

COMMENT

Tailoring Regimes for a Designer Drug: Developing Civil Liability for Retailers of Synthetic Marijuana

INTRODUCTION

Over the past two years, homeless shelters in cities across America found themselves in crisis as residents have overdosed, sometimes en masse, on a drug known as “synthetic marijuana.”¹ The drug’s effects are devastating, discriminating, and bizarre – sending users to the emergency room for seizures, heart attacks, and kidney failure; showing ruthless concentration among homeless populations; and creating “zombie-like” effects in users.² Concerned public health officials, however, learned quickly that the drug – also popular with another vulnerable and cash-strapped population, teenagers³ – would prove surprisingly

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1. See, e.g., Associated Press, *Homeless Across Country Fall Victim to Synthetic Marijuana*, FOX NEWS (Dec. 17, 2016), <http://www.foxnews.com/us/2016/12/17/homeless-across-country-fall-victim-to-synthetic-marijuana.html> [<http://perma.cc/HJ5G-UL4M>] (“Nearly 300 homeless people became ill last month in St. Louis.”); Jackie Bensen & Andrea Swalec, *11 People Overdose on Synthetic Drug “Bizarro” in Downtown D.C.*, NBC WASH. (June 7, 2015, 7:34 AM EDT), <http://www.nbcwashington.com/news/local/-At-Least-10-People-Overdose-on-Synthetic-Marijuana-in-Downtown-DC-306311941.html> [<http://perma.cc/N9KM-2A83>] (reporting a “mass overdose outside [Washington, D.C.’s] largest homeless shelter on a type of synthetic marijuana”); Eli Rosenberg & Nate Schweber, *33 Suspected of Overdosing on Synthetic Marijuana in Brooklyn*, N.Y. TIMES (July 12, 2016), <http://www.nytimes.com/2016/07/13/nyregion/k2-synthetic-marijuana-overdose-in-brooklyn.html> [<http://perma.cc/LZ72-JMWZ>] (noting the popularity of one type of synthetic marijuana among people experiencing homelessness in New York).
 2. Rosenberg & Schweber, *supra* note 1.
 3. *Synthetic Marijuana Lands Thousands of Young People in the ER, Especially Young Males*, NAT’L INST. ON DRUG ABUSE (Feb. 2013), <http://www.drugabuse.gov/related-topics/trends-statistics/infographics/synthetic-marijuana-lands-thousands-young-people-in-er-especially-young-males> [<http://perma.cc/JX9S-UNWA>].

difficult to contain.⁴ As a synthetic or “designer” drug, synthetic marijuana can be produced from any of hundreds of synthetic cannabinoids; when law enforcement catches wind of a particular strand, manufacturers quickly adjust their formulas.⁵

Retailers also market synthetic marijuana inconsistently; there are over four hundred commercial varieties of synthetic cannabinoids,⁶ which are known by almost seven hundred street names.⁷ As recently as 2016, synthetic marijuana could be purchased in small packets off the shelves of gas stations and convenience stores.⁸ Often cheekily labeled as “potpourri” or “incense,” so that it can be sold openly alongside drug paraphernalia, and bearing a disclaimer that its contents are not for human consumption, the packets feature colorful, whimsical packaging, often alluding to natural marijuana.

Many of the challenges of regulating synthetic marijuana arise from legal complexities defining its nature. The drug takes its name from the chemical similarity between synthetic cannabinoids and THC, the active ingredient in natural marijuana,⁹ but produces stronger and less predictable effects than its natural

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4. See Andy Rosen & Michael Levenson, *Mass., N.H. Crack Down on ‘Synthetic Marijuana,’* BOS. GLOBE (Aug. 15, 2014), <http://www.bostonglobe.com/metro/2014/08/15/mass-crack-down-synthetic-marijuana/E5mt2tXU9jNCEis5ofVqjO/story.html> [<http://perma.cc/PRB7-7T86>]; Rosenberg & Schweber, *supra* note 1; *Synthetic Cannabinoids*, AM. ASS’N POISON CONTROL CENTERS, <http://www.aapcc.org/alerts/synthetic-cannabinoids> [<http://perma.cc/U3G5-HUH8>].
 5. Zunny Losoya, Comment, *Synthetic Drugs – Emergence, Legislation, and the Criminal and Legal Aftermath of Broad Regulation*, 66 SMU L. REV. 401, 410-11 (2013).
 6. Mike Stucka, *List of Banned Synthetic Marijuana Brands*, MACON TELEGRAPH (Mar. 28, 2012, 5:28 PM), <http://www.macon.com/news/local/crime/article28647490.html> [<http://perma.cc/4W8C-5KWB>].
 7. *700 Names for Synthetic Marijuana (Spice, K2, etc.)*, SPICE ADDICTION SUPPORT (Mar. 1, 2017), <http://spiceaddictionsupport.org/street-names-for-synthetic-marijuana> [<http://perma.cc/H9NR-WVLL>].
 8. See Jaclyn Reiss, *What Is Synthetic Marijuana?*, BOS. GLOBE (Jan. 14, 2016), <http://www.bostonglobe.com/metro/2016/01/13/what-synthetic-marijuana/x26SioodViJPPYtgGPm9GK/story.html> [<http://perma.cc/ESY7-Z7BR>] (“In recent years, synthetic marijuana has been fairly easy to get. It is . . . often sold at gas stations, smoke shops, and mom-and-pop stores.”).
 9. *Dangerous Synthetic Drugs: Hearing Before the S. Caucus on Int’l Narcotics Control*, 113th Cong. 5 (2013) (statement of Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration) [hereinafter Rannazzisi Statement], http://www.drugcaucus.senate.gov/sites/default/files/Rannazzisi_Dangerous%20Synthetic%20Drugs%20Testimony%20%28SDC%29.pdf [<http://perma.cc/PYT5-EA2X>].

counterpart.¹⁰ One study found that a batch of synthetic marijuana could be eighty-five times more potent—or capable of producing effects at a particular dosage—than natural marijuana;¹¹ a study in the Centers for Disease Control and Prevention's *Morbidity and Mortality Weekly Report* suggests that the potency may be up to one hundred times greater.¹² In order to evade law enforcement, manufacturers frequently alter the chemical compound sprayed over the dried plant matter that makes up the drug; as a result of this haphazard production method, two packages with identical labels can contain drugs with substantially different potencies.¹³ Consumers are thus unable to make predictions about the contents of the substance they are ingesting. This unpredictability, combined with the drug's potency,¹⁴ makes each user "unwittingly a guinea pig in an uncontrolled laboratory test."¹⁵

That variable chemical composition creates a wide range of reactions. Synthetic marijuana has powerful psychoactive effects; some, such as altered perception, are recreational, while others are more insidious, including violent behavior and suicidal ideation.¹⁶ Physically, the drug can cause uncontrollable vomiting, hemorrhaging, seizures, heart attacks, and organ failure.¹⁷ Despite

