Morris, *Methamphetamines: Types, Forms, Effects, and the Federal Sentencing Guidelines*, 32 NAT’L ASS’N CRIM. DEF. LAW. CHAMPION MAG., Jan. 2009, at 20 (“Methamphetamine is known by a plethora of nicknames including, inter alia, meth, crank, speed, chicken feed, crystal, go-fast, shabu, glass, ice, strawberry quick, and methlies quick.”).

88. U.S. DEP’T OF HEALTH & HUM. SERVS., *Methamphetamine: Abuse and Addiction*, 2006 NAT’L INST. ON DRUG ABUSE RESEARCH REPORT SERIES 3-4.

89. Methamphetamine is produced in two forms—powder and crystal (and is in this way similar to cocaine). Powdered methamphetamine is generally ingested, injected, or inhaled. Jane Carlisle Maxwell, *Methamphetamine: Epidemiological and Research Implications for the Legal Field*, 82 N.D. L. REV. 1121, 1121-22 (2006). Crystal forms of methamphetamine are generally either smoked or heated and inhaled. *Id.*

90. See, e.g., Anna M. Johnson, *A Perspective Regarding Treatment for Methamphetamine Addiction*, 82 N.D. L. REV. 1435, 1435-36 (2006).

91. For a thorough summary of methamphetamine’s major effects and side effects, see Avi Brisman, *Meth Chic and the Tyranny of the Immediate: Reflections on the Culture-Drug/Drug-Crime Relationships*, 82 N.D. L. REV. 1273, 1275-83 (2006).

thamphetamine is classified federally as a Schedule II drug,<sup>92</sup> but is available legally, by prescription, under the trade name Desoxyn or in generic form.<sup>93</sup>

Concern about methamphetamine use and addiction also is not new. Amphetamines, which are chemically similar to methamphetamine,<sup>94</sup> historically received rounds of media and legislative attention.<sup>95</sup> Domestic methamphetamine “home-cooking” probably had its origin in California in the 1950s, as Korean War veterans may have imported methamphetamine production methods when they returned from service.<sup>96</sup> Major media sources covered methamphetamine abuse by long-haul truckers and motorcycle gangs during the 1970s and 1980s, when articles described the popularity of the drug’s use for maintaining alertness on overnight drives.<sup>97</sup> A smattering of news articles and academic works documented methamphetamine production and distribution, particularly in the western United States, in the late 1980s<sup>98</sup> and into the 1990s.<sup>99</sup> In particular, between 1996 and 1999, a handful of news articles either predicted that a methamphetamine “epidemic” was imminent or described such an epidemic as having already taken root.<sup>100</sup>

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92. Controlled Substances Act, 21 U.S.C. §§801-971 (2006). Methamphetamine was added to the Act as a Schedule II drug under in 1971. See Schedules of Controlled Substances: Amphetamine, Methamphetamine and Optical Isomers, 36 FED. REG. 12,734 (July 7, 1971).

93. On the legal uses of methamphetamine, see JOHNSON, *supra* note 10, at 7; U.S. DEPT. OF HEALTH & HUM. SERVS., *supra* note 88, at 2.

94. Methamphetamine is a “synthetic” drug that draws its active ingredient from its “parent drug” amphetamine. It is produced by chemically adding a second methyl-group molecule to an amphetamine compound. On the chemical relationship between methamphetamine and amphetamine, see, for example, Brisman, *supra* note 91, at 1275-77, 1276-77 n.5.

95. The major academic work on the history of American use and regulation of amphetamine is GRINSPOON & HEDBLUM, *supra* note 17, *passim*.

96. On the early history of methamphetamine production and use, including in particular its substantial use by military personnel during World War II and the Korean War, see, for example, DAVID T. COURTWRIGHT, FORCES OF HABIT: DRUGS AND THE MAKING OF THE MODERN WORLD 76-84 (2001); M. Douglas Anglin *et al.*, *History of the Methamphetamine Problem*, 32 J. PSYCHOACTIVE DRUGS 137, 137-38 (2000); Brisman, *supra* note 91, at 1303-04; see also GRINSPOON & HEDBLUM, *supra* note 17, at 18-20, 24-25 (discussing amphetamine use among U.S. soldiers and veterans of World War II and the Korean War, albeit without distinguishing between methamphetamine and other amphetamines).

97. See, e.g., JOHNSON, *supra* note 10, at 7 (describing use of methamphetamine by long-haul truckers and motorcycle gangs in the 1960, 1970s, and 1980s).

98. See, e.g., Jonathan Beaty, *Southern California Tales of the Crank*, TIME, Apr. 24, 1989, at 10 available at <http://www.time.com/time/magazine/article/0,9171,957521,00.html> (describing use and manufacture in Southern California); Richard Lacayo, *The Menace of Ice*, TIME, Sept. 18, 1989, at 28 (describing methamphetamine as Hawaii’s number one drug and noting that methamphetamine was making “serious inroads” in other states and that “speed kings” were planning “vast expansions in production”).

99. See, e.g., T. Christian Miller, *O.C. Meth Lab Bust Points up Boom in Drug*, L.A. TIMES, July 22, 1993, at 1.

100. See, e.g., Charlie Goodyear, *Methamphetamine Abuse Called Epidemic*, SAN FRANCISCO CHRON. Apr. 8, 1999, at A15 (describing an existing “epidemic”); Anastasia

The latest round of press articles describing the menace of methamphetamine surfaced in 2004 and 2005.<sup>101</sup> In those two years, major American newspapers and news magazine ran over one hundred articles discussing and bemoaning the scourge of meth. Accounts continued to portray methamphetamine use as an “epidemic”<sup>102</sup> or a “siege.”<sup>103</sup> Coverage was quick to emphasize the prevalence of methamphetamine in rural areas and to draw connections between methamphetamine use and rural poverty.<sup>104</sup> (A second strand of coverage that never gained quite as much traction emphasized the use of methamphetamine by urban, gay men and expressed concern about the possibility that meth use among gay men might retrigger the AIDS epidemic.<sup>105</sup>) Media coverage emphasized a variety of problems related to

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Toufexis, *There Is No Safe Speed: Three Toddlers' Deaths Spotlight the Nation's Latest Drug Epidemic*, TIME, Jan. 8, 1996, at 37, available at <http://www.time.com/time/magazine/article/0,9171,983922,00.html> (quoting a Drug Enforcement Administration official as describing 1996 methamphetamine use as “absolutely epidemic”); Christopher S. Wren, *Sharp Rise in Use of Methamphetamines Generates Concern*, N.Y. TIMES, Feb. 14, 1996, at A16 (describing a “startling rise” in methamphetamine use in western states); Walter Kirn, *Crank*, TIME, June 22, 1998, at 24, available at <http://www.time.com/time/magazine/0,9263,7601980622,00.html> (describing methamphetamine use as “a powdery plague on America’s heartland”).

101. See, e.g., John-Manuel Andriote, *Meth Comes out of the Closet*, WASH. POST, Nov. 8, 2005, at F1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/04/AR2005110402178.html> (describing signs of increasing concern about methamphetamine); Joyce Pellino Crane, *Lowell Police Voice Concern on Methamphetamine Threat*, BOSTON GLOBE, Nov. 16, 2005, at A24 (describing police in several Massachusetts communities as being concerned, based on recent methamphetamine laboratory discoveries, that methamphetamine, “epidemic” in the Midwest, was establishing a toehold in Massachusetts); David J. Jefferson et al., *America’s Most Dangerous Drug*, NEWSWEEK, Aug. 8, 2005, at 41 (offering hyperbolic account of impending crisis); Dirk Johnson, *Policing a Rural Plague*, NEWSWEEK, Mar. 8, 2004, at 41 (describing the use of methamphetamine as “soaring” and small towns as “[f]eeling under siege”); Paul F. Walsh, Jr., *“May You Live in Interesting Times . . .”*, 39 PROSECUTOR, Aug. 2005, at 5, available at [http://www.ndaa.org/ndaa/about/president\\_message\\_july\\_august\\_2005.html](http://www.ndaa.org/ndaa/about/president_message_july_august_2005.html) (President of National District Attorneys Association describing methamphetamine as “continu[ing] to roar eastward across our country leaving destruction, pain and new criminal issues for prosecutors to contend with”); *United States: Instant Pleasure, Instant Ageing*; Methamphetamine, ECONOMIST, June 18, 2005, at 47 (noting that methamphetamine “is in the eyes of many, America’s leading drug problem”).

102. E.g., Crane, *supra* note 101, at A24.

103. E.g., Johnson, *supra* note 101, at 41.

104. See, e.g., *id.* (describing methamphetamine as a “rural plague”); Cameron McWhirter & Jill Young Miller, *Meth Stalks Rural Georgia: Cheap, Easily Manufactured Stimulant Is Countryside’s Fastest-Growing Drug Problem, and Abuse Can Be Deadly*, ATLANTA J. & CONST., June 6, 2004, at C1 (describing linkage between methamphetamine use and rural poverty); see also Joh, *supra* note 10, at 180 (identifying the rural white poor as one of the two groups who the media associated with methamphetamine use during this period).

105. Professor Joh treats this strand of coverage as on par with the depiction of methamphetamine as a drug of the rural poor. See Joh, *supra* note 10, at 181-82; see also *id.* at 181 n.32 (collecting media sources from this period depicting purported epidemic of meth use among urban, gay men); David J. Jefferson et al., *Party, Play — And Pay*, NEWSWEEK, Feb. 28, 2005, at 38 (describing a “Party and Play” phenomenon in which gay men use methamphetamine prior to having risky sexual relations, and arguing that methamphetamine use is associated with HIV transmission rates).

methamphetamine manufacturing and consumption, paying particular attention to the explosiveness of the ingredients used in manufacturing the drug,<sup>106</sup> the alleged horrific effects of the drug on the oral health of its users,<sup>107</sup> and the many ways in which meth endangered children.<sup>108</sup> Advertising campaigns against methamphetamine include warnings of the environmental hazards posed to innocent bystanders when local residents manufacture methamphetamine.<sup>109</sup>

Has this coverage reflected a real, recent epidemic of methamphetamine use? As was the case with crack cocaine, the media coverage has not appeared to accurately depict trends in methamphetamine usage.<sup>110</sup> Methamphetamine use does not appear, by credible measures, to be on an upswing.<sup>111</sup> Among teenagers, methamphetamine use has steadily declined over the past five years, and was in decline during the 2005 uptick in methamphetamine articles.<sup>112</sup>

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106. See, e.g., Arian Campo-Flores, *The Fallout: 'I Felt My Face Just Melting,'* NEWSWEEK, Aug. 8, 2005, at 44.

107. See, e.g., Paul Harris Crossville, *Tragic Orphans of U.S. Drugs Epidemic: Crystal Meth Hits Rural Areas*, OBSERVER, Aug. 14, 2005, at 22 (describing “meth mouth”). Whether the effects of “meth mouth” are actually attributable to methamphetamine use quickly became an object of substantial debate. Cf. Jack Shafer, *The Meth-Mouth Myth: Our Latest Moral Panic*, SLATE, Aug. 9, 2005, at A.21, <http://www.slate.com/id/2124160> (expressing skepticism).

108. See, e.g., Crossville, *supra* note 107, at 22.

109. See, e.g., Steve Suo, *Nationwide Ad Campaign Takes Aim at Methamphetamine Abuse*, OREGONIAN, Dec. 3, 2005, at C7 (describing a national anti-methamphetamine televised commercial campaign by the Partnership for a Drug-Free America, including one dramatization in which a small child is exposed to methamphetamine fumes from a neighbor’s manufacturing enterprise, and a second dramatization in which a confused non-smoker reports coughing symptoms to his medical care provider while a narrator intones that the man’s new home is a former methamphetamine lab).

110. In contrast with earlier drug panics, some media sources openly doubted—and even directly critiqued—their competitors’ hyperbolic coverage of methamphetamine. In particular, *Slate* columnist Jack Shafer has mobilized data to aggressively critique some of the more exaggerated media accounts. See, e.g., Jack Shafer, *Meth Madness at Newsweek: This Is Your Magazine on Drugs*, SLATE, Jan. 31, 2007, at 5, <http://www.slate.com/id/2123838>; Shafer, *supra* note 107.

111. A 2006 study suggests that approximately 731,000 Americans were using methamphetamine in 2006, a number that was roughly unchanged from four years earlier. See Joh, *supra* note 10, at 180 n.24. Quest Diagnostics, the largest administrator of workplace drug tests in the United States, reported similar overall rates of usage, but also noted a steeper pattern of decline. See Quest Diagnostics, *USE OF METHAMPHETAMINE AMONG U.S. WORKERS AND JOB APPLICANTS DROPS 22 PERCENT IN 2007 AND COCAINE USE SLOWS DRAMATICALLY*, in *DRUG TESTING INDEX*, (2008), available at [http://www.questdiagnostics.com/employersolutions/dti/2008\\_03/dti\\_index.html](http://www.questdiagnostics.com/employersolutions/dti/2008_03/dti_index.html) (reporting that positive test results for methamphetamine peaked at 0.33% in 2004 and declined by between 15 and 36 percent each year between 2004 and 2007). Those rates are substantially lower than the positive test results for marijuana (2.59%) or cocaine (0.70%). See *id.* As happened with crack cocaine, to the extent that methamphetamine use was at any point on an upswing—Quest reports that positive methamphetamine screens increased by some 73% between 2002 and 2004—by the time media and public attention turned to the drug, usage, never particularly widespread, was on the decline. *Id.*

112. According to in-school surveys conducted by the University of Michigan’s Monitoring the Future study and supported by grants from the National Institute on Drug Abuse and the National Institutes of Health, methamphetamine use among teenagers has dropped fairly

While words like “epidemic” pepper articles about methamphetamine use,<sup>113</sup> most Americans do not use and have never used methamphetamine,<sup>114</sup> and the 2007 usage figures continue to show decline, suggesting that most Americans never will. While methamphetamine use doubtlessly can be devastating, and while usage rates likely have increased in particular areas or communities, there is not what

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steadily since the survey began tracking self-reported methamphetamine use figures in 1999. In 1999, 4.5% of eighth graders, 7.3% of tenth graders, and 8.2% of twelfth graders reported having ever used methamphetamine; the 2005 figures were 3.1%, 4.1%, and 4.5% respectively, and the latest available figures, from 2007, put lifetime usage at 1.8%, 2.8%, and 3.0% respectively. See L.D. Johnson, et al., *Overall, Illicit Drug Use by American Teens Continues Gradual Decline in 2007*, Table 1 <http://monitoringthefuture.org/data/07data.html#2007data-drugs>. According to usage figures from 2007, more teenagers have tried marijuana, inhalants, non-LSD hallucinogens, MDMA (“ecstasy”), cocaine, other amphetamines, and tranquilizers. See *id.* Similarly, teens reporting that they have used methamphetamine at any point within the past year declined (for eighth, tenth, and twelfth graders respectively) from 3.2%, 4.6%, and 4.7% in 1999, to 1.8%, 2.9%, and 2.5%, respectively, in 2005; the 2007 figures are 1.1, 1.5%, and 1.7%. See *id.*, at Table 2. Self-reported methamphetamine use within the past thirty days follows the same pattern; in 1999, 1.1% of eighth graders, 1.8% of tenth graders, and 1.7% of twelfth graders reported such recent use; by 2005, those percentages had declined to 0.7%, 1.1%, and 0.9%, and they stood at 0.6%, 0.4%, and 0.6% in 2007. See *id.*, at Table 3. These survey results are similar to those produced by the Youth Risk Behavior Survey (YRBS), a Centers for Disease Control and Prevention survey that includes self-reported youth engagement in various risky behaviors, including drug use; according to the YRBS, among 9<sup>th</sup> through 12<sup>th</sup> graders, the percentage of students who reported that they ever had used methamphetamines showed “no change” between 1999 and 2001 (hovering between 9.1 and 9.8%), and fell to 6.2% by 2005 and 4.4% by 2007. See CTR. FOR DISEASE CONTROL, TRENDS IN THE PREVALENCE OF MARIJUANA, COCAINE, AND OTHER ILLEGAL DRUG USE—NATIONAL YRBS: 1991-2007, available at [http://www.cdc.gov/HealthyYouth/yrbs/pdf/us\\_drug\\_trend\\_yrbs.pdf](http://www.cdc.gov/HealthyYouth/yrbs/pdf/us_drug_trend_yrbs.pdf).

113. See *supra* notes 100-09.

114. As noted above, see *supra* note 111, the most recent systematic data suggests that there are less than three-quarters of a million current users of methamphetamine. According to 2006 data from the Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration, as of 2006, there were approximately 731,000 current methamphetamine users in the United States (about 0.3% of the population); about 5.8% of Americans reported that they had tried methamphetamine. DEPT OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., OFFICE OF APPLIED STUDIES, RESULTS FROM THE 2006 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 18, available at <http://www.oas.samhsa.gov/nsduh/2k6nsduh/2k6Results.pdf>. The same survey reports that about 5.2 million Americans were, in 2006, current recreational users of prescription drugs; 2.4 million were current cocaine users; and 14.8 million were marijuana users. *Id.* at 16, 18. See also KING, *supra* note 10, at 4-14 (reviewing several different drug usage studies, including emergency room admissions and positive drug tests among arrestees, and concluding that methamphetamine is used regularly by a very small percentage of Americans, and that the rate of people using methamphetamine monthly has been stable over the past several years). Despite this data, even articles in law journals make statements to the effect that methamphetamine “has become one of the most abused drugs in America.” Lauren Grau, Comment, *Cutting off the Building Blocks to Methamphetamine Production: A Global Solution to Methamphetamine Abuse*, 30 HOUS. J. INT’L L. 157, 161 (2007). Methamphetamine use does, however, vary by location—while positive drug tests among arrestees are fairly constant across jurisdictions, positive drug tests for methamphetamine specifically vary widely, reflecting provincial differences in drugs of choice. See KING, *supra* note 10, at 13-14; DEPT OF HEALTH & HUMAN SERVS., *supra*, at 27 (reporting that methamphetamine use was approximately five times more widespread in the West than in the Northeast).

would appear to be a large-scale, widespread upswing in methamphetamine use.

While “epidemic” thus appears an inflation of actual usage rates, the racial depictions of methamphetamine users are more accurate: most methamphetamine users are Caucasian.<sup>115</sup> About half of federal methamphetamine DEA arrests are of individuals identified as Caucasian; the majority of non-Caucasian methamphetamine DEA arrestees are Latino/Hispanic.<sup>116</sup>

### B. Legislative Responses to Methamphetamine

The central and most pervasive legislative responses to the perceived methamphetamine epidemic have been to constrain the ability of would-be home manufacturers to obtain necessary production ingredients and to educate the public against methamphetamine use and production. Recipes for methamphetamine production are readily available via print media and the internet<sup>117</sup> and use ingredients and hardware that historically have been easy to purchase at neighborhood stores.<sup>118</sup> The most important of those ingredients, pseudoephedrine—the active ingredient in certain kinds of cold medications—has anchored legislative action, as states, followed by Congress, have sought to limit the ability of prospective manufacturers to access necessary materials as well as to discourage people from becoming new users or producers of methamphetamine.

In fact, the legislative response to methamphetamine in some areas preceded the perception of a regional methamphetamine problem. When, for example, Massachusetts State Senator Harriette L. Chandler, D-Worcester, introduced legislation seeking to restrict public ac-

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115. See, e.g., David E. Smith, Gantt P. Galloway & Richard B. Seymour, *Methamphetamine Abuse, Violence and Appropriate Treatment*, 31 VAL. U. L. REV. 661, 667 (1997) (providing data).

116. See Mark Motivans, U.S. Dep’t of Just. Stat., BUREAU OF JUSTICE STATISTICS, BULLETIN: FEDERAL JUSTICE STATISTICS 2005 at 2 (Sept. 2008), available at <http://www.bjs.ojp.usdoj.gov/content/pub/pdf/fjs05.pdf> (reporting that of 6,461 methamphetamine arrests conducted by the DEA in 2005, 3,154 of the arrestees were white; 2,809 Hispanic/Latino; 173 Asian/Pacific Islander; 143 black/African American; and 61 American Indian/Alaskan Native).

117. Debra S. Peterson and R. Michael Jennings, *Methamphetamine A Recipe for Disaster*, 73 J. KAN. B. ASS’N, Oct. 2004, at 7 (noting that bookstores, internet sites, and even court decisions provide recipes for manufacturing methamphetamine). For a description of the methamphetamine production process in laymen’s language, see *id.* at 8,44.

118. Methamphetamine is similar in chemical structure to ephedrine and pseudoephedrine, making it relatively easy to synthesize in home- or vehicle-based “laboratories.” See, e.g., Samantha S. McKinley & Joseph L. Fink III, “Speed Limits”: *States’ Approaches to Regulating Access to Methamphetamine Chemical Precursors with Statutes and Regulations Limiting Pseudoephedrine Availability*, 82 N.D. L. REV. 1217, 1220-21 (2006). Recipes generally include cold medication (for the active ingredient, ephedrine or pseudoephedrine), lithium extracted from lithium batteries, ether, and anhydrous ammonia or iodine (depending on the methamphetamine form produced), as well as other substances such as paint thinner, freon, drain cleaner, and lye. *Id.* at 1221-22.

cess to pseudoephedrine, she did not argue that this restriction was necessary to combat current methamphetamine production in the state; rather, she argued that such restrictions were necessary to avoid developing a methamphetamine problem in the state.<sup>119</sup> Similarly, the Partnership for a Drug Free America justified a major new government-backed public education campaign against methamphetamine manufacturing, launched in late 2005, as “true prevention” and an attempt to “deal[] with [the drug] before it’s a crisis.”<sup>120</sup>

The focus on education, treatment, and pseudoephedrine restriction has not been one settled on accidentally; legislatures and executives explicitly and intentionally have privileged methamphetamine-reduction options rather than focusing on criminal sanctions.<sup>121</sup> In the following Sections, I describe state and federal legislative responses to the perceived epidemic of methamphetamine use and manufacture. While jurisdictions have in some cases increased criminal penalties—in particular, where legislatures have believed that “innocent” nonusers, particularly children, are endangered—by and large, legislators have focused on preventative rather than incarcerative strategies, a response we might not have been conditioned to expect from the literature surrounding legislative reactions to the crack cocaine “epidemic” in particular.

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119. Dan Lamothe, *‘Meth’ Eyed as Latest Menace*, REPUBLICAN, Sept. 26, 2005, at A1 (quoting State Senator Chandler as saying, “[w]e’re looking to put [pseudoephedrine] behind the counter because we’re looking to avoid the problem that places like Oregon have had . . . Nothing happens across the country that doesn’t eventually happen here”); see also Brian Scheid, *Officials on the Watch for Meth in Bucks*, INTELLIGENCER, Oct. 7, 2005, at 3B (quoting Chief of County Detectives in Bucks County, Pennsylvania, as saying that methamphetamine could move into his area, and arguing for proactive action because “[i]t’s perfectly ripe for this problem to get out of hand if we don’t get our hands around it first”); Jennifer Sinco Kelleher, *For Now, Meth’s LI Presence on Fire Island*, NEWSDAY, Mar. 15, 2004, at A42 (quoting a local Nassau County officer, commenting on crystal methamphetamine, as saying: “It’s virtually nonexistent . . . You keep hearing it’s going to come, but it hasn’t hit here yet”).

120. Kenneth C. Crowe II, *Ad Campaign Targets Meth Lab Dangers: TV Commercials are Designed to Shock to Mobilize Communities*, ALBANY TIMES UNION, Dec. 13, 2005, at B8.

121. For example, when Congress began considering comprehensive anti-methamphetamine legislation in 2006, one of the prominent bills included harsh new mandatory minimum sentences. See Cassidy, *supra* note 10, at 134. However, after considering the matter, the House Judiciary Committee voted unanimously to strip them from the bill. See *id.*

Some individuals involved in administering the legislative response to methamphetamine have made similar observations. For example, Anna M. Johnson, Director of Operations at a North Dakota recovery center, notes that “[d]uring North Dakota’s Fifty-Ninth Legislative Assembly in 2005, senators and representatives from across the state voted to respond to the methamphetamine epidemic with treatment rather than incarceration.” Johnson, *supra* note 90, at 1437. As Johnson notes, the relevant bill passed the North Dakota Senate by a 47-0 vote and the North Dakota House by an 88-5 vote (88 yeas, 5 nays, 1 absent). See *id.*, at 1437 n.8.

### 1. Precursor Regulations

The primary way in which legislatures have responded to a perceived methamphetamine epidemic has been to make it more difficult for prospective methamphetamine manufacturers to obtain essential production ingredients. Many confused persons first encounter this central form of legislative response when attempting to self-medicate cold and allergy symptoms. Puzzled drug store patrons must request that Sudafed bottles be liberated from locked cabinets and behind-counter stashes; provide identification as they might for alcohol purchase; observe limits on the number of capsules they can purchase; and submit information to the commercial establishment to permit either the store or law enforcement officials to track the quantity and frequency of pseudoephedrine purchases. These changes in commercial practice comport with restrictions that states pioneered and the United States Patriot Act now essentially requires.

Restrictions on the ability to purchase precursor ingredients for methamphetamine manufacture are not in themselves new. Western states began restricting precursor sales in the 1980s,<sup>122</sup> and Congress passed a half-hearted measure that imposed some restrictions in 1996 in response to the first significant round of media stories positing a coming meth “epidemic.”<sup>123</sup> However, as described below,<sup>124</sup> the widespread introduction of precursor regulations did not occur until 2004 to 2005, when legislatures began to respond to the perceived epidemic of drug use described above.<sup>125</sup>

Prior to the recent round of relatively uniform restrictions, some prosecutors attempted to utilize then-existing criminal law to convince merchants to monitor sales of items associated with methamphetamine manufacturing and to avoid selling items where they might be used to manufacture meth. Merchants were, for example, prosecuted under general conspiracy laws for selling items such as cold medication, lighter fluid, matches, and ether in quantities or combinations that, according to law enforcement officials, put the merchants on notice that a customer intended to use the purchased items to manufac-

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122. See, e.g., CAL. HEALTH & SAFETY CODE § 11055(f)(1) (West Supp. 1990); IDAHO CODE ANN. § 37-2707(g)(1) (Supp. 1990); NEV. REV. STAT. § 453.146(2)(h) (Michie Supp. 1989); OR. REV. STAT. § 475.940 (1989); UTAH CODE ANN. §§ 58-37c-3(2)(p)-(q), 58-37c-4 (1990); WASH. REV. CODE ANN. § 69.50.206 (g)(1) (West. Supp. 1990).

123. See generally Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, 110 Stat. 3099 (codified as amended in scattered sections of 19, 21, 28, and 42 U.S.C.). As commentators have noted, the 1996 Act was largely ineffective in regulating precursors as it provided a blanket exception to purchase restrictions for approved over-the-counter cold medications. See, e.g., Jean C. O'Connor, Jamie F. Chriqui & Duane C. McBride, *Developing Lasting Legal Solutions to the Dual Epidemics of Methamphetamine Production and Use*, 82 N.D. L. REV. 1165, 1177 (2006).

124. See *infra* notes 129-141 and accompanying text.

125. See *supra* Part III.B.

ture methamphetamine.<sup>126</sup> An individual who purchases or attempts to purchase such items in combinations and quantities that seem suspicious may still be detained by law enforcement officers to investigate intent to manufacture methamphetamine.<sup>127</sup> Some retailers voluntarily moved pseudoephedrine products behind their counters prior to any specific legislation requiring them to do so.<sup>128</sup>

The specific set of legal changes described in this Section passed quickly and without organized opposition. Some drug companies resisted restrictions on purchases and sales by lobbying against legislation,<sup>129</sup> although those lobbying efforts proved unsuccessful. Also, some pharmaceutical manufacturers have replaced the pseudoephedrine in some cold medication products with phenylephrine, an active ingredient that may not be as effective as a decongestant.<sup>130</sup>

Within the past few years, virtually all states have passed legislation that in essence formalizes the assumption that purchasing partic-

126. In one high-profile law enforcement effort in Georgia, “Operation Meth Merchant,” undercover agents went to stores in several counties, told clerks in slang terms that they planned to “cook” methamphetamine, and purchased combinations of products that, according to prosecutors, should have put merchants on notice that they were selling items to be pressed into service for methamphetamine manufacture. Defendants were prosecuted for violating federal statutes that criminalize (i) selling legal but regulated drugs with reason to believe that the drugs are going to be used to manufacture illegal drugs, *see* 21 U.S.C. § 841(e)(2) (2006), and (ii) selling materials or products with reason to believe that they will be used to manufacture illegal drugs, *see* 21 U.S.C. § 843(a)(7) (2006). *See* United States v. Patel, No. 4:05-CR-27-02, slip. op. at 3-4 (N.D. Ga. Aug. 1, 2006), *available at* <http://www.stopoperationmethmerchant.org/pdf/MotionDeniedOrder.pdf>. Civil liberties groups and others criticized the operation for, as they perceived, targeting stores operated by South Asian immigrant families with limited English skills and a lack of knowledge of manufacturing mechanics and methamphetamine lingo, as well as for using an informant who may have been unreliable, leading to the arrests of misidentified suspects. *See, e.g.,* Jay Bookman, Editorial, *Meth Sting Pointed at South Asians*, ATLANTA J. CONST., Oct. 13, 2005, at A15 (noting that forty-three of forty-nine convenience store clerks and owners arrested in Operation Meth Merchant were south Asian immigrants); Jay Bookman, *War on Crystal Meth Cooks Up Many Flimsy Charges*, ATLANTA J. CONST., Oct. 10, 2005, at A13 (criticizing operation); Feature: Federal Meth Precursor Sting Targeting South Asian Convenience Stores Draws Protests, ACLU Intervention, Jan. 13, 2006, <http://stopthedrugwar.org/chronicle/418/convenience.shtml> (last visited Aug. 27, 2010). A federal district judge dismissed the collected defendant’s claim of selective prosecution. *See* United States v. Patel, No. 4:05-CR-27-02, slip. op. at 3-4 (N.D. Ga. Aug. 1, 2006), *available at* <http://www.stopoperationmethmerchant.org/pdf/MotionDeniedOrder.pdf>.

127. *See infra* Part III.B.

128. *See* Jim Puzanghera, *Putting Cold, Flu Drugs Out of Reach*, SAN JOSE MERCURY NEWS, Dec. 15, 2005, at 1A (explaining that Walgreens, Target, Wal-Mart, Longs, and other stores in California put pseudoephedrine-containing products behind the counter in early 2005, prior to the passage of precursor restrictions requiring them to do so).

129. For example, Pfizer, the manufacturer of Sudafed, and the Consumer Healthcare Products Association lobbied unsuccessfully against Oklahoma’s Bill 2176, which requires pseudoephedrine purchasers to present identification and sign a registry. *See* Mark Schone, *The Epidemic on Aisle 6*, LEGAL AFF., Dec. 2004, *available at* [http://www.legalaffairs.org/issues/November-December-2004/feature\\_schone\\_novdec04.msp](http://www.legalaffairs.org/issues/November-December-2004/feature_schone_novdec04.msp). The Consumer Healthcare Products Association lobbied with similarly unavailing results in several other states. *Id.*

130. Robert Cohen, *Many Cold Meds Aren’t What They Used to Be*, MINNEAPOLIS STAR-TRIB., Nov. 24, 2006.

ular items denotes an intent to manufacture methamphetamine, and in general places the burden on stores to prevent customers from purchasing precursor items.<sup>131</sup> Oklahoma created the “model” for this sort of legislation in 2004, when it passed H.B. 2176.<sup>132</sup> Legislators hope that by choking off ingredient supply lines, particularly the sizable quantities of ephedrine or pseudoephedrine essential to methamphetamine manufacture, local mom-and-pop methamphetamine producers will be forced to shut down—positing that when “[y]ou control pseudoephedrine, you control the meth.”<sup>133</sup> Restrictions on pseudoephedrine purchase and possession vary from state to state,<sup>134</sup> and while (as discussed below) federal law now provides a floor for precursor purchase restrictions,<sup>135</sup> state laws have the following general characteristics.