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10. Jeneen Interlandi, *Synthetic Marijuana Has Real Risks*, CONSUMER REP. (May 7, 2016), <http://www.consumerreports.org/drugs/synthetic-marijuana-real-risks> [http://perma.cc/46JQ-QTL2].
 11. Axel J. Adams et al., "Zombie" Outbreak Caused by the Synthetic Cannabinoid AMB-FUBINACA in New York, 376 NEW ENG. J. MED. 235, 240 (2017).
 12. Anne M. Riederer, *Acute Poisonings from Synthetic Cannabinoids—50 U.S. Toxicology Investigators Consortium Registry Sites, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 692, 692 (2016).
 13. See Kevin T. Brown, Note, *A Problem of Design: Proposed Changes to Controlled Substance Analogue Statutes—Modifying Tennessee's Approach*, 45 U. MEM. L. REV. 395, 404 (2014).
 14. See Marc Santora, *Drug 85 Times as Potent as Marijuana Caused a "Zombielike" State in Brooklyn*, N.Y. TIMES (Dec. 14, 2016), <http://www.nytimes.com/2016/12/14/nyregion/zombielike-state-was-caused-by-synthetic-marijuana.html> [http://perma.cc/TB4S-688D].
 15. Rannazzisi Statement, *supra* note 9, at 6.
 16. For a more in-depth discussion of these effects, see Losoya, *supra* note 5, at 401-02, which cites, among other examples, a teenager in Kentucky who experienced paralysis after smoking synthetic marijuana and a twenty-two-year-old man who "tortured, killed, and ate his roommate's dog" while high on the drug.
 17. See, e.g., Moustafa Elsheshtawy et al., *Synthetic Marijuana Induced Acute Nonischemic Left Ventricular Dysfunction*, CASE REP. CARDIOLOGY, 2016, art. 9625758, at 1; Dolkar Sherpa et al., *Synthetic Cannabinoids: The Multi-Organ Failure and Metabolic Derangements Associated with Getting High*, J. COMMUNITY HOSP. INTERNAL MED. PERSP., Sept. 2015, art. 27540, at 1, 4.

these risks, the drug remains popular because of its accessibility¹⁸ and low price relative to natural marijuana.¹⁹

While law enforcement officers have begun to crack down on sales at mainstream retail establishments (such as gas stations), the drug remains widely available online and in stores selling drug paraphernalia. Because it can be produced from a wide range of synthetic compounds, manufacturers can alter its chemical basis to evade criminal²⁰ or civil liability.²¹ In the ensuing game of legal “whack-a-mole,”²² the rapid introduction of new compounds makes regulation of synthetic marijuana entirely reactive to creative manufacturers.²³ These swift and frequent changes – coupled with variations in the product’s packaging and labeling – have made it difficult for legislators and law enforcement to determine whether a particular substance can be treated as synthetic marijuana when its labeling and chemical composition do not offer clear identifying markers.

This Comment suggests a two-pronged approach for addressing this public health crisis. First, legislative reform is needed to combat this new challenge in

18. Rannazzisi Statement, *supra* note 9, at 5.

19. Synthetic marijuana sells for around \$50 per ounce in bulk or around \$10 for a small packet. Leon Neyfakh, *What Is the Deal with Synthetic Marijuana?*, SLATE (July 15, 2016, 12:35 PM), http://www.slate.com/articles/news_and_politics/crime/2016/02/synthetic_marijuana_is_a_weird_and_confusing_drug_here_s_what_you_need_to.html [http://perma.cc/GYZ7-MGJ2]. Natural marijuana, by contrast, usually sells for between \$250 and \$300 per ounce in Colorado. See Julie Verhage, *This Survey Says that Marijuana Prices Are Crashing in Colorado*, BLOOMBERG (June 22, 2015, 8:13 AM EDT), <http://www.bloomberg.com/news/articles/2015-06-22/this-survey-says-that-marijuana-prices-are-crashing-in-colorado> [http://perma.cc/G2NA-XSS2]; see also Eliza Gray, *The Drug Threat in Plain Sight*, TIME, Apr. 21, 2014, at 24, 31 (quoting a Colorado state representative as suggesting that natural marijuana costs \$300 to \$500 an ounce).

20. In criminal enforcement regimes, drugs are regulated through a process known as “scheduling,” in which the Drug Enforcement Administration (DEA) will prohibit a drug or class of drugs based on its dangerousness and potential for abuse. This process, however, depends upon the ability to identify a drug by its chemical composition. See *Drug Schedules*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.dea.gov/druginfo/ds.shtml> [http://perma.cc/6N7M-2RGJ].

21. Olga Khazan, *Synthetic Drugs Are Multiplying Too Fast for Regulators To Outlaw Them*, ATLANTIC (June 27, 2013), <http://www.theatlantic.com/international/archive/2013/06/synthetic-drugs-are-multiplying-too-fast-for-regulators-to-outlaw-them/277321> [http://perma.cc/7RJV-RY86].

22. See, e.g., *id.*; Neyfakh, *supra* note 19.

23. Rannazzisi Statement, *supra* note 9, at 25-26 (“[T]hese chemicals can be easily synthesized to stay one step ahead of control.”); see also Riederer, *supra* note 12, at 692 (“[E]nforcement is hampered by the continual introduction of new chemical compounds.”).

a comprehensive manner. Because local governments are uniquely well positioned to identify these actors and respond to the needs of their communities,²⁴ this Comment suggests that legislative reforms be developed to enable city and county attorneys to bring public tort actions, such as public nuisance and unfair competition claims,²⁵ against synthetic marijuana retailers. Comprehensive legislative reform will allow local governments and other stakeholders to use tort law's flexible regulatory potential to curb the spread of synthetic marijuana's harmful effects through some of the country's most vulnerable populations. Until those laws are passed, though, this Comment suggests that private plaintiffs can leverage tort law to bring novel claims against synthetic marijuana retailers.

Civil liability offers several advantages relative to criminal law regimes in this arena. It avoids perpetuating the racialized criminalization of drug use²⁶ and collateral civil consequences²⁷ of the war on drugs. Regulators, meanwhile, can benefit from lower evidentiary standards and mens rea requirements,²⁸ as well as the availability of injunctive relief and civil penalties.²⁹ This Comment also argues that tort strategies can make use of the "representational" approach to identifying synthetic marijuana, which looks holistically at the effects of a product's packaging, marketing, or manner of sale, rather than relying on strictly chemical definitions of the drug. Expanding regulation beyond a chemical understanding of synthetic marijuana makes it easier to target retailers who engage in deceptive

24. See Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in *WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY* 51, 60 (Kathleen Claussen et al. eds., 2008).

25. See generally 7 & 11 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* §§ 20.A, 34 (1983) (surveying the law of public nuisance and unfair competition claims).

26. See, e.g., *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet> [<http://perma.cc/5S38-G89G>] (noting that "African Americans and whites use drugs at similar rates, but the imprisonment rate of African Americans for drug charges is almost 6 times that of whites" and that "African Americans represent 12.5% of illicit drug users, but 29% of those arrested for drug offenses and 33% of those incarcerated in state facilities for drug offenses"). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (recounting how the criminal justice system, and the war on drugs in particular, has led to racialized mass incarceration).

27. See, e.g., Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); *Roadblocks to Reentry*, LEGAL ACTION CTR. (2004), http://lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf [<http://perma.cc/H8GA-66TP>]; see also ALEXANDER, *supra* note 26, at 137-72 (discussing how collateral consequences burden offenders' reintegration into society).

28. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1805-06 (1992); Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 720 (2008).

29. See Mann, *supra* note 28, at 1863.

sales and marketing practices and make synthetic cannabinoids easily accessible to vulnerable populations.

Part I identifies the conceptual frameworks through which courts, legislatures, and law enforcement officials have approached synthetic marijuana: a “chemical” approach, a “household products” approach, and a “representational” approach. Part II calls for greater involvement by local government actors in developing and enforcing tort liability regimes targeting retailers who sell synthetic marijuana. Because instituting such a regime would require substantial time and resources, Part II also suggests an alternative short-term recourse for private plaintiffs under the tort doctrine of “manifestly unreasonable design”³⁰ (MUD).³¹

I. THREE CONCEPTUAL APPROACHES TO SYNTHETIC MARIJUANA

Efforts to regulate synthetic marijuana are generally based on one of three conceptual frames: a “chemical approach” focused on the drug’s underlying chemical basis; a “household products” approach that takes marketing claims about the product at face value and regulates sales through labeling laws; and a “representational” approach that looks holistically at the conceptual import of a product’s packaging, marketing, or manner of sale. Traditional drug regulation relies on the notion that drugs can predictably be identified by their chemical composition. Synthetic marijuana is different, however, and regulatory efforts have lagged insofar as they have failed to move away from a strictly chemical approach. The household products approach offers one alternative, but has not been widely adopted and may not force manufacturers or retailers to fully internalize the drug’s social costs. The representational approach is ultimately the most promising because of its flexibility and compatibility with tort liability regimes. This Comment, therefore, recommends that litigants base their tort claims on this more flexible and nuanced understanding.

30. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. b (AM. LAW INST. 1998) [hereinafter RESTATEMENT].

31. This Comment focuses on expanding liability for sellers, rather than manufacturers, of synthetic marijuana because manufacturers are often unknown or difficult to locate, and frequently based outside of the United States. By contrast, stores that sell synthetic marijuana directly to consumers can be identified with relative ease. For similar reasons, claims against online retailers – who are likely to be similarly evasive – are left aside in favor of a focus on brick-and-mortar stores that lawmakers and enforcers can recognize within their own communities. See Rannazzisi Statement, *supra* note 9, at 11 (“The ease with which foreign chemists can develop and manufacture designer drugs in clandestine laboratories located outside of the United States[] creates challenges for the administrative scheduling option when dealing with large-scale manufacturing and distribution of designer drugs.”).

A. *The Chemical Approach*

The chemical approach identifies a substance as synthetic marijuana if it contains prohibited chemical compounds. Identification via the presence of prohibited compounds has been the dominant lens through which regulation has been attempted. Federal statutes embody the chemical approach—twenty-six synthetic drugs were initially listed as Schedule I controlled substances under the 2012 Synthetic Drug Abuse Prevention Act,³² and additional compounds have been added.³³ In addition, all fifty states³⁴ and more than two hundred cities³⁵ have used the chemical approach to ban synthetic cannabinoids either by prohibiting specific compounds or by incorporating the federal schedules.

The chief advantage of the chemical approach is clarity for both enforcers and regulated parties: laboratory tests can confirm that the drug in question is a controlled substance, and, once procured, such evidence is easy to present in court to establish a defendant's unlawful conduct. Outlawing the sale or distribution of a particular chemical compound provides clear notice of prohibited conduct to sellers and manufacturers. But despite the clear boundaries this approach offers, it has largely proven inadequate to contain synthetic marijuana for several reasons.³⁶ First, the process of identifying and banning strands of synthetic marijuana compound-by-compound has struggled to keep pace with manufacturers who are able to rapidly alter synthetic marijuana's design.³⁷ In

32. Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, § 1152, 126 Stat. 993, 1130-32.

33. Rannazzisi Statement, *supra* note 9, at 9.

34. See *Synthetic Cannabinoids Banned by Statute or Regulation Through 2013*, NAT'L ALLIANCE FOR MODEL ST. DRUG LAWS, <http://www.namsdl.org/library/3764BBF9-1372-636C-DD1C21883EFF8A94> [<http://perma.cc/S339-869H>]; accord *Emerging Drug Threats: Synthetic Drug*, NAT'L CONF. OF ST. LEGISLATURES (Nov. 28, 2012) [hereinafter *Emerging Drug Threats*], <http://www.ncsl.org/issues-research/justice/synthetic-drug-threats.aspx> [<http://perma.cc/4GRH-7JVJ>].

35. See *City Ordinances—Synthetic Substances*, NAT'L ALLIANCE FOR MODEL ST. DRUG LAWS (Oct. 18, 2013), <http://www.namsdl.org/library/C8B389DC-19B9-E1C5-31DBE858808DEB7A> [<http://perma.cc/HZB9-NV7L>].

36. See Losoya, *supra* note 5, at 410-15.

37. See, e.g., Rannazzisi Statement, *supra* note 9, at 11 (“DEA has identified over 75 additional synthetic cannabinoids that are not controlled but are currently appearing in the domestic marketplace . . . or discussed on the Internet. The ease with which foreign chemists can develop and manufacture designer drugs . . . creates challenges for the administrative scheduling option . . .”); Sara Lykken, *We Really Need To Talk: Adapting FDA Processes to Rapid Change*, 68 FOOD & DRUG L.J. 357, 384-86 (2013); Timothy P. Stackhouse, Note, *Regulators in Wackyland: Capturing the Last of the Designer Drugs*, 54 ARIZ. L. REV. 1105, 1110 (2012) (“The traditional approach of individually listing drugs as they become a problem is too slow, and

order to be prohibited under the chemical approach, legislators must single out a chemical. The Federal Analogue Act³⁸ expands the class of prohibited substances to “analogues” that have “substantially similar” chemical structures to controlled substances and are used or sold to produce pharmacological effects.³⁹ While the Act expands the class of substances that may be targeted under the chemical approach, analogues offer less regulatory flexibility than it might seem. Because the government must establish both chemical similarity and the intent to distribute products for human consumption, analogues are substantially more burdensome to prosecute than controlled substances.⁴⁰ Even when expanded beyond explicitly prohibited compounds, chemical approaches have little hope of responding to the dynamism of synthetic marijuana.