First, states limit the amount of pseudoephedrine products a customer may purchase (without prescription) at any given time or location. A customer may purchase a specified quantity of pseudoephedrine products at one store or from several stores within a certain period of time.<sup>136</sup> In order to ensure that customers are not assuming new identities; returning repeatedly to a store or a series of stores in an attempt to cobble together a number of small purchases (a tactic known as “smurfing”<sup>137</sup>); or otherwise attempting to circumvent purchase restrictions, legislation requires stores to demand that customers produce identification at the time of purchase or to sign into a

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131. In 2005 alone, thirty-five states passed such laws, generally known as “meth precursor” restrictions, bringing the total number of states with such restrictions well over forty. See Monica Cain & Cretson Dalmadge, *The Effects of State-Level Methamphetamine Precursor Restriction on Drug Laboratory Seizures*, 8 REV. BUS. RES. 36, 36 (2007) (summarizing 2006 legislation).

132. See Scott Ehlers, *State Legislative Affairs Update*, NAT'L ASS'N CRIM. DEF. LAW. CHAMPION MAG., Nov. 2005, at 58.

133. Gaylord Shaw, *When Meth Hits Home/Oklahoma Trooper's Routine Check Turns Fatal, Prompting Focus on a Powerful Drug Gaining Popularity*, NEWSDAY, Mar. 15, 2004, at A6 (quoting an Oklahoma state narcotics bureau official in an article that describes multiple killings that state officials attribute to methamphetamine).

134. For one fairly complete list of state regulations, see DUANE C. MCBRIDE ET AL., INSTITUTE FOR PREVENTION OF ADDICTIONS, *THE RELATIONSHIP BETWEEN STATE METHAMPHETAMINE PRECURSOR LAWS AND TRENDS IN SMALL TOXIC LABS (STL) SEIZURES* 60-61 (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/223467.pdf>.

135. See 21 U.S.C. § 830(e)(1)(A)(i) (2006) (imposing restrictions and reporting requirements on retailers who display and sell products identified as potential methamphetamine precursors); see also Patricia Stanley, Comment, *The Combat Methamphetamine Epidemic Act: New Protection or New Intrusion?*, 39 TEX. TECH L. REV. 379, 404-05 (2007) (summarizing the relevant federal provisions).

136. For a summary of state purchase restrictions that notes some interesting differences between state laws, see O'Connor et al., *supra* note 123, at 1182-85; see also Stanley, *supra* note 135, at 393-94 (noting variations in state laws, in particular between states that simply limit the amount that can be purchased during a single transaction and states that limit the total amount that can be purchased within a given time period).

137. See, e.g., Andrew C. Goetz, Note, *One Stop, No Stop, Two Stop, Terry Stop: Reasonable Suspicion and Pseudoephedrine Purchases by Suspected Methamphetamine Manufacturers*, 105 MICH. L. REV. 1573, 1584 (2007) (explaining the term).

hard-copy or electronic log book so that purchase amounts and patterns can be tracked.<sup>138</sup>

Second, state laws place requirements on retailers who vend products that contain pseudoephedrine. Jurisdictions mandate that stores monitor pseudoephedrine products, put pseudoephedrine products under the control of pharmacists, or keep products secured behind a counter or in a locked case; and report thefts and suspicious behavior to authorities.<sup>139</sup> In this manner, some law enforcement functions are placed on retailers, who monitor customers and merchandise to ensure compliance with the law.

Third, some states have criminalized possession of particular amounts of pseudoephedrine or permitted an inference of intent to manufacture from possession of a specified quantity of pseudoephedrine.<sup>140</sup> While it may have always been possible to get a jury instruction to the effect that intent to manufacture methamphetamine can be inferred from the possession of a certain quantity or combination of precursor materials, this inference has been formalized by states into a statutory presumption.<sup>141</sup>

The efficacy of the relatively new precursor restrictions is debatable. Most law enforcement officials appear to believe that the restrictions have reduced the number of mom-and-pop methamphetamine labs, and media sources and police departments have reported fewer methamphetamine laboratory raids in many areas since restrictions have been put into place.<sup>142</sup> Reduced numbers of laboratories detected

138. See O'Connor et al., *supra* note 123, at 1184-85 (describing a variety of identification and record-keeping requirements imposed by different states). Since 2006, Oregon has required a prescription for the purchase of products containing pseudoephedrine. See OR. REV. STAT. §475.950(2) (2008). Oregon Senator Ron Wyden has recently introduced federal legislation to impose a similar requirement, but the bill has made no significant legislative progress. See Dan Schiff, *Pseudoephedrine Prescription Bill on the Way*, OVER THE COUNTER TODAY (Feb. 24, 2009), available at <http://www.overthecountertoday.com/2009/02/pseudoephedrine-prescription-bill-on-the-way.html> (noting that Senator Wyden has drafted and was planning on introducing such a ban in "the Meth Lab Elimination Act of 2009").

139. For a summary of some such laws, see Stanley, *supra* note 135, at 395 (discussing restrictions imposed on retailers in Alabama, Missouri, and Oklahoma).

140. See, e.g., IND. CODE §35-48-4-14.5 (2006) (classifying possession of more than ten grams of pseudoephedrine or ephedrine as a Class D felony); 35 PA. STAT. ANN. §780.113.1 (2004) (criminalizing possession of any amount of pseudoephedrine or ephedrine if—but only if—the state can establish an intent to manufacture or distribute methamphetamine); S.C. CODE ANN. §44-53-375(E)(1) (2005) (criminalizing the possession of more than twelve grams of pseudoephedrine or ephedrine).

141. See, e.g., MISS. CODE ANN. § 41-29-313(2)(c)(ii) (2005) ("[P]ossession of one or more products containing more than twenty-four (24) grams of ephedrine or pseudoephedrine shall constitute a rebuttable presumption of intent to use the product as a precursor to methamphetamine or another controlled substance."); OKLA. STAT. tit. 63, §2-332(B) (2004) (creating a rebuttable presumption that possession of more than nine grams of pseudoephedrine evinces an intent to produce methamphetamine).

142. See, e.g., Paul Bird, *3 Stores Cited in Meth Checks*, INDIANAPOLIS STAR, Dec. 17, 2005, at 1S (reporting that, as of December of 2005, state police had responded to 941 calls

can, however, reflect shifting law enforcement priorities or changing manufacturing strategies. Law enforcement officers might have other local crises, such as the contemporaneous uptick in violent crime,<sup>143</sup> that shift their attention away from methamphetamine production; they might rely on precursor restrictions in part to reduce their need to actively work to detect methamphetamine laboratories; mom-and-pop producers might shift locations in order to be less detectable (sites that are more rural, more professional “superlabs,” or mobile such as automobile trunks). Also, as discussed below, reducing local production may or may not reduce local methamphetamine use, although it certainly would reduce the number of persons in the United States exposed to toxic and volatile methamphetamine production chemicals.

State precursor restrictions of course leave several methods of pseudoephedrine procurement open for the enterprising methamphetamine manufacturer. Not all jurisdictions passed precursor restrictions in the circa-2004 era, and options such as mail-order companies were not covered by state precursor statutes. In 2006, Congress stepped in to close some of these loopholes and establish national standards, adopting the Combat Methamphetamine Epidemic Act as part and parcel of a larger bill expanding and reauthorizing the Patriot Act.<sup>144</sup> The Methamphetamine Act created nationwide pseudoephedrine restrictions that largely mirrored the restrictions recently put into place in most states and restricted the international and mail-order sale of pseudoephedrine.<sup>145</sup>

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about methamphetamine labs, compared to 1061 at the same point the year prior, before precursor restrictions were enacted); Vic Ryckaert, *Meth Makers Outside U.S. Help Fill Void*, INDIANAPOLIS STAR, Dec. 15, 2005, at 4A (quoting John P. Walters, Director of the White House Office of National Drug Control Policy, as saying that all Midwestern states had seen declines in home methamphetamine manufacturing since precursor restrictions were enacted); Michael A. Lindenberger, *Law May Be Cutting Number of Meth Labs*, (Louisville) COURIER-JOURNAL, Nov. 4, 2005, at A1 (officials in Kentucky credit precursor restrictions with reducing methamphetamine laboratory seizures). *But see* Matthew Hathaway, *New Law Isn't Reducing Meth Lab Seizures*, ST. LOUIS POST-DISPATCH, Dec. 14, 2005, at C5 (Jefferson County, Missouri drug task force members did not observe a drop in methamphetamine lab raids in the period following the implementation of precursor regulations in Missouri; according to one official: “After the law went into effect, the (meth) cooks were confused for a few weeks . . . but after that it was back to the same-old, same-old”).

Efforts to study the impact of such laws empirically—rather than anecdotally—are still in their infancy. For some of the early efforts in this vein, see, for example, MCBRIDE ET AL., *supra* note 134; Cain & Dalmadge, *supra* note 131.

143. See, e.g., Dan Eggen, *Violent Crime, a Sticky Issue for White House, Shows Steeper Rise*, WASH. POST, Sept. 25, 2007, at A7 (noting that, after a long decline, violent crime rates rose in 2006 and rose more steeply in 2005).

144. Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified as amended in scattered sections of 21 U.S.C. and 42 U.S.C.).

145. For the core restrictions adopted by the Act, see 21 U.S.C. § 830(e)(1)(A)(i) (imposing restrictions and reporting requirements on retailers who display and sell products identified as potential methamphetamine precursors and on the mail order purchase of such products). For an effective summary of the new federal provisions, see Stanley, *supra* note 135, at 404-05. Congress expressly indicated that the new federal restrictions were

## 2. Methamphetamine Registries

Some states have created methamphetamine registries, similar to sex offender registries, to permit private citizens to track persons convicted of methamphetamine offenses. Tennessee pioneered the methamphetamine registry in 2005, providing public access to a web site that offers the names, dates of birth, offense category, and date of conviction for persons convicted of methamphetamine manufacturing offenses.<sup>146</sup> Legislatures passed bills creating similar registries in several other states.<sup>147</sup> These registries in general are less user-friendly and provide far less personal information than do sex offender registries.<sup>148</sup> Registries are not costless—they require administration and updates—but they are not as costly as continued incarceration.

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meant only as a floor and were not meant to preempt more stringent state restrictions. *See* Combat Methamphetamine Epidemic Act §711(g), 120 Stat. at 263 (codified at 21 U.S.C. §802 note).

146. *See* Tennessee Meth Offender Database, <http://www.tennesseeanytime.org/methor-app/search.jsp> (last visited Aug. 27, 2010).

147. *See, e.g.*, Illinois Methamphetamine Manufacture Registry, <http://www.isp.state.il.us/meth/> (last visited Aug. 27, 2010); Minnesota Methamphetamine Offender Registry, <https://mor.state.mn.us/OffenderSearch.aspx> (last visited Aug. 27, 2010); Sexual or Violent Offender Registry, MT Dep't of Justice, <http://www.doj.mt.gov/svor/> (last visited Aug. 27, 2010).

148. National guidelines for sex offender registries provide minimum standards for state sex offender registries. According to these minimum standards, states should post to websites fairly comprehensive information about sex offenders—their names, addresses, vehicle descriptions and license plate numbers, physical descriptions and current photographs of registered persons, and the sex offenses for which the person has been convicted. DEPT OF JUST., THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION 33-34 (2008).

When Oklahoma's state legislature considered legislation to create a registry, Speaker Todd Hiatt, who introduced the bill, argued that "Oklahomans have the right to know if a meth lab could be in their own neighborhood or community," while Representative John Nance, who carried the bill, offered that the registry would "be a useful tool to families as they look to buy a home. You need to be able to check out all aspects of that home's history, including whether there has been a meth lab close by." Press Release, Speaker of the Oklahoma House of Representatives Todd Hiatt (Mar. 1, 2006), *available at* <http://www.okhouse.gov/OkhouseMedia/pressroom.aspx?NewsID=512>. The focus was on protecting property values and avoiding nuisances, not on stigmatizing offenders. Even still, Oklahoma never adopted a registry, and most of the established registries have been even less useful. *See infra* notes 149-150.

The Illinois registry requires a last name to be submitted in order to search for a convicted person; unlike sex offender registries, a private citizen accessing the registry cannot, for example, generate a neighborhood map showing where persons convicted of methamphetamine offenses reside. The publicly-accessed record provides the convicted person's full name, date of birth, and offense of conviction; no photograph or address may be publicly accessed. *See* Illinois Methamphetamine Registry, *supra* note 147. In contrast, the Illinois sex offender registry, *available at* <http://www.isp.state.il.us/sor/>, permits the general public to access lists of sex offenders by city and zip code; to, in addition to viewing dates of birth and offenses of conviction, access maps of sex offender residence locations; and to view photographs, full physical descriptions, specific offense details, and complete addresses of registered sex offenders. Other states with methamphetamine registries similarly provide less information and less ease of access than offered through sex offender registries. Compare Tennessee's methamphetamine registry, *supra* note 146, which permits citizens to search for persons convicted of methamphetamine manufacturing offenses by county or by last name with a first initial, and provides the name, birth date, offense title,

This methamphetamine registration trend never took root in most states, however. While a handful of states ultimately passed legislation creating registries, most states never formally considered methamphetamine registries as a strategy for reducing methamphetamine production, and not all jurisdictions that have considered methamphetamine registries actually created them.<sup>149</sup> In 2006, for example, Georgia, Oklahoma, West Virginia, and Washington State all considered legislation to create registries but ultimately declined to do so.<sup>150</sup>

The story of state legislative dalliance with methamphetamine registries is a telling allegory. Legislators looking for ways to crack down on methamphetamine floated proposals modeled on earlier get-tough-on-crime strategies. Their bills were quickly reshaped to be less punitive and more public health oriented than the earlier legislation. Even then, when the costs of the programs became apparent and were weighed against their limited benefits, most such proposals quietly died on the vine.

### 3. Property Regulations

The methamphetamine-producing methods described above carry, in addition to immediate risks to producers,<sup>151</sup> longer-term problems of contamination and waste.<sup>152</sup> Methamphetamine manufacture gen-

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and date of conviction, with Tennessee's sex offender registry, available at <http://www.ticic.state.tn.us/sorinternet/sosearch.aspx>, which also permits searches by last name, city, and zip code, and which provides a photograph, address, and registration status information for listed persons. Minnesota's methamphetamine registry permits searches by last name or by county. See Minnesota Methamphetamine Registry, *supra* note 147. Registry records include the convicted person's full name, date of birth, and registry-triggering offense, and provide a link to the person's publicly accessible criminal history, if desired. The registry does not provide a photo, address, or further physical or biographical description. In contrast, the state's sex offender registry permits searches by county, city, zip code, or name, and provides a photograph, physical description, address, and specific offense details for the registrant.

149. For examples of bills introduced with great fanfare that were never adopted, see Ga. H. B. 793, (2006), available at [http://www.legis.state.ga.us/legis/2007\\_08/fulltext/hb793.htm](http://www.legis.state.ga.us/legis/2007_08/fulltext/hb793.htm); Okla. H. B. 3121, (2008), available at [http://webserver1.lsb.state.ok.us/2007-08bills/HB/HB3121\\_hflr.rtf](http://webserver1.lsb.state.ok.us/2007-08bills/HB/HB3121_hflr.rtf); W. Va. H. B. 4525, (2006), available at [http://www.legis.state.wv.us/bill\\_status/bills\\_text.cfm?billdoc=hb4525%20intr.htm&yr=2010&sesstype=RS&i=4525](http://www.legis.state.wv.us/bill_status/bills_text.cfm?billdoc=hb4525%20intr.htm&yr=2010&sesstype=RS&i=4525).