Second, unlike natural marijuana and other drugs, synthetic marijuana does not depend upon the purity of any underlying substance to create its effects. It is therefore ill suited to regulation within an exclusively chemical framework because manufacturers have an array of synthetic compounds from which to produce their products. The chemical approach thus also has the perverse effect of instructing manufacturers, who can tailor their compounds based on those listed in the U.S. Code and the Federal Register, on how to evade law enforcement.⁴¹ Third, the fact that synthetic marijuana is purposefully mislabeled and sold openly in stores makes it difficult for law enforcement to prove that defendants knowingly or intentionally sold controlled substances or analogues and, accordingly, to establish the requisite mens rea for criminal prosecution.⁴²

there are too many new compounds to replace them as soon as they are banned. Analogue acts, which require an easily exploited intent requirement to be valid, suffer from vagueness and overbreadth.”).

38. 21 U.S.C. § 813 (2012).

39. Because the Analogue Act treats analogues as controlled substances insofar as they are intended for human consumption, *see id.*, the labels on packets of synthetic marijuana proclaim that the packet’s contents are “not for human consumption” in an effort to circumvent the Act.

40. Hari Sathappan, *The Federal Controlled Substances Analogue Act: An Antiquated Solution Meets an Evolving Problem*, OHIO ST. J. CRIM. L.: AMICI BLOG, <http://moritzlaw.osu.edu/students/groups/osjcl/amici-blog/the-federal-controlled-substances-analogue-act-an-antiquated-solution-meets-an-evolving-problem> [<http://perma.cc/672S-M4XG>].

41. Brown, *supra* note 13, at 399; *see also* Kelly Puente, *Family of Teen Who Died Smoking Synthetic Pot Files Lawsuit Against Santa Ana Smoke Shop*, ORANGE COUNTY REG. (Jan. 21, 2015, 4:10 PM), <http://www.oregister.com/2015/01/21/family-of-teen-who-died-smoking-synthetic-pot-files-lawsuit-against-santa-ana-smoke-shop> [<http://perma.cc/S5JE-ZWKS>] (describing how a California teen was killed by a version of synthetic marijuana that was a derivative of another version that had already been banned).

42. *See, e.g.*, *United States v. Makkar*, 187 F. Supp. 3d 1301, 1313 (N.D. Okla. 2016) (finding that the government failed to establish the mens rea necessary to maintain conviction under the Controlled Substance Analogue Enforcement Act); *People v. Chatha*, 33 N.E.3d 277, 285 (Ill.

Finally, because the identification must occur before the substance is banned and then again to prove that the substances are identical, the chemical approach begets significant costs: testing for controlled substances and analogues is an expensive and burdensome process. The chemical approach relies heavily on expert witnesses and on sophisticated scientific testing.⁴³ The former Deputy Assistant Administrator for the DEA's Office of Diversion Control, Joseph Rannazzisi, notes that "the current approach to the designer drug problem comes at a high cost to the government," including "a strain on laboratories and scientific staff," citing, for example, a \$300,000 agency purchase of "reference standards" for synthetic drugs.⁴⁴ These costs, coupled with the problem of inflexibility, demonstrate that the chemical approach is incapable of providing a sufficient regulatory response to synthetic marijuana.

B. *The Household Products Approach*

An alternative to the narrow chemical approach, the household products approach, focuses not on a substance's chemical composition but on manufacturers' claims about how it should be used. Strictly followed, this approach entails treating synthetic marijuana products as the benign consumer commodities they claim to be. This understanding follows the fiction of a product's disclaimers, conceptualizing synthetic marijuana as a regular consumer product and penalizing manufacturers and retailers for creating and distributing products that fail to comply with labeling requirements. The theoretical aim of a household products approach is to hold manufacturers and retailers to their statements by strictly enforcing labeling laws and thereby raising the costs of producing synthetic marijuana immensely.⁴⁵ And, if manufacturers are unable to comply with

App. Ct. 2015) (holding that the government did not establish that the defendant who sold synthetic marijuana labeled as potpourri knew he was selling a controlled substance); *see also* Stackhouse, *supra* note 37, at 1133-34 (discussing the challenges of proving under an analogue act that a product is intended for human consumption and suggesting alternatives); Gray, *supra* note 19, at 30 ("[T]he Potter County district attorney[] also blames the legal ambiguity created when these substances are sold openly, labeled as herbal incense or potpourri. . . . 'Texas law requires that a person intentionally or knowingly deliver an illegal substance When you step into the storefront, all of that goes away' . . .").

43. Rannazzisi Statement, *supra* note 9, at 3. Rannazzisi also notes that targeting synthetic drugs under the chemical approach "requir[ed] the DEA to devote a large amount of its resources to compiling the necessary scientific data and information [and] initiate control actions." *Id.* at 20.

44. *Id.* at 22.

45. For examples of scholars proposing solutions in the mold of the household products approach, see Lykken, *supra* note 37, which suggests adapting FDA communication strategies

traditional labeling requirements, the household products approach functions as a shadow prohibition.

Although no jurisdiction has fully embraced the household products approach, a series of cases brought by New York Attorney General Eric Schneiderman against New York-based smoke shops came closest to enacting this approach. These cases proceeded on unfair competition grounds as well as on the theory that, based on their labels, synthetic drugs were nonprescription drugs and therefore subject to state and federal labeling laws.⁴⁶ Accordingly, commercial distribution of synthetic marijuana packets not labeled with necessary information—including ingredients and the addresses of the manufacturer and distributor—constituted an unlawful business practice under New York’s General Business Law section 349.⁴⁷ Some of these cases succeeded in obtaining injunctive relief and civil penalties from several New York retailers.⁴⁸ However, at least one court, while upholding deceptive practices claims, rejected the state’s efforts to enforce labeling laws on the grounds that this authority was vested exclusively in the FDA and the New York Commissioner of Health.⁴⁹

The household products approach attempts to foreclose the safe harbors for manufacturers who mislabel their drugs as consumer products—loopholes that exacerbate the challenge of regulating synthetic drug retailers. Yet, the household products approach is lacking in a few respects. This approach has not been widely adopted and has failed to gain traction beyond the cases cited above. In particular, *Moss* suggests that courts might be hostile to nonadministrative bodies zealously enforcing labeling requirements. Furthermore, tightening labeling requirements increases the transaction costs of production and distribution, but in a highly lucrative industry,⁵⁰ manufacturers are likely to adjust to these costs in order to keep their channels of distribution open, suggesting that the house-

more quickly to changes in drug production; and Stackhouse, *supra* note 37, which proposes, among other legislative reforms, a “bona fide use” exception to the Federal Analogue Act that would require distributors and manufacturers of alleged household products, such as bath salts, to demonstrate a product’s fitness for its stated purpose.