150. For national coverage of Georgia's then-pending legislation, see Kari Huus, Click Here for Drug Offenders: Internet Listings Have Popular Appeal, But do they Really Protect the Public?, MSNBC, (Dec. 7, 2006), <http://www.msnbc.msn.com/id/15971396/>. Press coverage throughout 2006 identified Oklahoma, Washington, and West Virginia, as other states considering the adoption of a registry. See, e.g., *id.* As of August 2008, none of those states had adopted a meth registry. See Jeff Lambert, *Tennessee's Meth Offender Registry Copied and Reviled*, TIMES-NEWS, Aug. 24, 2008, <http://www.timesnews.net/article.php?id=9007847> (reporting that only Tennessee, Illinois, Minnesota, Montana, and Kansas had established methamphetamine registries).

151. For reports of methamphetamine laboratory explosions, see for example, *Man Injured in Arnold Meth Lab Explosion*, ST. LOUIS POST-DISPATCH, July 4, 2008; *Deputies Blame Explosion on Meth Lab*, ORLANDO SENTINEL, Sept. 19, 2006, at G2.

152. See, e.g., McKinley & Fink, *supra* note 118, at 1223 (describing the environmental concerns arising from methamphetamine manufacture). News coverage of methampheta-

erates hazardous byproducts, including chemicals that do not easily degrade. Those chemicals can contaminate the property where the methamphetamine was produced, groundwater and soil in surrounding areas, and any other property or water supply where byproducts are dumped. Future property occupants face contamination hazards and possible health complications from exposure to toxins. These problems are neither new nor newly identified.<sup>153</sup>

These concerns about the environmental consequences of methamphetamine have spurred diverse policy responses and proposals. The Combat Methamphetamine Epidemic Act requires the United States Transportation Department and the Environmental Protection Agency to begin tracking and reporting on some chemicals that are byproducts of methamphetamine production.<sup>154</sup> Some states have adopted legislation putting notice and cleanup burdens on people seeking to transfer property, to ensure that unwary purchasers are not exposed to toxins.<sup>155</sup> Some state and federal programs offer to pay some or all of the costs of cleaning up the toxic byproducts of methamphetamine when they are found on the property of innocent individuals.<sup>156</sup> Advertising campaigns against methamphetamine have prominently incorporated warnings about the environmental hazards posed to innocent bystanders when local residents manufacture methamphetamine.<sup>157</sup> Some commentators have advocated the aggres-

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mine production has routinely made reference to the environmental hazards posed by home methamphetamine laboratories. See, e.g., Hal Marcovitz, *Congressmen Call for Limits on Sales of Cold Medication; Bill Aimed at Stopping Crystal Meth Operators, Two Tell Bucks County*, THE MORNING CALL (Allentown, Pa.), Oct. 7, 2005, at B1 (describing how methamphetamine lab operators dump hazardous waste into woods and streams). For recent academic discussion of environmental issues raised by methamphetamine production, see O'Connor et al., *supra* note 123, at 1172-73, 1187. See generally Smith, *Cooking Up Solutions*, *supra* note 10; Cheri-Lynn Wortham, Comment, *Methamphetamine and Cocaine Manufacturing Effects on the Environment and Agriculture*, 17 SAN JOAQUIN AGRIC. L. REV. 343 (2008).

153. Several student notes on the environmental problems associated with methamphetamine labs appeared prior to the recent flurry of news articles about methamphetamine. See, e.g., Tamara B. Maher, Note, *Legal Liabilities Faced by Owners of Property Contaminated by Clandestine Methamphetamine Laboratories: The Oregon Approach*, 27 WILLAMETTE L. REV. 325 (1991); Anna S. Vogt, Comment, *The Mess Left Behind: Regulating the Cleanup of Former Methamphetamine Laboratories*, 38 IDAHO L. REV. 251 (2001). States had also previously enacted statutes for the purpose of addressing environmental hazards associated specifically with methamphetamine production. See, e.g., OR. REV. STAT. § 453.855 (2007); WASH. REV. CODE § 64.44.005 (2009). These statutes include provisions that require property owners to warn potential purchasers about contamination. See, e.g., OR. REV. STAT. § 105.464(I)(8)(F)&(H)(2007); WASH. REV. CODE § 64.06.020 (2009).

154. See Jeff Wyble, *Methamphetamine—The New Epidemic*, 11 MICH. ST. U. J. MED. & L. 115, 140 (2007) (collecting and describing scattered provisions of the Act that impose new environmental reporting requirements).

155. See O'Connor et al., *supra* note 123, at 1187 (describing adoption of such reforms in Colorado and South Dakota).

156. See Wortham, *supra* note 152, at 349-53 (describing some such programs).

157. See, e.g., Suo, *supra* note 109, at C7.

sive use of nuisance and zoning laws to regulate, eliminate, and sanction methamphetamine laboratories.<sup>158</sup>

#### 4. *Child-Protective Measures*

Legislative responses to methamphetamine have often focused—both rhetorically and substantively—on the dangers that the manufacture and use of the drug pose to children.<sup>159</sup> Many such efforts have been educative or ameliorative. For example, the Combat Methamphetamine Epidemic Act included a twenty million dollar grant program to assist states in establishing programs to assist children exposed to methamphetamine.<sup>160</sup> Sponsors of a similar House provision emphasized the children’s innocence; as Representative Zach Wamp stated, “Through no fault of their own these children have been placed in an unconscionable position because their parents or guardians surrendered their wills to an incredibly addictive drug,” describing affected children as “orphans of the despicable meth trade.”<sup>161</sup> Public education campaigns have, likewise, focused on dangers to children.<sup>162</sup>

As might be expected when children are involved, initiatives in this area have also, at times, been punitive. While it is possible that a variety of methamphetamine offenses might expose a parent or guardian to traditional child neglect or abuse charges, many states have enacted specific “child abuse by methamphetamine” statutes that make it an offense to expose a child or other helpless dependant to the production of methamphetamine or have passed sentence enhancement provisions that increase the punishment of those convicted of methamphetamine manufacturing if children are present during the manufacturing of the drug.<sup>163</sup> These statutes seek to limit the extent to which “innocents” in custodial care are exposed to toxic chemicals and possible explosions and fires through punishing parents and caregivers who facilitate that exposure.

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158. See, e.g., Smith, *America’s Methamphetamine Crisis*, *supra* note 10, at 624-34 (advocating aggressive use of nuisance laws).

159. Expressions of particular concern for children “victimized” by methamphetamine are a familiar trope in the academic literature, see, e.g., Smith, *America’s Methamphetamine Crisis*, *supra* note 10, at 609 (describing children as one of “two classes of individuals” who “most consistently suffer from the harms of methamphetamine production”); in media coverage, see, e.g., Joh, *supra* note 10, at 183 (reviewing media coverage of the so-called meth “epidemic” and concluding that “the methamphetamine addict was construed as an immoral or amoral monster, whose addiction wreaked havoc upon children”); and in government reports, see, e.g., KAREN SWETLOW, U.S. DEP’T OF JUSTICE, CHILDREN AT CLANDESTINE METHAMPHETAMINE LABS: HELPING METH’S YOUNGEST VICTIMS (2003).

160. Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, § 755; see also Wyble, *supra* note 153, at 141 (explaining the intended uses of this grant money).

161. Press Release, Rep. Jim Cooper, *Meth-Endangered Children to Benefit from New Grant Program*, U.S. FED. NEWS, Dec. 14, 2005, available at 2005 WLNR 20389395.

162. See, e.g., Suo, *supra* note 109, at C7 (describing one such commercial).

163. For a discussion of these developments, see *infra* Part III.B.

### 5. *Methamphetamine Prisons*

During the round of concern about crack-cocaine offenses, many people were sent to prison; the prisons were general prisons with a variety of offender types that may or may not have had specific substance abuse treatment or other rehabilitative programs available.

In contrast, in response to methamphetamine, Montana and Illinois have created prisons specifically designed to house persons who have been convicted of offenses and are addicted to methamphetamine,<sup>164</sup> while several other states have set up special units within other prisons dedicated to meth-addicted prisoners.<sup>165</sup> While obviously incarcerative, these prisons reflect a more nuanced—and more ambivalent—response to the problems raised by substance abuse. Certainly, prisons specially dedicated to the rehabilitative needs of a specific class of substance abusers were not part of prior legislative and executive responses to perceived drug epidemics.

### 6. *Drug Treatment Courts*

In confronting the problems posed by methamphetamine, states have increasingly utilized specialized drug courts to deal with a significant segment of those charged with violating criminal drug statutes. Many states have made drug courts a centerpiece of their anti-methamphetamine efforts.<sup>166</sup> For example, Montana—a state that considers itself one of the hardest-hit regions of the country in terms of its methamphetamine problem—has established family drug court programs in several jurisdictions, serving both adults and juveniles.<sup>167</sup> The federal government has also endorsed the strategy, making over \$70 million available annually to states to implement and maintain such courts.<sup>168</sup>

164. See Catharine Skipp & Arian Campo-Flores, *Addiction: A "Meth Prison" Movement*, NEWSWEEK, Apr. 24, 2006 (describing the new prisons in those states).

165. See *id.* (describing experiences in other states, notably Indiana); see also NORTH DAKOTA LEGISLATIVE COUNCIL, METH PRISONS IN OTHER STATES (2006) (document prepared for North Dakota Assembly Budget Committee on Government Services), available at <http://www.legis.nd.gov/assembly/59-2005/docs/pdf/79288.pdf> (evaluating success of "meth prisons" in Illinois, Indiana, and Montana in response to proposal for similar prison in North Dakota).

166. See, e.g., C. WEST HUDDLESTON, III, U.S. DEP'T OF JUSTICE, DRUG COURTS: AN EFFECTIVE STRATEGY FOR COMMUNITIES FACING METHAMPHETAMINE (2005), available at <http://www.ojp.usdoj.gov/BJA/pdf/MethDrugCourts.pdf> (discussing successful drug court programs in California, Utah, and Washington State); Melody Finnemore, *Juggling Act: Rapidly Changing Judiciary Requires Judges to Take on More Complex Roles*, 66 OR. ST. B. BUL., Dec. 2005, at 17, 17 (discussing use of drug courts to combat methamphetamine in Oregon and crucial role of judges in such courts); Ed Kemmick, *Drug Treatment Court: A Glimmer of Hope in the Fight Against Meth*, BILLINGS GAZETTE, Aug. 24, 2005 (discussing Montana's commitment to utilizing drug courts to combat its meth problem).

167. See Kemmick, *supra* note 166 (describing program).

168. Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, §§ 751-54 (2006). The federal commitment to drug courts was not unconditional; in order to obtain

Drug courts generally provide alternatives to incarceration for participating defendants.<sup>169</sup> Defendants whose offenses are considered linked to drug addiction—whether or not the offense charged is a drug offense—may be identified by judges, service personnel, prosecutors, or defense attorneys as persons who would benefit from substance abuse treatment, and who should avoid incarceration and/or conviction if they successfully complete treatment. These programs usually follow one of two formats: either the defendant enters the alternative program after arrest, but prior to conviction,<sup>170</sup> or, alternatively, the defendant may plead guilty and have an incarcerative sentence suspended pending completion of the drug court program.<sup>171</sup> Completion of the program might lead to no conviction, the dismissal of a conviction, or a conviction that does not lead to a jail or prison sentence.<sup>172</sup>

Drug courts usually require the participant to complete drug abuse treatment, maintain employment or student status, be closely supervised by program personnel, and receive other services, such as family or mental health services, that the court might consider necessary.<sup>173</sup> While drug courts are superficially similar to probation in that defendants are supervised and a failure to comply with the program's terms may lead to consequences for the defendant, the level of supervision provided to defendants is generally more intensive (defendants often appear in front of judges for status reports, and may attend several meetings with treatment providers and other rehabi-

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these funds states were required to design their drug courts to include mandatory drug testing and to impose graduated sanctions for failures to pass such test. *See id.* at §753; *cf.* HUDDLESTON, *supra* note 166 (mentioning a federal report encouraging states to adopt drug courts).

169. On drug courts generally, see Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 417-25 (2009) (summarizing history, theory, and functions of modern drug courts).

170. *See, e.g.*, California Courts, *Drug Court*, <http://www.courtinfo.ca.gov/programs/collab/drug.htm> (last visited Aug. 27, 2010) ("A preplea diversion program allows criminal proceedings to be suspended while the defendant participates in a program involving counseling, drug testing, education, or other requirements. If the defendant successfully completes the program, the criminal charges are dismissed."). In some such systems, defendants may be required to sign confessions before entering the drug court program, so that, should they not successfully complete the program, the prosecutor's burden of proof at trial will be easy to meet.

171. *See, e.g.*, *Felony Drug Court: Statement from Judge Thomas A. Teodosio*, <http://www.summitpcourt.net/fdc.html> (last visited Aug. 27, 2010) (noting that the drug courts in Summit County, Ohio "will be based upon a post-adjudication model").

172. For comparison of the different consequences of completing and failing to complete different kinds of drug court programs, see, for example, JAMES L. NOLAN, *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 41 (2001); Hon. Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 725-26, 750 (2008).

173. *See generally, e.g.*, Hora & Stalcup, *supra* note 172, at 725-27 (describing normal operation of drug courts).

litative personnel each week), and intermittent noncompliance, such as an isolated positive drug test, generally is tolerated.<sup>174</sup>

To some extent, the willingness of states to experiment with drug courts as a mechanism for dealing with methamphetamine users (and the federal government's encouragement of this experimentation) may reflect a judgment that methamphetamine use presents a different set of problems—or attracts a different set of users—than other illegal drugs.<sup>175</sup> However, drug treatment courts have existed for two decades now and have generally become more popular over the last few years.<sup>176</sup> To the extent that methamphetamine users charged with criminal offenses are being diverted into specialized drug treatment courts, it is unclear whether they are benefiting from a special solicitude for meth users or from a general national trend.<sup>177</sup>

### 7. Educational Programs

Both state and federal drug education programs, as well as campaigns funded by nonprofit organizations, have created specific anti-methamphetamine resources, including television and print advertisements as well as school-based workshops.<sup>178</sup> The educational campaigns have varied in tone and focus; some show innocent children exposed to methamphetamine production by parents or neighbors; some show ravaged producers frantically cooking methamphetamine; most focus on the potentially debilitating physical and oral health consequences of repeated methamphetamine use.<sup>179</sup> One

174. *See id.*

175. The question of whether our ambivalent policy response to methamphetamine reflects factors unique to methamphetamine or signals a more general softening of American drug policy is treated extensively *infra* Part V.

176. *See* Miller, *supra* note 169, at 420 (noting creation of first modern drug court in 1989); *id.* at 417 (“Perhaps the most important judicial response to the War on Drugs has been the creation of specialty ‘drug courts’ designed to ameliorate the impact of drug sentencing policy on individual drug users.”). One incomplete list of drug court programs lists programs in 43 states. *See* National Center for State Courts, *Specialty Courts: Drug Courts, Drug Indicators, and Drug Court Programs: State Links*, <http://www.ncsconline.org/wc/CourTopics/StateLinks.asp?id=24&topic=DrugCt> (last visited Aug. 27, 2010).

177. Moreover, there are reasons to question whether diversion into a specialized drug court program is an unmitigated benefit for a criminal defendant. I explore these issues in a work in progress entitled “Thinking Outside the Cell: Criminal Justice Policy in a Post-Mass Incarceration World.” *See also* Miller, *supra* note 169 (criticizing aspects of contemporary drug courts as well).

178. One of the most aggressive state-level programs has been the Montana Meth Project. For coverage of the Project and its advertising campaign, see, for example, Thomas W. Seibel & Steven A. Mange, *The Montana Meth Project: “Unselling” a Dangerous Drug*, 20 STAN. L. & POL’Y REV. 405 (2009); Kate Zernike, *With Scenes of Blood and Pain, Ads Battle Methamphetamine in Montana*, N.Y. TIMES, Feb. 26, 2006. The Project’s website, which includes many of the pictures and other material it uses to attempt to influence teens not to try meth, is available at <http://www.montanameth.org/>.