46. See 15 U.S.C. §§ 1451-1460 (2012); see, e.g., *People ex rel. Schneiderman v. Jamail*, 32 N.Y.S.3d 828, 829 (Sup. Ct. 2016).

47. N.Y. GEN. BUS. LAW § 349 (McKinney 2014).

48. See, e.g., *Jamail*, 32 N.Y.S.3d at 829; Press Release, Att’y Gen. Eric T. Schneiderman, A.G. Schneiderman Wins Court Victory in Push To Ban Mislabeled Drugs from Head Shops (Oct. 25, 2012), <http://ag.ny.gov/press-release/ag-schneiderman-wins-court-victory-push-ban-mislabeled-drugs-head-shops> [<http://perma.cc/43TT-ZJVP>].

49. See *People v. Moss*, No. 20556/12, 2013 WL 6497868, at *8 (N.Y. Sup. Ct. Nov. 6, 2013).

50. Matthew Speiser, *The Synthetic Marijuana Trade Is a Multi-Million Dollar Industry*, BUS. INSIDER (Sept. 5, 2015, 8:30 AM), <http://www.businessinsider.com.au/dea-busts-show-lucrative-of-synthetics-2015-9> [<http://perma.cc/9ZS2-9D27>].

hold products approach might not provide enduring relief. Finally, the household products approach does not force distributors to internalize the most significant harms of synthetic marijuana – the drug’s toll on human health and well-being. Instead, this approach focuses on, for example, the failure to include a manufacturer’s address, from which the harm to any given consumer is minimal.

C. *The Representational Approach*

The inadequacies of the chemical and household products approaches have begotten a more dynamic understanding of synthetic marijuana in some jurisdictions: the representational approach. While there are variations, the driving question behind the representational approach is whether a product has been represented as synthetic marijuana. In 2015, the New York City Council banned the sale not only of specific synthetic cannabinoids but also of any substance “represented to be” a prohibited synthetic drug.⁵¹ The law defines “representation” to include nonverbal portrayals about the substance’s “price, nature, use or effect” as well as “packaging in a manner normally used” for synthetic drugs.⁵² A similar ordinance in Houston prohibits the sale of plant material containing a synthetic chemical that “has no legitimate relation to the advertised use of the product,” eliminating safe harbors for drugs masquerading as household products, as well as those with “packaging or labeling” or “verbal or written representations” that suggest the substance “mimics the pharmacological effects of marihuana.”⁵³ These flexible definitions are able to capture the sale, for example, of packages of synthetic marijuana that mimic the packaging and slogans of known synthetic marijuana brands but contain strands of synthetic cannabinoids that have not yet been classified as controlled substances. And this approach, which lends itself to enforcement under tort theories, enables a wider range of authorities – beyond the FDA and state public health agencies – to bring civil actions against synthetic marijuana retailers.

Courts engaging in representational analysis have considered evidence that the substance at issue was sold only to customers over eighteen or alongside drug paraphernalia;⁵⁴ sold at an inflated price;⁵⁵ or packaged in a manner similar to

51. N.Y.C., N.Y. Local Law 917-A (Oct. 20, 2015).

52. *Id.*

53. HOUS., TEX., CODE OF ORDINANCES art. 17, § 28-571 (2017).

54. See *United States v. Makkar*, 187 F. Supp. 3d 1301, 1315 (N.D. Okla. 2016); *State ex rel. DeWine v. Fred’s Party Ctr., Inc.*, 2014-Ohio-2358 at ¶ 77 (Ct. App.), 13 N.E.3d 699.

55. See *People v. Chatha*, 33 N.E.3d 277, 283 (Ill. App. Ct. 2015).

other, known synthetic drug products.⁵⁶ One New York court held that inferences about the nature of a substance could be drawn from representations other than direct verbal communications between a buyer and seller.⁵⁷

This approach has found mixed success in court. The representational approach was successfully employed in *State ex rel. DeWine v. Fred's Party Center, Inc.*, in which the government obtained relief through a nuisance abatement action.⁵⁸ The court in *Fred's Party Center* noted that the products at issue were sold at an inflated price and inferred that the products, although labeled as incense and potpourri, could be classified as synthetic drugs.⁵⁹ In other instances, the representational approach has been less successful, likely because of authorities' continued reliance on criminal prosecutions rather than civil liability. The courts in both *United States v. Makkar* and *People v. Chatha* engaged in representational analysis,⁶⁰ but nevertheless found that the government could not establish the requisite mens rea for a criminal prosecution.⁶¹ In *Makkar*, the court conceded that the evidence supported a finding that the defendants knew they were selling a controlled substance analogue, but held that the defendant retailers could not be found guilty absent proof that they knew the substance's specific chemical composition.⁶² The court in *Chatha* noted "the near impossibility of proving *knowing possession* in cases involving such lab-manufactured chemicals."⁶³ These examples demonstrate the problems of overreliance on the chemical approach and also suggest that the representational approach will be most successful if regulatory strategies shift towards civil, rather than criminal, theories of liability. Relaxed mens rea requirements in civil actions mean that authorities can exploit the full flexibility of the representational approach.⁶⁴

56. See *Makkar*, 187 F. Supp. 3d at 1313.

57. *People v. Gonell*, 789 N.Y.S.2d 675, 678 (Crim. Ct. 2005) ("[A] 'representation' 'is not limited to' an oral or a written representation . . . [A] seller may 'represent' a substance to be a controlled substance by its appearance and/or packaging alone . . ." (quoting N.Y. PUB. HEALTH LAW § 3383(1)(c) (McKinney 2004))).

58. *Fred's Party Ctr., Inc.*, 2014-Ohio-2358.

59. *Id.* ¶¶ 19, 77.

60. *Makkar*, 187 F. Supp. 3d at 1315 (noting, for instance, that a product labeled as incense "was frequently sold with wrapping papers for smoking"); *People v. Chatha*, 33 N.E.3d 277, 283, 287 (Ill. App. Ct. 2005) (citing a lower court opinion pointing to evidence that a product labeled as potpourri was sold at an inflated price and in a manner suggestive of an illegal drug sale).

61. *Makkar*, 187 F. Supp. 3d at 1311; *Chatha*, 33 N.E.3d at 288.

62. *Makkar*, 187 F. Supp. 3d at 1315.

63. *Chatha*, 33 N.E.3d at 286.

64. See Mann, *supra* note 28, at 1805; Simons, *supra* note 28, at 722.

The representational approach allows courts and regulators to dispel the fiction of synthetic marijuana's labeling and draw inferences by holistically examining the transaction at issue. Just as importantly, categorizing substances based on common representations avoids many of the costs and obstacles of the chemical approach by eliminating the need for expensive laboratory testing. The representational approach also avoids the need, present in the chemical approach, to work to reach beyond the compounds that have been placed on controlled substance schedules. While criminal enforcement relies heavily on these processes, many civil causes of action, with lower intent requirements and burdens of proof, do not.

It remains to be seen, however, whether the representational approach will prove sufficiently robust. Because the representational approach is highly discretionary, it offers judges and juries little guidance on when a manufacturer or retailer represents a product as synthetic marijuana. Without clear standards to govern judicial analysis, a representational approach risks devolving into "I know it when I see it."⁶⁵ Similarly, the approach might prove too narrow: inquiring into whether a defendant represented a product as synthetic marijuana can devolve into a repackaged intent or knowledge standard if too much focus is placed on an individual defendant's conduct rather than a product's labeling, packaging, and manner of sale. Finally, the representational approach raises questions about the relevant timeframe for courts to employ in their analysis and market definition. Defendants can easily modify marketing strategies or consumer interactions in response to regulation. That flexibility makes the selection of products that serve as reference points for whether a product resembles banned substances challenging. Nevertheless, as the next Part illustrates, the representational approach has the potential to be useful to local governments bringing tort actions against synthetic marijuana retailers in their communities.

II. EXPANDING CIVIL LIABILITY FOR SYNTHETIC MARIJUANA RETAILERS

The flexible chemical structure of synthetic marijuana, along with loopholes that retailers can exploit, raises unique challenges for regulation. As the previous Part illustrated, the drug's deceptive packaging and erratic chemical composition necessitate a move away from strict reliance on the chemical approach towards one that incorporates representational analysis. These challenges are best addressed through tort law, which emphasizes foreseeability of harm, deceptive marketing practices, and harm to users in place of the criminal law's focus on chemical structures and the conduct of individual defendants. Later, in Section

65. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

II.B, this Comment argues that tort doctrine already holds promise to regulate synthetic marijuana as a manifestly unreasonable design (MUD). A superior, but longer term, solution is the subject of Section II.A. Specifically, jurisdictions should develop legislative solutions that adapt current tort regimes to address synthetic marijuana.

While greater involvement by local government actors in combating synthetic marijuana holds promise for addressing the problem systematically, the political process may move too slowly to address the harms of synthetic marijuana in the short term. Where this process fails, the plaintiffs' bar may be able to fill a gap by litigating under the theory that synthetic marijuana possesses a MUD. Section II.B outlines the advantages and obstacles to such a claim. The challenges of MUD litigation suggest that legislative efforts coupled with local civil enforcement may provide more enduring reform.

A. Legislative Reform

Local governments are well positioned to craft ordinances regulating synthetic marijuana and enforce these regimes through public litigation under public nuisance, unfair competition, and related tort theories.⁶⁶ Particularly “compared to the entities typically relied on to pursue affirmative litigation, local public law offices are uniquely accessible and accountable” and able to be responsive to the needs of their communities.⁶⁷ Additionally, the unpredictability of synthetic marijuana makes nimble government responses all the more important, a condition more easily met in local government settings.

While the needs and capacities of individual communities will vary, local ordinances should have three central features to expand possibilities for liability and empower local jurisdictions with respect to the synthetic drug crisis: they should provide for civil, rather than criminal, sanctions; incorporate multiple definitions of synthetic marijuana; and be enforceable by city and county attorneys.

1. Focusing enforcement on the proper individuals is crucial, and commercial retailers, not individual users, are the appropriate targets if enforcement against synthetic marijuana expands. Criminalizing possession and low-level dealing of synthetic marijuana risks exacerbating the failures of the ongoing war

66. See Losoya, *supra* note 5, at 427-28 (outlining the advantages of local enforcement against synthetic drug retailers).

67. Morris, *supra* note 24, at 60.

on drugs,⁶⁸ chief among them racial disparities in drug-related arrests and incarceration and the burdens and stigma imposed by contact with the criminal justice system.⁶⁹ Given the evidence that punitive approaches to drug use often do more harm than good,⁷⁰ regulatory efforts should move away from criminal enforcement against individual synthetic marijuana users. Instead, local authorities should focus on imposing civil sanctions on retailers and disrupting institutionalized profitmaking from the sale of synthetic drugs. Unfortunately, many synthetic marijuana ordinances fall short on this front, criminalizing individual possession or sale—in some cases for amounts as small as ten packets⁷¹—and imposing prison sentences rather than relying on fines and civil penalties.⁷²

The harms arising from the widespread accessibility of synthetic marijuana are better addressed through a civil regulatory regime targeting larger commercial establishments. Unfair competition and nuisance laws provide a good avenue for these claims. Colorado, for example, amended its state consumer protection statute in 2015 to make the sale of synthetic cannabinoids a deceptive trade practice punishable by a fine of up to \$500,000 per sachet.⁷³ Cities can also seek injunctive relief. Employing a public nuisance strategy, Duluth, Minnesota obtained a temporary injunction against a store selling synthetic marijuana, citing public urination and disruptive activity outside of the store, as well as increased burdens on local hospitals.⁷⁴ Similarly, city officials in Lincoln, Nebraska prevailed on a public nuisance claim by showing “the recent increase of medical

68. See, e.g., Thomas Kerr et al., *The Public Health and Social Impacts of Drug Market Enforcement: A Review of the Evidence*, 16 INT'L. J. DRUG POL'Y 210, 210 (2005) (finding with respect to punitive policies to curb illicit drug use that “a growing body of research indicates that these approaches have substantial potential to produce harmful health and social impacts”); *War on Drugs: Report of the Global Commission on Drug Policy*, GLOBAL COMMISSION ON DRUG POL'Y 2 (June 2011), http://www.globalcommissionondrugs.org/wp-content/uploads/2012/03/GCDP_WaronDrugs_EN.pdf [<http://perma.cc/FG4P-XUM8>] (“The global war on drugs has failed.”).

69. See *supra* notes 27–28 and accompanying text.

70. See, e.g., Kerr et al., *supra* note 68, at 216.

71. See, e.g., N.Y.C., N.Y., Local Law 917-A § 4(b) (Oct. 20, 2015).

72. *Id.* § 4(c) (“Any person or entity that violates subdivision a of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000 or imprisonment of up to one year, or both.”); see also *City Ordinances – Synthetic Substances*, *supra* note 35 (showing possible terms of imprisonment for up to one year in cities in Alaska, Arkansas, Kentucky, and Mississippi and up to six months in cities in Alaska, California, Idaho, Louisiana, Maryland, Mississippi, and Utah).

73. COLO. REV. STAT. ANN. § 6-1-725(2)(a) (West 2015) (classifying sale of synthetic marijuana as a deceptive trade practice); *id.* § 6-1-112(1)(e) (authorizing civil penalties).