179. *See, e.g.,* Joh, *supra* note 10, at 182; Suo, *supra* note 109, at C7; Zernike, *supra* note 178. For one media expert’s compilation of the forty most effective anti-meth ads (in-

common tactic of such campaigns is to offer “before” and “after” photographs of meth users.<sup>180</sup>

Other advertisements specifically target people already using methamphetamine. Here, the language and the imagery are less catastrophic; the pathos is laced with hope. In September of 2008, for example, the Office of National Drug Control Policy submitted an advertisement entitled “Rebuild After Meth.” Under a photograph of a smiling woman and child, the advertisement trumpets rising treatment and falling usage numbers and focuses on a story to be associated with the photograph:

Consider Teresa. She is a mother, Girl Scout volunteer, and website developer. Her life took a sharp turn when she started using meth to lose weight. Her story went from bad to worse as she abandoned her family, including her 4-year-old daughter, for nearly a year in the search for her next high. She eventually entered a treatment program and made a commitment to conquer her addiction. Today, she is drug-free and a leader in anti-meth efforts in her community. There are thousands of people like Teresa out there, showing individuals and communities what they need to know.<sup>181</sup>

#### IV. MAKE NEW DRUG LAWS, BUT KEEP THE OLD

Missing among these various legislative responses to methamphetamine is a dramatic increase in penalties for possession, manufacture, trafficking, and sale. Some legislatures have indeed increased penalties for various methamphetamine offenses in the same way that we saw penalties increase for crack cocaine in the late 1980s,<sup>182</sup> but, as discussed above, most legislatures have focused more on prevention, education, and treatment than on increased incarceration.<sup>183</sup> Nevertheless, there are some familiar themes in the response to methamphetamine by legislatures, courts, and law enforcement officials. In particular, courts have used methampheta-

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cluding both still images and videos), see 40+ Most Powerful Anti-Meth Advertisements, <http://elitebydesign.com/anti-meth-ads/> (last visited Aug. 27, 2010).

180. The source for most such photographs is the “Faces of Meth” program administered by the Multnomah (Portland), Oregon County Sheriff’s Department. The photographs, which originally gained prominence as accompaniments to the hyperbolic methamphetamine stories THE OREGONIAN ran in 2004 and 2005, are most easily accessed through the Partnership for a Drug Free America’s website at <http://www.drugfree.org/Portal/DrugIssue/MethResources/faces/index.html> (last visited Aug. 27, 2010); see also Lisa Demer, *Meth Ills Expand in Alaska*, ANCHORAGE DAILY NEWS, Sept. 7, 2005 (noting that the United States Attorney’s office in Alaska distributes before-and-after photos of methamphetamine users from the same series).

181. OFFICE OF NAT’L DRUG CONTROL POL’Y, REBUILD AFTER METH (undated), available at <http://www.theantidrug.com/openletter/Meth-Rebuild.pdf>.

182. See, e.g., Act of May 21, 2004, ch. 845, §§2-3, 2004 Tenn. Pub. Acts 1922, 1923 (codified at TENN. CODE ANN. §39-17-417 (Supp. 2005)) (lowering the triggering quantity of methamphetamine for certain sentences from 100 and 1000 grams to 26 and 300 grams).

183. See *supra* Part III.B.

mine cases to carve out exceptions to Fourth Amendment protections, and legislatures and prosecutors have sought to protect fetuses and children from the effects of parental drug use, production, and sale.

### A. Familiar Fourth Amendment Developments

A familiar narrative of drugs and the Fourth Amendment describes the expansion of exceptions to Fourth Amendment limitations on searches and seizures due to the perceived need to police the use, manufacture, and sale of drugs.<sup>184</sup> Based on the nature of drugs themselves—portable, fungible, and easy to conceal—courts have gifted law enforcement officers with the ability to search more intrusively and thoroughly than prior doctrine might have suggested.<sup>185</sup> Courts have used the ease of illicit drug disposal, as well as the violence associated with drug sales, to support findings of exigent circumstances that permit officers to dispense with obtaining warrants and, when they do obtain warrants, knocking and announcing their presence when serving warrants they do obtain.<sup>186</sup>

The volatility of the chemicals used to produce methamphetamine has similarly provided a foundation for permitting officers to search without obtaining warrants. Officers generally establish probable cause in suspected methamphetamine lab cases by identifying by smell chemicals associated with methamphetamine production<sup>187</sup> or

184. See, e.g., Glasser & Siegel, *supra* note 67, at 243. Graham Boyd, Director of the American Civil Liberties Union's Drug Policy Litigation Project, argues that "the court cases that have most destroyed the Bill of Rights, methodically abridging freedom of religion, freedom of speech, freedom from unreasonable searches and seizures and property rights, have all concerned drugs." Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 840 (2002). In the context of the Fourth Amendment, Boyd argues that the expansion of exceptions based on the War on Drugs is inevitable, as drug offenses lack complaining witnesses, meaning that police need to rely on informants, wiretapping, undercover operations, wiretapping, and other practices that implicate the Fourth Amendment. *Id.* at 842.

185. A 2002 *Villanova Law Review* symposium provided some of the nation's leading critics of current Fourth Amendment doctrine with an opportunity to explore the connections between drug policy and the decline of Fourth Amendment protections. For some of the most powerful critiques, see Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897 (2002); Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002); David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815 (2002). See also Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237; Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

186. On the various justifications offered for loosening Fourth Amendment protections in the drug context, see Luna, *supra* note 185, at 765-77.

187. A long line of recent Eighth Circuit cases find that both probable cause and exigent circumstances justifying a warrantless entry are established based on the smell of methamphetamine manufacture and little or nothing else. See, e.g., *United States v.*

by observing equipment and materials associated with methamphetamine manufacture.<sup>188</sup> Courts reason that, where an officer has probable cause to believe that an operational methamphetamine laboratory exists in a location, exigent circumstances permit the officer warrantless entry in order to protect residents, neighbors, and the officers themselves from the possibility that the methamphetamine lab might at any moment explode.<sup>189</sup>

Finally, as methamphetamine manufacturers have experimented with work-around strategies to avoid restrictions on pseudoephedrine purchases, courts have held that purchasing patterns can also provide reasonable suspicion to detain suspected producers.<sup>190</sup> Shopping companions who separately purchase pseudoephedrine may provide reasonable suspicion to support a stop.<sup>191</sup> Purchasing the maximum permitted amount of pseudoephedrine at several stores in succession may also provide reasonable suspicion to effectuate a stop.<sup>192</sup> As discussed above, a store clerk or operator who permits a person to make such purchases, aside from breaking precursor sales restrictions laws, may be providing investigating officers with reasonable suspi-

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Clarke, 564 F.3d 949, 959 (8th Cir. 2009); *United States v. Walsh*, 299 F.3d 729, 734 (8th Cir. 2002).

188. *See, e.g.*, *United States v. Rhiger*, 315 F.3d 1283, 1288 (10th Cir. 2003).

189. *See, e.g.*, *United States v. Clarke*, 564 F.3d at 959; *Williams v. State*, 995 So. 2d 915, 920-221 (Ala. Crim. App. 2008); *State v. Simmons*, 714 N.W.2d 264, 273 (Iowa 2006); *United States v. Walsh*, 299 F.3d at 734; *United States v. Wilson*, 865 F.2d 215, 217 (9th Cir. 1989). In *Williams*, the officers offered memorable testimony explaining their reasons for proceeding without a warrant. 995 So. 2d at 917 (reporting that officers testified “we’ve been almost blew up in meth labs before”). *But see* *State v. Moore*, 183 P.3d 158, 161-162 (N.M. Ct. App. 2008) (affirming district court’s finding that exigent circumstances did not justify officer’s warrantless entry into home; while an operational methamphetamine laboratory might provide an exigent circumstance supporting warrantless entry, the police did not “have knowledge of specific, articulable facts that demonstrate that immediate action is necessary”).

190. *See generally* Andrew C. Goetz, Note, *One Stop, No Stop, Two Stop, Terry Stop: Reasonable Suspicion and Pseudoephedrine Purchases by Suspected Methamphetamine Manufacturers*, 105 MICH. L. REV. 1573 (2007).

191. *See, e.g.*, *United States v. Ameling*, 328 F.3d 443, 448 (8th Cir. 2003) (upholding a finding of reasonable suspicion where two customers picked up pseudoephedrine products together, purchased them from separate cashiers, consolidated the purchases in the parking lot, and had also purchased a lithium battery that might be used in methamphetamine manufacture); *State v. Heuser*, 661 N.W.2d 157 (Iowa 2003) (finding police had sufficient suspicion to stop defendant’s vehicle when the defendant and a woman entered a Target store together but then separated and bought several boxes of cold medication containing pseudoephedrine at separate cash registers, before driving to a Walmart). *But see* *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004) (finding, on similar facts, that police lacked reasonable suspicion to conduct a *Terry* stop).

192. *See, e.g.*, *United States v. Thurston*, No. S1-4.02 CR 494 CDP DDN, 2003 U.S. Dist. LEXIS 14954, at \*8-10 (E.D. Mo. May 14, 2003) (finding that police had reasonable suspicion to perform a *Terry* stop where customer purchased two boxes of pseudoephedrine products at a Target, proceeded to a Walgreens, and purchased two additional boxes of pseudoephedrine).

cion or probable cause to believe that they are conspiring with or are an accessory to the manufacture of methamphetamine.<sup>193</sup>

### B. “But What About the Children?”

A second similarity in the criminal sanctions response to methamphetamine has been the focus on the effects of exposure to drug activity on children and the attempts of legislatures, courts, and prosecutors to devise ways in which criminal sanctions might curtail the effects of drug manufacture and use on minors. The exposure of children to methamphetamine itself can support an exigent circumstances exception to the warrant requirement.<sup>194</sup>

While the legislative response to methamphetamine generally has not included radically increased sanctions for offenses or wholesale creation of new crimes, one of the exceptions to this observation is in the area of child protection. Legislatures have appended methamphetamine exposure to existing child abuse and neglect offenses or created new “child abuse by methamphetamine exposure” statutes;<sup>195</sup> created special felonies criminalizing the manufacture of methamphetamine in the presence of a child or dependant adult;<sup>196</sup> and increased penalties for existing methamphetamine offenses when children are present or involved.<sup>197</sup> In states with more general child

193. See, e.g., *supra* note 126 (discussing one such incident).

194. See, e.g., *Richards v. State*, 659 S.E.2d 651, 653 (Ga. App. 2008) (holding that the smell of chemicals normally associated with methamphetamine manufacturing and a glimpse of what looks like a meth lab were sufficient to create an exigent circumstance when there was reason to believe that a child was present); *State v. Crabb*, 835 N.E.2d 1068, 1071 (Ind. App. 2005) (holding that the smell of ether and the rustling of curtains, “combined with credible evidence that a small child was on the premises and, thus, being exposed to both risks from explosions due to the flammability of the chemicals used in producing methamphetamine and from the effects that ether can have on the respiratory system,” provided officers with sufficient exigent circumstances to permit officers to make warrantless entry).

195. See, e.g., WASH. REV. CODE § 9A.42.100 (Supp. 2007) (“A person is guilty of the crime of endangerment with a controlled substance if the person knowingly or intentionally permits a dependent child or dependent adult to be exposed to, ingest, inhale, or have contact with methamphetamine or ephedrine, pseudoephedrine, or anhydrous ammonia, including their salts, isomers, and salts of isomers, that are being used in the manufacture of methamphetamine, including its salts, isomers, and salts of isomers. Endangerment with a controlled substance is a class B felony.”). Michigan, Iowa, and South Dakota have also enacted specific “child abuse by methamphetamine” statutes. See *Feature: Methamphetamine as Child Abuse Laws Gain Ground, but Do They Help or Hurt?*, DRUG WAR CHRON., July 14, 2006, available at <http://stopthedrugwar.org/chronicle/444/drug-child-abuse-laws>.

196. See, e.g., N.D. CENT. CODE § 19-03.1-22.2 (2004); TENN. CODE ANN. § 37-1-102(23)(D) (2006). Georgia, Idaho, and Ohio are among the other states that have specific felonies criminalizing the manufacture of methamphetamine in the presence of a child. See *Feature: Methamphetamine as Child Abuse Laws Gain Ground, but Do They Help or Hurt?*, *supra* note 195.

197. For example, Washington provides a sentencing enhancement for methamphetamine manufacture where methamphetamine was produced in the presence of a child. See WASH. REV. CODE § 9.94A.827(2) (Supp. 2009).

abuse statutes, courts have likewise expanded criminal liability, upholding convictions for child abuse for exposing children to methamphetamine manufacturing, even in the absence of proof of harm to the child.<sup>198</sup>

As we saw with maternal use of crack cocaine,<sup>199</sup> prosecutors have sought to use existing child abuse statutes to sanction women who use methamphetamine during pregnancy.<sup>200</sup> As we also saw with respect to crack cocaine,<sup>201</sup> courts generally have not permitted such tactics.<sup>202</sup> In one high-profile case, local prosecutors in Hawaii brought manslaughter charges against a woman whose two-day-old baby died after she smoked methamphetamine in the days leading up to its birth.<sup>203</sup> She entered a conditional guilty plea, reserving the right to contest the charges, and was vindicated when the Hawaii Supreme Court rejected the prosecutor's interpretation of the statute

The extent to which laws of these various types have been or will be effective in limiting the exposure of children to hazardous conditions has not been studied. The number of children endangered by methamphetamine manufacture, or who enter state child protective service programs because of methamphetamine exposure, is unclear; state departments do not keep statistics, and informal estimates range from half of child abuse cases to less than one percent. Statutes might protect children from toxic exposure by providing parents with a manufacturing disincentive or by making unavailable via imprisonment parents who produce methamphetamine; they might, on the other hand, drive parents who produce methamphetamine into greater secrecy, or place children who live in environmentally toxic environments in possibly unsafe foster care environments.

198. *See, e.g.*, *People v. Toney*, 90 Cal. Rptr. 2d 578, 581 (Cal. Ct. App. 1999) (upholding child abuse conviction when child was found in location where chemicals for the manufacturing of methamphetamine were found without requiring proof that methamphetamine was actually manufactured there).

199. *See supra* notes 64-68 and accompanying text. For a recent article decrying the trend of prosecuting mothers for harms allegedly inflicted on their fetuses, see generally Linda C. Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537 (2006).

200. One difference between this wave of prosecutions and those relating to crack cocaine is that this time the community of criminal defense attorneys, public health officials, and advocates for pregnant women were ready with a concerted legal and scientific response. *See generally Meth and Myth: Top Doctors, Scientists and Specialists Warn Mass Media on "Meth Baby" Stories*, July 29, 2005, <http://stopthedrugwar.org/chronicle/397/methandmyth.shtml> (gathering medical evidence problematizing link between meth use and fetal health); KING, *supra* note 10, at 16 (criticizing media's handling of scientific and medical data relating to methamphetamine); *see also* PROVINE, *supra* note 10, at 165 (noting that media and politicians were much more skeptical about "meth baby" claims than they had been about "crack baby" stories).

201. *See* discussion *supra* note 68. In this context, it is worth noting that the most high-profile homicide conviction against a pregnant woman who used crack cocaine was set aside on state post-conviction review in 2008, on the grounds that her lawyers were ineffective in failing to present sufficient expert testimony and to fully "investigate medical evidence contradicting the State's experts' testimony on the link between cocaine and still-birth." *McKnight v. State*, 661 S.E.2d 354, 354 (S.C. 2008).

202. *See, e.g.*, cases discussed *infra* notes 203-05 and accompanying text. *See also* Amos Bridges, *Charge Filed after Baby Born with Meth Traces*, SPRINGFIELD NEWS-LEADER, Dec. 29, 2005, available at [http://www.csdp.org/news/news/news\\_mometh\\_122905.htm](http://www.csdp.org/news/news/news_mometh_122905.htm) (describing filing of child abuse charges against 19-year-old Missouri woman whose child was born with traces amounts of methamphetamine in its system).