74. *City of Duluth v. 120 E. Superior St.*, No. A13-0027, 2013 WL 5022523, at *1–2 (Minn. Ct. App. Sept. 16, 2013).

emergencies caused by the smoking or ingestion of [synthetic marijuana] products.”⁷⁵ Moving beyond the chemical approach empowers cities to respond directly to harms in their communities and to marshal evidence of these harms to build claims instead of relying on chemical testing. Cities can benefit from injunctive relief without perpetuating the criminalization of low-level drug offenses and, by increasing the availability of civil penalties, will be incentivized to target commercial defendants with deep pockets rather than low-level users. Ideally, successful litigation will also produce a deterrent effect beyond retailers that are directly targeted.⁷⁶

2. In response to the variability of synthetic marijuana, local ordinances should avoid relying on unitary definitions of the drug for a dynamic understanding. Specifically, the laws should incorporate multiple definitional bases of regulation, rather than exclusively chemical definitions, in order to open up additional avenues of liability.⁷⁷ While many ordinances still rely on chemical definitions,⁷⁸ versatile statutory definitions have taken hold in several municipalities. An ordinance banning synthetic marijuana in Houston prohibits the sale of controlled synthetic cannabinoids as well as “[a]ny vegetative material, . . . with packaging or labeling that indicates, suggests, or implies” similarity to natural marijuana.⁷⁹ New York City similarly declares that “it shall be no defense that the substance’s packaging or other representation states or indicates that the substance is not intended for human consumption.”⁸⁰ Finally, Charlotte County, Florida considers cost, verbal and written representations, manner of sale, and other relevant factors to identify drug products.⁸¹

Allowing for flexibility in the identification of synthetic marijuana helps to avoid the problems posed by its changing chemical composition. Not all new

75. *United States v. Elder*, No. 4:15CR3091, 2017 WL 499917, at *2 (D. Neb. Feb. 7, 2017).

76. Cf. Jean Macchiaroli Eggen, *The Synergy of Toxic Tort Law and Public Health: Lessons from a Century of Cigarettes*, 41 CONN. L. REV. 561, 564 (2008) (describing the public health goals of toxic tort litigation).

77. See *supra* Section I.C.

78. See generally *City Ordinances – Synthetic Substances*, *supra* note 35 (compiling city ordinances regulating synthetic substances).

79. HOUS., TEX., CODE OF ORDINANCES art. XVII, § 28-571 (2017).

80. N.Y.C., N.Y. ADMIN. CODE tit. 10, § 203(4)(g) (2017).

81. CHARLOTTE COUNTY, FLA., CODE OF LAWS AND ORDINANCES pt. II, ch. 2-5, art. VII, § 2-5-153(b) (2017).

legislation has proceeded along these lines; both Boston⁸² and Chicago,⁸³ for example, have passed synthetic marijuana ordinances defining the product exclusively in chemical terms, leaving these cities with less flexibility in enforcement.

3. Even with a flexible definition of synthetic marijuana, local authorities would still be dependent on private litigants to bring actions. In order to empower authorities with the expertise and incentive to address the public health concerns, legislatures should vest litigation authority in local public attorneys to bring civil actions on the basis of public nuisance,⁸⁴ unfair competition, or similar causes of action. As with statutory definitions of synthetic marijuana, some jurisdictions have embraced more robust roles for public attorneys in bringing civil claims against synthetic marijuana retailers. City attorneys are expressly authorized to bring civil actions against synthetic marijuana retailers in Kendallville, Indiana;⁸⁵ Portage, Indiana;⁸⁶ and Levelland, Texas,⁸⁷ among others. New York City, by contrast, authorizes seizure by police officers, sheriffs, and peace officers and delegates rulemaking authority to various state commissioners, but does not provide causes of action for counsel for the City.⁸⁸ While criminal enforcement authority is appropriately vested in law enforcement officials, local government civil attorneys possess the expertise to litigate civil actions against commercial actors. However, current consumer protection legislation provides most of these local bodies with relatively little scope to pursue actions against deceptive retail and trade practices.⁸⁹ To be sure, allowing local counsel to litigate civil actions alongside a parallel criminal enforcement regime may lead to challenges in coordination. The degree of coordination between police and

82. BOS., MASS., MUN. CODE ch. 16, § 59.2 (2017) (“*Synthetic cannabinoids* shall mean any chemical compound chemically synthesized and either 1) has been demonstrated to have binding activity at one or more cannabinoid receptors; or 2) is a chemical analogue or isomer of a compound that has been demonstrated to have binding activity at one or more cannabinoid receptors.”).

83. CHI., ILL., MUN. CODE ch. 4-4, § 333 (2017).

84. Legislation can also ease the evidentiary burden on public attorneys insofar as violation of statutes can be prima facie evidence of civil liability under per se nuisance claims.

85. KENDALLVILLE, IND., CODE OF ORDINANCES ch. 9, § 6(f) (2017).

86. PORTAGE, IND., MUN. CODE ch. 18, art. IX, § 18-351 (2017).

87. LEVELLAND, TEX., CODE OF ORDINANCES § 4.1204 (2017).

88. N.Y.C., N.Y. ADMIN. CODE tit. 10, § 203(4)(g) (2017).

89. See Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1906 (2013) (noting that among the fifty state-level “little” FTC Acts, “only seven permit city and county enforcement, and only eleven permit district attorney enforcement” (citations omitted)).

city or county attorneys' offices that is feasible is likely to vary across jurisdictions. However, this approach is not new; simultaneous civil and criminal enforcement efforts have been used to tackle complex public health and morals issues ranging from sex trafficking⁹⁰ to illegal gambling.⁹¹ Synthetic marijuana may benefit from a similar regime, in which local police and federal agents share responsibility for criminal enforcement and municipal lawyers focus on addressing consumer harms and removing safe harbors for businesses engaged in deceptive and illegal practices. And, as noted above, increasing the availability of injunctive and monetary relief will ideally incentivize cities to shift towards civil actions against commercial defendants instead of policing low-level offenders.

B. Synthetic Marijuana as Manifestly Unreasonable Design

Local governments have increasingly recognized synthetic marijuana as a public health crisis worthy of legislative attention.⁹² Such a crisis might be best addressed through legislative reform enabling public civil actions, private litigation, or a combination of the two.⁹³ While legislative reform would provide a broader and more enduring strategy, the realities of the political process may cause such changes to happen gradually across jurisdictions. In the short term, private plaintiffs' advocates have another potential recourse against retailers under the MUD doctrine.

In the case of synthetic marijuana, a products liability claim against retailers would arise out of the product's defective design. Ordinarily, a plaintiff alleging defective design must compare the harms and benefits of the product's existing

90. While local police and numerous federal agencies engage in the criminal investigation and prosecution of sex-trafficking offenses, attorneys general and city attorneys have gone after both online and brick-and-mortar businesses that provide shelter for sex traffickers. One example is the recent litigation against Backpage.com, alleging that the website's business practices enabled traffickers to advertise their victims. *See Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017).

91. Similarly, while gambling is often dealt with through criminal regimes, municipal code enforcement has proven useful in shutting down physical gambling venues. *See, e.g., Illegal Gambling Café To Close, as Gambling Software Company Ends Business Statewide*, CITY ATT'Y S.F. (Jan. 30, 2014), <http://www.sfcityattorney.org/2014/01/30/illegal-gambling-cafe-to-close-as-gambling-software-company-ends-business-statewide> [<http://perma.cc/M3Z7-MQFM>].