203. *See State v. Aiwohi*, 123 P.3d 1210, 1210-11 (Haw. 2008) (narrating events).

and reversed her conviction.<sup>204</sup> In another heavily followed case, a judge dismissed child endangerment charges brought against a Wyoming woman after her newborn child tested positive for methamphetamine.<sup>205</sup> In one Oklahoma case, a woman spent two years in prison awaiting a trial on homicide charges stemming from the stillbirth of a child born after she ingested methamphetamine during the late stages of pregnancy, pled guilty to second-degree murder and received an ostensible fifteen-year sentence, but was released a year later after completing drug rehabilitation as part of an informal deal with the prosecutor and the trial judge.<sup>206</sup>

## V. WHY IS THIS PANIC DIFFERENT FROM ALL OTHER PANICS?

If we are in the midst of a methamphetamine panic, it is a panic that has produced a comparatively temperate result. Why has public and legislative concern about a drug described in terms of natural disasters and communicable deadly disease generated cold medication restrictions and educational programs rather than extensive new criminal law?

### A. *Some Preliminary Theories*

#### 1. *Race*

The narrative provided by scholars of the crack cocaine legislative response, as detailed above,<sup>207</sup> is largely one of racial panic. Crack cocaine is and was associated with African-American users and sellers, goes the analysis, and this association facilitated draconian criminal sanctions and mass imprisonment.<sup>208</sup> The “War on Drugs” has largely been a war on people of color, waged against people citizens and leg-

204. *Id.* at 1224-25.

205. *See Judge Drops ‘Meth Baby’ Charge*, CASPER STAR-TRIB., Sept. 29, 2005, available at [http://trib.com/news/state-and-regional/article\\_e76def07-3088-527f-8a9a-18f5f05ea9a6.html](http://trib.com/news/state-and-regional/article_e76def07-3088-527f-8a9a-18f5f05ea9a6.html) (detailing case).

206. *See* Dana Stone, *Is Meth Murder Charge Useful?*, OKLAHOMAN, Dec. 19, 2007 (narrating story of Theresa Hernandez who spent two years in jail awaiting trial on first-degree murder charges before pleading guilty to second-degree murder and receiving a fifteen-year sentence); Jay F. Marks, *Woman Was Charged in Her Stillborn Son’s Death — Meth Mom Wins Early Release*, OKLAHOMAN, Nov. 20, 2008, at 1A (narrating later developments, including her release).

Creative prosecution strategies have, of course, not been limited to cases involving pregnant and parenting women. Prosecutors in North Carolina, for example, have charged persons who operate methamphetamine labs under the state’s antiterrorism “weapons of mass destruction” statute. O. Dean Sanderford, *Terrorism Statutes Run Wild: Methamphetamine and Weapons of Mass Destruction*, 82 N.C. L. REV. 2142, 2142 (2004). *See also* Jaime Holguin, *Terror Laws Used vs. Common Crimes: Critics Bothered by String of Increasing Cases*, CBS NEWS, Sept. 14, 2003, available at <http://www.cbsnews.com/stories/2003/09/14/national/main573155.shtml> (noting that a North Carolina man charged under this law faced twelve years to life in prison).

207. *See supra* Part III.B.

208. *See supra* notes 74-79 and accompanying text.

islators already fear.<sup>209</sup> It is easier to embrace mass incarceration when you do not identify with the persons incarcerated and to the extent that you do think of them, it is with trepidation. Whether or not legislators and citizens consciously wish to harm people based on race, racial unease, antipathy, and panic facilitate the decisions to prosecute and punish.<sup>210</sup>

This narrative is appealing as applied to methamphetamine. While crack cocaine in particular has been associated with African Americans, and other illicit drugs have historically been linked to disfavored subgroups, methamphetamine is, accurately, characterized as a drug that is preferred by white populations.<sup>211</sup> As white Americans do not comprise a disfavored racial group, and as there are no characteristics associated with methamphetamine users (such as radical politics or generalized social dissent)<sup>212</sup> that might otherwise corral them into such a targeted subgroup, we would not expect to see the sorts of dramatic legislative responses that we have seen in the past. Unlike Chinese immigrants smoking opium, or Mexican immigrants smoking marijuana, methamphetamine use does not stoke racial anxieties.

Media articles and legislative history provide some support for this argument. The portrayal of methamphetamine addicts in the popular press often has often been one of pity and sympathy.<sup>213</sup> Leg-

209. Kennedy, *supra* note 20 at 1258.

210. See *supra* note 208.

211. Methamphetamine prosecutions have been credited with “whitening” to some extent the federal prison population; in 1994, for example, about 73% of new federal inmates convicted of methamphetamine offenses were white. See Schone, *supra* note 129, at 35. By 2005, the data was more ambiguous; while the plurality of those newly convicted of federal meth offenses remained white, the number was not less than fifty percent. See Motivans, *supra* note 116, at 2. While the characterization of methamphetamine as a “white drug” has been fairly consistent, it has not proven universal. For example, some sources have linked methamphetamine use with the Native American population. See, e.g., Andrew Murr & Sarah Childress, *A New Menace on the Rez*, NEWSWEEK, Sept. 27, 2004, at 30 (offering a story about methamphetamine use on Native American reservations and quoting a Bureau of Indian Affairs official as arguing that “[m]eth is becoming the drug of choice in Indian Country”).

212. Cf. *supra* Part II.A.3 (discussing mainstream culture’s unease about social groups associated with drug use during the 1960s).

213. See, e.g., Joel Baird, *Crazy about METH*, DAILEY NEWS LEADER, Sept. 11, 2005 (on file with author) (profiling methamphetamine user whose methamphetamine use had led to the dissolution of his marriage and scars from picking his skin; the user described methamphetamine users as “everyday people,” “good people, educated people, uneducated people; white collar, blue collar; people who drive BMWs, people who drive grandma’s car that barely runs; housewives who’ve got two kids at home and are tired of washing clothes”); Melanie Bennett & Chuck Williams, *Meth’s Human and Economic Costs are Enormous*, COLUMBUS LEDGER-ENQUIRER, Oct. 26, 2005, available at 2005 WLNR 17275992 (describing a man whose methamphetamine use, according to him, led to losing his land, houses, wife, children, savings, business, vehicles, and ultimately, liberty). David Sheff, *My Son the Addict*, OBSERVER, Oct. 23, 2005, available at 2005 WLNR 17193468 (describing the author’s son, an upper-middle-class University of California at Berkeley addict who struggled with methamphetamine addiction before successfully completing a

islaters tell stories about relatives and community members whose lives have been savaged by methamphetamine use.<sup>214</sup> The public and political discourse about methamphetamine shows a degree of empathy for drug users that far exceeds anything seen in recent drug panics. The narrative that the racial status of persons associated with the use of methamphetamine—that of the white majority—has driven policy responses is thus an appealing one.

This explanation does not, however, seem fully persuasive. In recent years, it is not just methamphetamine legislation and executive action that has been characterized by relative restraint, but other

rehabilitation program and obtaining a job writing for an online magazine); Zernike, *supra* note 178 (describing Montana Meth Project's anti-methamphetamine advertising campaign featuring televised images of a fictional teenager's blood swirling in her shower drain from the cuts she has made while picking her skin during methamphetamine, and radio commercials using actual recovering methamphetamine addicts detailing prostituting themselves for methamphetamine and losing their homes and jobs).

*Newsweek* profiled a police chief arrested for conspiring to produce methamphetamine and cited a scientist who studies methamphetamine as describing "high achievers" such as college students and law enforcement officials as one of the fastest-growing groups of methamphetamine users. See Sarah Childress, *Crystal Handcuffs: Battling the Meth Scourge, a Police Chief is Charged*, NEWSWEEK, May 16, 2005, at 36.

*Newsweek's* controversial methamphetamine cover story, *America's Most Dangerous Drug*, tells the story of one woman in particular:

The leafy Chicago suburb of Burr Ridge is the kind of place where people come to live the American dream in million-dollar homes on one-acre lots. Eight years ago Kimberly Fields and her husband, Todd, bought a ranch house here on a wooded lot beside a small lake, and before long they were parents, with two sons, a black Labrador and a Volvo in the drive. But somewhere along the way this blond mother with a college degree and a \$100,000-a-year job as a sales rep for Apria Healthcare found something that mattered more: methamphetamine.

Jefferson et al., *supra* note 101, at 41. After turning to methamphetamine, Kimberly was arrested three times for shoplifting, and:

[B]y the time cops came banging on her door with a search warrant . . . Kimberly, now 37, had turned her slice of suburbia into a meth lab . . . . Dressed in a pink T shirt printed with the words ALL STRESSED OUT, Kimberly looked about 45 pounds thinner than when police first booked her for shoplifting two years ago. Her leg bore a knee-to-ankle scar from a chemical burn, and police found anhydrous ammonia, also used in cooking meth, buried in a converted propane tank in her backyard. As officers led Kimberly away in handcuffs, her 6-year-old son Nicholas was "only concerned that his brother had his toys and diapers," recalls Detective Mike Barnes. Meanwhile, police evacuated 96 nearby homes, fearing the alleged meth lab might explode.

*Id.*

Mom-and-pop local methamphetamine producers similarly are described in terms that suggest something other than organized criminal enterprise. As a district attorney in Georgia told a local newspaper, "I would not classify these as mom-and-pop operations. I would classify them as idiot operations. These are people who couldn't pass high school chemistry." Chuck Williams & Melanie Bennett, *'Cocaine Times 10,' COLUMBUS LEDGER-ENQUIRER*, Oct. 21, 2005, at A1 (quoting Lee County District Attorney Nick Abbott); see also Schone, *supra* note 129, at 35 (describing mom-and-pop methamphetamine manufacturers as "the plague of Beavis and Butt-Head").

214. Cf. *State Representative's Son Faces Meth Charge*, DULUTH NEWS-TRIB., Sept. 2, 2005.

skirmishes in the “War on Drugs.”<sup>215</sup> Crack cocaine, in particular—the drug which generated a rich literature detailing racialized drug policy—has enjoyed considerable reconsideration both in statute and in sentencing policy.<sup>216</sup> If the one-way ratchet can turn in reverse for a drug so closely associated with African-American users, it seems unlikely that race, while perhaps a partial explanation for focus on precursor restrictions and treatment programs, provides a full explanation. Ironically enough, the precursor restrictions may end up themselves testing the disfavored social group hypothesis: as precursors have arguably made it more difficult for mom-and-pop manufacturers to produce methamphetamine in home laboratories, methamphetamine has increasingly been imported from super labs located in Mexico.<sup>217</sup> If methamphetamine becomes associated less with white

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215. See *supra* note 15; *infra* Part IV.B.

216. See, e.g., Emery, *supra* note 15 (detailing progress towards repealing crack-cocaine powder sentencing disparity and predicting that “this may be the year” that the disparity is eliminated and crack sentences are reduced); *Kimbrough v. United States*, 552 U.S. 85 (2007) (allowing judges discretion to sentence individuals convicted of crack cocaine crimes to lesser terms based on judges’ personal disapproval of crack/powder disparity).

In an interesting and representative incident, when South Carolina recently decided to address disparities across penalties for powder and crack cocaine possession (a two-year maximum sentence for simple possession of powder cocaine, in contrast to a five-year maximum sentence for simple possession of crack cocaine), it did so not by doing what might twenty years ago have been predicted (simply raise the maximum penalty for possession of powder cocaine to five years, as drug sentences can only increase), but by lowering the maximum penalty for crack cocaine and raising the maximum penalty for powder cocaine so that both carried a possible three years. See 2005-2006 Bill 16: Include Manufacturing Methamphetamine as a Violent Crime, S.C. Gen. Assem. [http://www.scstatehouse.gov/sess116\\_2005-2006/bills/16.htm](http://www.scstatehouse.gov/sess116_2005-2006/bills/16.htm) (last updated Dec. 4, 2009) (providing text of Bill and noting its passage).

217. See, e.g., Bennett & Williams, *supra* note 213, at A1 (reporting on drug sting involving methamphetamine officers believed had been trafficked from Mexico); Sara Jean Green, *U.S. Meth Roundup Snares 24 in Western Washington; 427 arrested in all – Increased Smuggling from Mexico*, SEATTLE TIMES, Aug. 31, 2005 at B1 (quoting King County Sheriff Su Rahr as saying “as we’ve shut down the labs, we’re seeing meth coming up and U.S. Attorney for the Western District of Washington John McKay saying his office has observed “something of a trend” with a “shift from home-cooked methamphetamine” to methamphetamine “produced in super-labs”); Ryckaert, *supra* note 142, at A04 (quoting White House Office of National Drug Control Policy director John P. Walters as saying that “Organized criminals now produce large quantities of methamphetamine in Mexico and are moving it across our borders”); Lloyd de Vries, CBS News, *Mexican Meth Floods U.S.*, May 19, 2006, <http://www.cbsnews.com/stories/2006/05/19/eveningnews/main1636846.shtml> (reporting that, despite a decline in domestic methamphetamine production due to lab raids, “The epidemic of meth use is still rampant because the drug is still plentiful on America’s streets . . . This deadly [methamphetamine] is now a growth industry for Mexico’s deadly drug cartels. They’re replacing small U.S. kitchen labs with Mexican super labs”); *Greenwood Officials Arrest More Suspects in Meth Ring Investigation*, WIS-TV, Dec. 19, 2005, available at <http://www.wistv.com/global/story.asp?s=4250657&ClientType=Printable> (detailing workings of major ring importing methamphetamine into South Carolina from Mexico); Lisa Demer, *Meth Ills Expand in Alaska*, ANCHORAGE DAILY NEWS, Sept. 7, 2005, at B1 (noting a shift from homegrown methamphetamine to methamphetamine imported from Mexico); ABERDEEN AM. NEWS, Dec. 15, 2005, at B3, available at 2005 WLNR 20102925 (quoting director of the Iowa governor’s Office of Drug Control Policy says that since methamphetamine precursor restrictions were put into place, “organized criminals” are “now producing large bulk quantities of methamphetamine in Mexico,” and arguing that “[w]e’re being

stateside producers and users and more with Mexican manufacturers and importers, we will see if or how the legal response to methamphetamine changes.

## 2. Media Coverage

A second plausible explanation is that the language used to describe methamphetamine, methamphetamine addicts, and methamphetamine sellers/manufacturers, as employed by the media, legislators, and the public in general, differs in tone and content from the language that has surrounded past drug panics. Perhaps there simply isn't a panic; writers, policymakers, and citizens are unperturbed by methamphetamine. While there are scattered pieces of evidence to support this claim,<sup>218</sup> it ultimately fails to persuade.

It would be difficult to argue that the language surrounding methamphetamine in the media is substantially different in terms of its emphatic and hyperbolic qualities than it has been during past perceived epidemics of drug use. Articles about methamphetamine use "epidemic" and "plague" to describe the drug's use.<sup>219</sup> Natural-disaster language also has characterized the media response to methamphetamine; media sources have pressed the tidal wave disaster analogy into repeat service, echoing perhaps the language of law enforcement officers describing the perceived entrance of methamphetamine into or outbreak of methamphetamine use within a state.<sup>220</sup> The tornado has also enjoyed employment as a metaphor for methamphetamine, used to describe the imminent approach of methamphetamine to areas where methamphetamine has not yet taken root.<sup>221</sup>

According to media sources, methamphetamine is—as were the drugs that anchored past drug "epidemics"—the worst drug of all

killed with "Mexican ice," which he describes as substantially more pure than locally-produced methamphetamine).

218. See generally *supra* note 213 (collecting articles that offer comparatively sympathetic portrayals of methamphetamine users and producers).

219. See, e.g., Crane, *supra* note 101, at A24; Johnson, *supra* note 101, at 41. Politicians have also utilized this language. See, e.g., ABERDEEN AM. NEWS, *supra* note 217, at B3, (quoting Indiana Governor Mitch Daniels as saying that "we can trace [methamphetamine's] path like a plague . . . . If we call this effort to eliminate this problem a war, for once, we're not overstating it"). So, too, have academics. See, e.g., O'Connor et al., *supra* note 123 (article entitled *Developing Lasting Legal Solutions to the Dual Epidemics of Methamphetamine Production and Use*).

220. See, e.g., Jill Young Miler & Craig Schneider, *When Meth Hits Home: Meth's Forsaken Children—When Parents Disappear into a Chaotic World of Drug Abuse, Danger and Heartbreak Follow for Their Sons and Daughters*, ATLANTA J. CONST., Nov. 30 2003, at A1 (quoting Georgia Bureau of Investigation Director Vernon Keenan as describing methamphetamine as having entered his state "like a tidal wave").

221. Lamothe, *supra* note 119, at A1 (discussing the possibility of crystal methamphetamine becoming prevalent in Massachusetts).

time, more devastating and addictive than any other drug.<sup>222</sup> Media sources often run “before and after” photos of users to illustrate the drug’s effects on individuals.<sup>223</sup> Methamphetamine in fact has been described explicitly as “the new crack,”<sup>224</sup> the latest drug to take the crown of most addictive and devastating. “It really has become the drug of choice. It’s taken over heroin and it’s taken over crack.”<sup>225</sup> Media articles also have held methamphetamine responsible for the spread of sexually transmitted diseases.<sup>226</sup>

As we saw in the late 1980s with respect to crack cocaine, media sources have featured connections between methamphetamine use and external social effects. As noted above, media reports have highlighted the public health problems associated with methamphetamine production and extent to which methamphetamine producers endanger household members, children, and neighbors.<sup>227</sup> In addition to describing these physical and environmental dangers, media sources have detailed criminal offenses in which methamphetamine addicts engage in order to provide funding for their habits. In particular, articles have focused on information theft (often referred to

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222. See, e.g., Jennifer Chambers, *Police Offer Testing Kits as Meth Use Accelerates*, DETROIT NEWS, Dec. 15, 2005, at 3B (quoting Oakland County Commissioner Eric Coleman, speaking on behalf of the National Association of Counties, as saying that methamphetamine “is bigger and worse than heroin or cocaine can ever be”); Nancy Lofholm, *Arrest Ends Meth-Ring Manhunt: Mesa County for Weeks has been Rattled by Violence Linked to the Drug’s Widespread Use*, DENVER POST, Dec. 13, 2005, at A1 (describing a group of suspected methamphetamine addicts who “had held Mesa County in a jittery grip of fear and violence for weeks,” linked methamphetamine to local shootings, and quoting a local law enforcement officers as saying that methamphetamine “is public safety’s and the community’s worst nightmare” and that “[t]his drug is different . . . . What it does to people is so much worse than anything else out there”); Marcovitz, *supra* note 152, at B1 (quoting a local district attorney as saying that “meth is a killer. It destroys communities. It is not like any other drug”); Puzanghera, *supra* note 128, at A1 (“Law enforcement officials say [methamphetamine] is the most devastating drug they have ever encountered, hooking most users the first time they try it.”); *A Commission at Work: Public Safety Advisers Have Their Hands Full in Dealing with Crystal Meth*, LONG BEACH PRESS-TELEGRAM, Dec. 16, 2005, at A16 (“[Methamphetamine] is far more addictive and far more dangerous stuff than cocaine, heroine, or other street drugs.”).

223. See sources cited *supra* note 180.

224. See, e.g., Bruce Ramsey, *The Scourge of the New Crack*, SEATTLE TIMES, June 14, 2009, at H4 (reviewing REDING, *supra* note 10); Press Release, U.S. Senate, Schumer: New Stats Show Crystal Meth Quickly Becoming the New Crack—Seizures in New York Up 31% Over Last Year, (Apr. 25, 2004), available at [http://schumer.senate.gov/new\\_website/record.cfm?id=265406](http://schumer.senate.gov/new_website/record.cfm?id=265406) (“Crystal meth is becoming the new crack, and we need tough new penalties that treat it like crack.”).

225. Chambers, *supra* note 222, at 3 (quoting Police Chief William Dwyer of Farmington Hills, Michigan).

226. See Patricia Guthrie, *Drugs, Risky Sex Get Blame for Jump in Syphilis Cases*, Nov. 9, 2005, ATLANTA J. CONST., at A9 (reporting that the Center for Disease Control has seen a rise in syphilis cases among men who have sex with men, and suggests a link between methamphetamine use and risky sexual behavior leading to disease transmission); Jefferson et. al., *supra* note 105, at 38.

227. See, e.g., Kathleen Brady Shea, *8 Arrested in Methamphetamine Ring*, PHILADELPHIA INQUIRER, Sept. 8, 2005, at B5.

as identity theft), a crime which even when uncoupled from methamphetamine generates a fair amount of panic, describing methamphetamine addicts as stealing personal information in order to obtain money to buy drugs.<sup>228</sup> In one newspaper article, a local sheriff estimated that eighty five percent of information theft offenses he investigated were in fact committed by methamphetamine addicts.<sup>229</sup> Articles also have linked car thefts to methamphetamine, similarly portraying addicts as stealing cars to raise money for drugs.<sup>230</sup> The list of devastating methamphetamine effects as outlined in media sources is lengthy, and the language used to describe its effects thus is emphatic. While these stories may or may not be grounded in reality—figures on crimes related to methamphetamine are not reliable<sup>231</sup> and figures on the percentage of foster cases related to methamphetamine have proven unverifiable<sup>232</sup>—it is fairly unpersuasive to argue that to the extent media might drive police responses, that a change in tone in media articles is responsible.

### 3. *Alternative Panics*

Another explanation for the legal response to methamphetamine is that we are indeed panicking about crime—but primarily about other kinds of offenses, particularly sex offenses against children. During the last two decades, there has been a major expansion of legislation increasing penalties for those who commit sexual offenses

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228. See, e.g., Greg Risling, *Meth Users Turn to ID Theft to Pay for Habit*, CONTRA COSTA TIMES, Dec. 18, 2005, at F4 (“[M]ore and more desperate users of [methamphetamine] are turning to identity theft to pay for their habit, creating a criminal nexus costing Americans millions of dollars.”).

229. See *id.*

230. See, e.g., Jesse McKinley, *The Distinction Modesto Didn't Need: National Car-Theft Capital*, N.Y. TIMES, June 3, 2006 (noting that Modesto, California leads the nation in car thefts per capita and largely blaming methamphetamine for that distinction); *Janelle*, *supra* note 217 (describing the investigation and arrest of thirty suspects in an alleged methamphetamine distribution ring and noting that the investigation revealed a vehicular “theft ring, a chop shop for stolen cars,” and a counterfeiting scheme).

231. Efforts to evaluate extravagant claims of meth’s effects on crime rates have usually left the involved analysts skeptical. For one well-reported such effort, see Angela Valdez, *Meth Madness: How The Oregonian Manufactured an Epidemic, Politicians Bought It and You're Paying*, WILLAMETTE WEEK, Mar. 22, 2006, available at <http://www.wweek.com/popup/print.php?index=7368> (analyzing fourteen stories in *The Oregonian* that, *inter alia*, described the proportion of state property crimes “fuel[ed]” by methamphetamine as between 80 and 90 percent and failing to find supporting data to verify the accuracy of this figure).

232. In August of 2005, *The Oregonian* ran a front-page story with the subheadline: “Oregon’s Meth Epidemic Creates Thousands of ‘Orphans.’” See Joseph Rose, *The Children of Meth* OREGONIAN, Aug. 28, 2005 at A01. According to the story, a state Department of Human Services study found that half of the state’s foster cases involved children taken “from parents using or making the potent drug.” See *id.* There was no such study, and DHS does not track whether or not methamphetamine causes children to be removed from homes; rather, a DHS coordinator had compared a list of parents with a list of people who had received methamphetamine treatment and found a 50% correlation. See Valdez, *supra* note 231.

against children<sup>233</sup> and imposing onerous new collateral sanctions upon such individuals.<sup>234</sup> A wide variety of academic commentators have analyzed the legislative history and cultural politics of these laws and concluded that they are both disproportionate and vindictive, reflecting a predictable desire to take out our collective cultural anxieties on individuals who we can comfortably dismiss as “monstrous.”<sup>235</sup> According to some scholars, we are in the midst—or perhaps at the tail end—of a full-fledged “sex panic.”<sup>236</sup>

While one panic does not rule out the possibility of another, it arguably reduces the odds. After all, given the limits of human emotion and energy, our capacity for moral indignation is not inexhaustible. Moreover, the creation of cultural images of monstrous offenders who impose dramatic physical and psychological trauma on vulnerable children creates a very high standard for those whom might want to demonize methamphetamine users.<sup>237</sup> Next to those who sexually

233. In the most extreme example, a handful of states adopted laws authorizing the death penalty for certain child sexual offenses. In June 2008, a sharply divided Supreme Court found that such laws violate the Eighth Amendment to the United States Constitution. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008).

234. Here, the most notable development is the growth of sexual offender registration laws, often called “Megan’s Laws.” Since 1996, every State has had such a statute. See Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 370 n.6 (2009). The Supreme Court upheld two such statutes against constitutional challenges in 2003. See *Smith v. Doe*, 538 U.S. 84, 105-06 (2003); *Conn. Dep’t Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003). More recently, we have begun to see an expansion of laws that limit the ability of convicted sex offenders to live in proximity to places where children congregate, often to the point that there are few or even no places where they can legally reside. For one academic analysis of this trend, see generally Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1 (2006).

235. See generally, e.g., Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829 (2000); Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB., POL’Y & L. 452 (1998).

236. For descriptions of the recent decades as an era of “sex panic” or “sex crimes panic,” see, for example, James E. Bristol III, *Free Expression in Motion Pictures: Childhood Sexuality and a Satisfied Society*, 25 CARDOZO ARTS & ENT. L.J. 333, 352 (2007) (describing “sex panic”); Rose Corrigan, *Making Meaning of Megan’s Law*, 31 LAW & SOC. INQUIRY 267, 274 (2006) (describing “sex crimes ‘panic’ ”); Lisa Duggan, *Sex Panics*, in *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 74 (Lisa Duggan & Nan D. Hunter eds., 1995) (describing “sex panic”). The term “sex panic” is at times used to refer to our heightened and exaggerated concerns over sex crimes but is more often used to refer to a more general cultural anxiety about sexual behavior that manifests itself not only in sex crimes legislation but also in laws relating to pornography, obscenity, and gender relations. Used in the latter sense, the term is more often used with reference to the 1990s than to the most recent years. *Id.*

237. If, as posited here, the relevant distinction is between those who threaten others—particularly the vulnerable and most especially children—and those whose behavior mostly damages themselves, then the shape of methamphetamine legislation described above makes sense. As discussed in Part II *supra*, much of the state legislation in response to methamphetamine has been designed to prevent young people from becoming addicted or to

traumatize children, scraggly, frantic meth users might well appear more pathetic than dangerous.<sup>238</sup>

Efforts to import restrictions developed in the sex-offender context to the meth content have gained little traction. Though some were initially excited by the idea of methamphetamine registries,<sup>239</sup> for example, few states have adopted them<sup>240</sup> and those that have adopted them provide less information about those convicted of methamphetamine offenses than upon those convicted of even the most minor sex offenses.<sup>241</sup> With regard to sexual offense registries, there has been near constant political pressure for more—more states participating, more offenses included, more information provided, more access for the public, and more restrictions on where persons convicted of sex offenses can reside, work, and socialize. In contrast, meth registries, as they have developed in the few states that maintain them, are limited tools; lacking photographs or extensive search features, they serve as little more than free, limited background checks for potential landlords, employers, and home buyers.

#### 4. *Personal Responsibility as Political Focus*

The idea of being responsible for one's own person, decisions, and fate is hardly novel.<sup>242</sup> The mobilization of this concept politically,

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protect third parties from explosions and other environmental harms resulting from drug manufacturing. As discussed in Part III.B *supra*, situations in which children are harmed or threatened is the one area in which legislators have been quick to add new criminal laws and penalties related to methamphetamine.

238. For characterizations of methamphetamine users that emphasize their pathetic plight, see *supra* note 213 and sources cited therein.

239. Representative Mike Coan, who introduced legislation to create a methamphetamine offender registry in Georgia, argued that “[t]he registry is necessary because the production, distribution and use of this powerful street drug is the source of so much crime, ranging from robbery, theft, forgery, child abuse and neglect to a host of violent offenses.” Mike Coan, *My View: Registry for Meth Offenders Would Protect Residents—Metro Atlanta Area a Major Hub for Trafficking*, ATLANTA J. CONST., Feb. 12, 2006 at JJ4. He focused specifically on the effects of methamphetamine offenses on children, writing that “[j]ust as sex offenders do irreparable harm to children, meth abusers also harm innocent children. The addiction to this street drug is so powerful that addicts neglect their families, spend all their wages buying meth and behave extremely erratically, sometimes abusing children and spouses.” *Id.* With a methamphetamine registry, “neighbors can watch for suspicious activities,” arguing that “[i]nformation is power, and when residents have the ability to find out who lives in their community—whether it is a sex offender or a meth offender—they can make better decisions about how they live their lives.” *Id.* Comparing persons convicted of sex crimes to persons convicted of methamphetamine offenses, “we must now take the same steps to ‘out’ offenders who bring this dangerous drug into our communities.” *Id.*

240. See *supra* notes 149-150 and accompanying text.

241. See *supra* notes 146-148 and accompanying text.

242. See generally Michael B. Brennan, Essay, *The Lodestar of Personal Responsibility*, 88 MARQ. L. REV. 365 (2004) (discussing historical roots of “personal responsibility” as philosophy and observing how the principle is applied in law).

however, has gained significant traction in recent years.<sup>243</sup> This sort of libertarian impulse perhaps explains some of the legal developments we have seen with respect to methamphetamine. The changes that legislatures have made that increase criminal penalties for methamphetamine offenses generally focus on protecting “innocent” persons who have not made bad decisions and who are not in a position to protect themselves.<sup>244</sup> This may explain why legislatures have enacted lengthier sentences primarily where persons associated with methamphetamine expose others to the dangers of their activities: nonmethamphetamine producers do not make intrinsically bad decisions by having next-door neighbors or purchasing homes, and children are not making poor decisions when they are raised by methamphetamine producers. The language of self-sufficiency and personal responsibility in fact can be found directly in press releases supporting these legislative changes.<sup>245</sup> This focus may explain why, even if reducing domestic production were to do little to reduce addiction, curtailing the number of mom-and-pop methamphetamine labs would comprise success: shutting down local methamphetamine labs, even if it does nothing to stem the influx of methamphetamine into communities or the use of methamphetamine by addicts, will be help protect innocents from explosions and toxic chemicals.<sup>246</sup>

This explanation, like others, cannot be fully explanatory: legislatures are not ignoring the plight of addicts, but rather are allocating significant funding to educate potential users about the dangers of methamphetamine and to rehabilitate users through drug courts, methamphetamine prisons, and other treatment programs.<sup>247</sup> Still, to the extent that the way in which we have been recognizing and dealing with “serious” social problems has been by ratcheting up criminal penalties, it is possible to view recent legislative responses to me-

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243. For example, the controversial 1996 law that, depending on your perspective, either reformed or eliminated welfare was entitled the “Personal Responsibility and Work Opportunity Reconciliation Act of 1996.” See Pub. L. No.104-193, 110 Stat. 2105 (codified at 42 U.S.C. 1305). In 1999, then-Senator John D. Ashcroft similarly lauded Clarence Thomas for the extent to which he promotes in his public life notions of personal responsibility. John D. Ashcroft, *Justice Clarence Thomas: Reviving Restraint and Personal Responsibility*, 12 REGENT U. L. REV. 313, 315 (1999).

244. See generally Parts III.B and IV *supra* (exploring areas in which legislatures have chosen to focus their energies in regulating methamphetamine, including prevention, environmental remediation, and child protection).

245. In explaining his support of legislation to provide grant money to states to establish programs to assist methamphetamine-exposed children, for example, Representative Zach Wamp argued that the legislation would give the children “the helping hand they need to begin climbing the ladder of life and have an opportunity at the American dream of self-sufficiency.” *Meth-Endangered Children to Benefit from New Grant Program*, *supra* note 161.

246. An assistant United States Attorney in the Eastern District of Missouri commented, “Let the Mexicans have the meth trade. . . . We’ll have done a great thing if we take pseudoephedrine out of the game.” Schone, *supra* note 129, at 36.

247. See *supra* Parts III.B(5)-(6).

thamphetamine as signaling that while the government will still be heavily punitive if that is necessary to protect innocent citizens, non-innocents who themselves ingest methamphetamine or are exposed to the hazards of their own methamphetamine production can be left to deal with the consequences of their own choices.

##### 5. *Privatizing/Outsourcing*

Another possible explanation for current approaches to drug policy is the vogue for privatization and outsourcing—taking traditional government functions and committing them to private entities.<sup>248</sup> Pseudoephedrine purchase restrictions place the burden for reducing methamphetamine production on private actors who have incentive for compliance. Police officers have less need to spend precious tax-dollars to root out methamphetamine labs in far-flung rural houses. Instead, drugstore personnel check identification, maintain registries of purchasers, refuse profit-making purchases as required, and shelve pseudoephedrine inaccessibly or in view of surveillance mechanisms, all of which represent enforcement costs placed on business rather than on taxpayers.<sup>249</sup> In general, governments have shown a desire to privatize the cost of anti-methamphetamine programs, in some cases shifting primary responsibility for such programs to privately financed campaigns<sup>250</sup> and in at least one case seeking to finance the cost of drug treatment programs through the sale of special anti-methamphetamine license plates.<sup>251</sup>

The “outsourcing” of drug restrictions to private industry has precedent. The first rounds of drug legislation, as described above,<sup>252</sup> looked similar to methamphetamine precursor restrictions in that they were civil requirements placed on doctors and pharmacists to restrict distribution of possibly dangerous drugs. Even after the primary approach to drug abuse became criminalization and imprisonment, private enterprise was considered a possible means for reducing drug use. During the late 1980s, for example, the Reagan administration encouraged private employers to drug test employees in an effort to fight the “War on Drugs.”<sup>253</sup> Placing such efforts at the center

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248. On the trend toward privatization of government functions, see, e.g., Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 576 (2009) (“The much-noted current trend in public administration is toward privatization of public functions.”); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1291-92 (2003) (noting the trend towards privatization in recent decades).

249. See Part III.B(1) *supra*.

250. See, e.g., *supra* note 178 (discussing one such organization, the Montana Meth Project).

251. *Minnesota Roundup*, GRAND FORKS HERALD, Dec. 17, 2005, available at 2005 WLNR 20363759.

252. See *Supra* Part II.A(2).

253. See Larry Martz et al., *Trying to Say ‘No,’* NEWSWEEK, Aug. 11, 1986, at 14 (noting that then-president Ronald Reagan’s proposals for discouraging drug use included

of new drug policy is, however, something we have not seen during the last several rounds of drug panic. Perhaps what we are seeing is, at least in part, an effort on the part of legislators to find ways to reduce the harms of illicit drugs while placing the responsibility for enforcing new laws primarily upon private parties.

### B. *An Age of Ambivalence*

Though many of these theories provide compelling partial explanations for the response to methamphetamine, even stitched together they fail to provide a complete explanation. While methamphetamine users may have benefited from the perception that theirs was a “white drug,” the prevalence of news stories about Native-American meth users and Mexican meth merchants have offered levers if the culture was intent on racializing the drug;<sup>254</sup> moreover, poor rural whites are not exactly the kind of powerful group that can be confident in its immunity from social scapegoating. Similarly, while media portrayals of methamphetamine users have certainly been more empathetic than portraits of crack cocaine users,<sup>255</sup> they have not shied away from blaming meth users for a myriad of social problems, often portraying those problems in the most hyperbolic terms.<sup>256</sup> While legislatures may have been distracted by our cultural panic against sexually violent offenders,<sup>257</sup> history is full of eras in which drug and sex panics coexisted or even mutually reinforced each other.<sup>258</sup> Finally, while the increasing popularity of arguments focusing on individual responsibility and the benefits of privatization may well have played some role in convincing legislators and voters to approve some particular pieces of anti-methamphetamine legislation,<sup>259</sup> there is no evidence that the content of the legislation was shaped by these—or any other—big ideas.

What the legislative responses (and nonresponses) to methamphetamine cataloged in this Article reveal more than anything is an undercurrent of ambivalence about current drug policy. In an undertheorized, semi-rational way, legislators and citizens responding to methamphetamine were simply less persuaded by the drumbeat of panic than they were in other recent episodes. While they spoke loud-

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requiring certain federal workers to be drug tested, offering federal contractors incentives to drug test, and generally encouraging private businesses to drug test employees).

254. See sources cited *supra* notes 211 & 217.

255. See *supra* note 213 and sources cited therein.

256. See *supra* note 219-230 and accompanying text.

257. See *supra* Part V.A(3).

258. For example, the recent crack cocaine panic overlapped with the beginning of the modern sex crimes panic. See also *supra* Part II.A(2) (explaining how cocaine panic of the 1930s was fueled, in part, by fears of African-American men raping white women).

259. See *supra* Part V.A(4).

ly and acted swiftly against methamphetamine, their response was more muted and, on the whole, less punitive.

A string of developments since 2005 support this diagnosis of ambivalence. In recent years, both state legislatures and the United States Sentencing Commission have taken steps to lower crack cocaine sentences in response to longstanding racial equity concerns,<sup>260</sup> the Supreme Court has granted trial judges freedom to reject hefty crack cocaine sentences on policy grounds,<sup>261</sup> and Congress has moved ever closer to abolishing the crack/powder sentencing disparities altogether.<sup>262</sup> Meanwhile, in a move both symbolic and substantive, New York has drastically reworked its infamously draconian Rockefeller Drug Laws,<sup>263</sup> while other states have taken similar steps to scale back on mandatory minimum sentences.<sup>264</sup> Voters in nine states in eleven years have voted to approve initiatives and referenda decriminalizing medical marijuana.<sup>265</sup> Through this all, drug courts and other forms of alternative sanctions have quietly established a foothold in nearly every jurisdiction.<sup>266</sup> Finally, in early 2009, the White House announced that the federal government would no longer utilize the term

260. For the federal developments, see Cassidy, *supra* note 10, at 125 & n.176 (detailing Commission amendments and Congressional inaction that allowed amendments to pass into law). For one representative state development, see *supra* note 216 (detailing change in South Carolina law).

261. See *Kimbrrough v. United States*, 552 U.S. 85 (2007) (allowing judges discretion to sentence individuals convicted of crack cocaine crimes to lesser terms based on judges' personal disapproval of crack/powder disparity).

262. For informed speculation that the disparities may finally be repealed this year, see Emery, *supra* note 15. For a list of recent or pending bills proposing to reduce the disparity or eliminate it entirely, see Cassidy, *supra* note 10, at 133 n.231. Interestingly, all the legislation now being considered either lowers crack sentences to the levels that currently apply to powder cocaine, lowers crack sentences part of the way towards current powder cocaine sentences, or sets new sentences for both crack and powder cocaine that are less severe than the current crack sentences. The direction of sentencing reform also reflects changing times. Cf. Marc Mauer, *Race, Drug Laws, & Criminal Justice*, 10 TEMP. POL. & CIV. RTS. L. REV. 321, 325 (2001) (noting that, at that time, efforts to equalize powder cocaine and crack cocaine sentences were taking the form of legislation that "basically says, 'You want to equalize penalties, we can do that. We will increase the penalties for powder cocaine and put even more people in prison'").

263. For some of the first such changes, see Ehlers, *supra* note 132, at 58. For the more recent and drastic changes, see Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES., Mar. 26, 2009, at A1.

264. In New Jersey, for example, the State Assembly recently adopted a bill to eliminate the State's strict mandatory minimum sentences for drug crimes committed in school zones (though the State Senate has thus far declined to act). See N.J. Assem. B. 2762, 213th Legislature, introduced May 19, 2008 (permitting judges to place a defendant on probation or to waive the minimum term of parole eligibility after consideration of the defendant's prior record, the specific location of the drug offense, whether or not school was in session at the time of the offense, and whether or not children were present in the area of the offense).

265. See Brown, *supra* note 1, at 243-44 (reporting this fact, though noting that this trend towards decriminalization of medical marijuana may be constrained by *Gonzales v. Raich*, 545 U.S. 1 (2005)).

266. See generally Miller, *supra* note 169.

“War on Drugs,” retiring a divisive and militaristic locution that has been a flashpoint in the cultural struggle over drug policy.<sup>267</sup>

If our instincts about drug regulation are now more ambivalent and our policies more balanced, perhaps we have learned something from prior panics. With regard to methamphetamine in particular, study, scholarship, and activism surrounding the response to crack cocaine may have paid dividends in calming the waters during the early days of the meth panic. For example, when the predictable “meth baby” headlines surfaced during 2005, warning of an epidemic of new methamphetamine-addicted and damaged infants,<sup>268</sup> public health advocates were ready with a signed statement by ninety-two medical researchers and drug policy advocates arguing that “use of stigmatizing terms, such as ‘ice babies’ and ‘meth babies,’ lack scientific validity and should not be used” noting that “[e]xperience with similar labels applied to children exposed parentally to cocaine” had impaired efforts to develop policies and treatments appropriate for cocaine-exposed children.<sup>269</sup> Similarly, when major news sources like *Newsweek* and *The Oregonian* offered sensationalized account of an emerging methademic, investigative journalists and media critics were quick to question their unverifiable factual claims and intentionally inflammatory language.<sup>270</sup> It is now increasingly common for politicians to convene hearings or summits to evaluate, in a systematic way, the efficacy of the heavily punitive antidrug measures on which we have been relying.<sup>271</sup>

To take a less sanguine view, perhaps it is money that is driving our newfound ambivalence. In 1986, then-Democratic congressional campaign chair Tony Coehlo said that Congressional representatives “intend to bust the budget” on the War on Drugs, which he meant as a positive sign of commitment to eradicating drug abuse.<sup>272</sup> In con-

267. See Fields, *supra* note 15.

268. See, e.g., Christine Lagorio, *Generation of Meth Babies: Heartland Doctors and Programs Help Meth-Addict Moms Cope*, CBS NEWS, Apr. 28, 2005, <http://www.cbsnews.com/stories/2005/04/28/eveningnews/main691764.shtml>; Bennett & Williams, *supra* note 213 (quoting a doctor describing babies born to methamphetamine using mothers as “worse than crack babies”).

269. Letter from Donald G. Miller to Whom It May Concern (July 27, 2005), *General Media Letter on “Meth Babies” and “Ice Babies,”* available at [http://www.jointogether.org/resources/pdf/Meth\\_Letter.pdf](http://www.jointogether.org/resources/pdf/Meth_Letter.pdf).

270. See, e.g., Shafer, *Meth-Mouth Myth*, in SLATE, *supra* note 107; Shafer, in SLATE, *Meth Madness*, *supra* note 110; Valdez, *supra* note 231.

271. See, e.g., David Lerman, *Webb Urges Fresh Look at the War on Drugs*, DAILY PRESS, June 20, 2008, at A2 (describing hearing by Joint Economic Committee convened by Senator Jim Webb to hear testimony from scholars and prosecutors who argue that incarceration has been costly and ineffective as a remedy for drug addiction); Diana Heil, *Meth Use Claims 56 Lives*, THE SANTA FE NEW MEXICAN, Oct. 28, 2005, at C-1 (describing drug summit convened by State Drug Czar that recommended primarily treatment, prevention, and environmental remediation efforts).

272. Martz et al., *supra* note 253, at 14. According to Congressional representatives at the time, money would be no object in fighting the war on drugs. *Id.*

trast, budgetary and space constraints make increased incarceration less appealing in the 2000s.<sup>273</sup> For more than a decade, advocates and scholars have been pointing to the budget-breaking cost of mass incarceration policies.<sup>274</sup> The serious economic crisis that has engulfed this nation in the last two years may have forced states to take notice. Certainly, it is impossible to open a newspaper without reading a story about the devastating state of particular state budgets.<sup>275</sup> In almost every instance, coverage of state budget woes discusses either the role that prison costs have played in driving up state expenditures or proposed cuts to prison budgets or both.<sup>276</sup> In a time of belt-tightening and tough choices, spending tens of thousands of dollars a year to express your moral indignity towards a particular individual might, to some, come to seem an emotional extravagance.

## VI. CONCLUSION

What if they threw a drug panic and nobody came?

While the media, public, and legislatures clearly have identified methamphetamine use and production as a serious issue worthy of attention and concern, and while hyperbolic anecdotes and natural-disaster analogies have worked their way into discourse, they have not leveraged a concomitantly hyperbolic criminal sanctions response.

While we have seen criminal sanctions expand and increase somewhat in response to methamphetamine, and we have in particular seen movement to protect children and to authorize police to search with less preclearance and restriction,<sup>277</sup> the legislative response has focused on prevention, via restrictions on precursor purchases and education of potential users.<sup>278</sup> The focus of legislative change has been primarily on making it difficult for people to produce methamphetamine and protecting “innocents” from either trying the drug or being exposed to substances that are volatile and toxic.

Certainly, the racial differences between methamphetamine users/producers and public perceptions of, for example, crack cocaine users/sellers can work to explain the differences between the choice

273. See, e.g., Schone, *supra* note 129, at 32-33 (noting that Missouri’s state budget is strained, prison beds are filled, and the state lacks both funds and cells to incarcerate methamphetamine users and producers).

274. See, e.g., *id.*

275. See, e.g., Solomon Moore, *California State Assembly Approves Prison Legislation*, N.Y. TIMES, Sept. 1, 2009, at A19 (reporting on legislation dealing with California budget crisis).

276. See, e.g. *id.* (reporting that the California Assembly passed a bill that will cut the state prison population by about 27,000 inmates, saving about one billion dollars per year). Underscoring that this is an age of ambivalence about drug policy, not an age of retreat, the article points out that the State Senate passed an even bolder bill but that, after extensive lobbying, the Assembly balked at the broader cuts. See *id.*

277. See generally *supra* Part IV.

278. See generally *supra* Part III.

to primarily control methamphetamine through limiting pseudoephedrine purchases and the choice to control crack cocaine through lengthy and mandatory prison terms.<sup>279</sup> As methamphetamine supply shifts to importation rather than mom-and-pop production, and as that importation is linked to Hispanic importers and illegal immigration, we may see the extent to which race and ethnicity drive legislative action; under the social group theory,<sup>280</sup> we will expect to see methamphetamine sanctions rise dramatically, and time will tell whether or not the prevention-education-personal regulation model is transitory or trend.

In the meantime, the United States appears to have entered a period in which the appetite for increased drug-related penalties has waned.<sup>281</sup> In part, this may be because of increased panic about violent crime, particularly sex offenses against children; it may stem from norm shifts that encourage “personal responsibility” and privatization; or it may reflect, related to all of these theories, tight government budgets and a governmental desire to craft programs that cost little and place the onus on private parties to resolve social problems. In general, legislators and citizens seem more ambivalent about the ability of incarceration to address the problems associated with substance use and abuse, and willing to examine strategies that place less emphasis on costly prison programs and more emphasis on private industry and individual will.

Is this a positive shift? The efficacy of methamphetamine responses remains to be seen. The general shift in focus from criminal punishment to education, alternatives to incarceration, and precursor control may be good news for foes of mass incarceration, and might represent a rational, evidence-based approach to a substance that inarguably has ill effects. Or perhaps it simply represents a damning of expectations, some measure of fiscal austerity and economic reality as applied to government policy. Either way, I argue that what the response to methamphetamine has shown us is that we have entered an age of ambivalence—one where we are less certain that harsh criminal sanctions are the solution to social problems, and one where we are open to alternatives.

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279. *See supra* Part V.A(1).

280. *See supra* note 19-20 and accompanying text.

281. *See supra* Part V.B.