92. *See City Ordinances – Synthetic Substances*, *supra* note 35.

93. *See* Eric Helland & Jonathan Klick, *The Tradeoffs Between Regulation and Litigation: Evidence from Insurance Class Actions*, 1 J. TORT L. 2 (2007); Patrick W. Schmitz, *On the Joint Use of Liability and Safety Regulation*, 20 INT'L REV. L. & ECON. 371 (2000); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984).

design with a proposed reasonable alternative design (RAD)⁹⁴ and demonstrate that the defendant failed to adopt a RAD that would have prevented the injury. However, the Third Restatement suggests a narrow class of highly dangerous products with such high risks and “little legitimate purpose in today’s society”⁹⁵ that no RAD showing is needed to establish liability.⁹⁶

A MUD claim against synthetic marijuana retailers would allow injured parties to recover directly, immediately, and under a more favorable burden of proof than that present in a criminal trial. Although plaintiffs have persistently had trouble proving MUD claims,⁹⁷ there are compelling reasons for courts to apply this doctrine to commercial sales of synthetic marijuana. First, the drug’s inconsistent composition prevents even regular users from ascertaining the risks of consumption and renders it egregiously unsafe. Against this extreme danger, there are few – if any – countervailing therapeutic benefits.⁹⁸ Retailers also deliberately shroud the risks from consumers; deceptive packaging and labeling prevents consumers from forming reasonable predictions about the risks they will incur from use.⁹⁹ Conceptually, then, synthetic marijuana lends itself to the designation of a MUD.

94. RESTATEMENT, *supra* note 30, § 2 cmt. d (“[T]he standard for judging the defectiveness of product designs . . . is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design . . . rendered the product not reasonably safe.”).

95. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1156 (Md. 1985); *see also* RESTATEMENT, *supra* note 30, § 2 cmt. d (discussing design defects more generally).

96. *See Bifolck v. Philip Morris, Inc.*, 152 A.3d 1183, 1194 (Conn. 2016) (“Few products will have such a marginal utility and such a high degree of risk . . . that will satisfy the manifestly unreasonable standard.”); RESTATEMENT, *supra* note 30, § 2 cmt. b (“This Restatement recognizes the possibility that product sellers may be subject to liability even absent a reasonable alternative design when the product design is manifestly unreasonable.”).

97. *See, e.g., Karavitis v. Makita U.S.A., Inc.*, 243 F. Supp. 3d 235, 252, 255 (D. Conn. 2017) (finding that a product used in construction did not fit MUD criteria because, far from having no social value, “the Circular Saw’s utility appears substantial”), *appeal docketed*, No. 17-1008 (2d Cir. Apr. 7, 2017); *Junk v. Terminix Int’l. Co.*, No. 4:05-CV-0608-JAJ, 2008 WL 5191865, at *4 (S.D. Iowa Nov. 3, 2008) (declining to find MUD liability against pesticide manufacturer, citing evidence of product’s utility and widespread use), *aff’d*, 628 F.3d 439 (8th Cir. 2010); *Parish v. Icon Health & Fitness, Inc.*, 719 N.W.2d 540, 545 (Iowa 2006) (finding no MUD liability for trampoline manufacturer because the product’s social utility exceeded its harms).

98. *See* RESTATEMENT, *supra* note 30, § 2 cmt. e (stating that in a MUD case, “[t]he court would declare the product design to be defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product”).

99. *See Bifolck*, 152 A.3d at 1203 (recognizing a MUD classification for products for which “the risk of harm so clearly exceeds the product’s utility that a reasonable consumer, informed of those

Second, classifying synthetic marijuana as manifestly unreasonable is consistent with tort doctrine. Synthetic marijuana comports with other legislative and judicial recognition of products to which a MUD designation might apply, including products “marketed for use in dangerous criminal activities”;¹⁰⁰ those valuable in criminal activity due to “easy concealability and low price”;¹⁰¹ and those possessing a “low social utility and high degree of danger.”¹⁰²

Legislators are increasingly recognizing the desirability of totally removing synthetic marijuana from the market—numerous state legislatures as well as cities and Congress have expressed concern about the dangers of synthetic marijuana and its ubiquity.¹⁰³ Far from usurping a legislative function or making a premature determination about the drug’s dangerousness, bringing tort claims against synthetic marijuana retailers gives substance to a legislative purpose that has otherwise lacked meaningful enforcement. Using MUD claims to fill the gaps in state and federal regulation is not new. The Maryland Supreme Court took such an approach in *Kelley v. R.G. Industries*, a case brought by the victim of a grocery store robbery against the manufacturer of a cheap and highly dangerous handgun known as a “Saturday Night Special.”¹⁰⁴ The court opined that a MUD-type claim might lie.¹⁰⁵ The court found that a MUD-type classification could be appropriate in part because an examination of the treatment of Saturday Night Specials in state and federal gun control statutes suggested that the weapons were unfit for any legitimate use, notwithstanding a general right to own and carry private handguns.¹⁰⁶ Similarly, a MUD claim against a synthetic marijuana retailer would further the legislative goal of removing a dangerous and unpredictable substance from circulation.

risks and utility, would not purchase the product. The factors that a jury may consider include, but are not limited to, the magnitude and probability of the risk of harm, the instructions and warnings accompanying the product, the utility of the product in relation to the range of consumer choices among products, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing”).

100. S. 2805, 1987 Gen. Assemb. 3, 5 (N.J. 1987).

101. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1158 (Md. 1985).

102. RESTATEMENT, *supra* note 30, § 2 cmt. (e).

103. See Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, 126 Stat. 993; *City Ordinances—Synthetic Substances*, *supra* note 35; *Emerging Drug Threats*, *supra* note 34.

104. 497 A.2d at 1143. Although the court did not refer to the MUD classification by name, the court opined on why the product was unreasonably dangerous, and the case is nonetheless considered a canonical example of MUD analysis. See, e.g., Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1721-22 (2003).

105. *Kelley*, 497 A.2d at 1145.

106. *Id.* at 1153 (“There is, however, a limited category of handguns which clearly is not sanctioned as a matter of public policy.”).

Critics have raised concerns about the fairness of the MUD doctrine to retailers and manufacturers and its potentially undesirable effects on the marketplace as well as personal autonomy and consumer choice.¹⁰⁷ Some advocates have argued that consumers are “in the best position to decide” whether to make use of optional safety features and that categorical product liability reduces the range of products available in the marketplace.¹⁰⁸ Early commentators also worried that MUD doctrine might run distributors of necessarily dangerous but “common and popular” products, such as cigarettes, alcohol, and trampolines, out of business.¹⁰⁹ Richard Ausness argues that the “economic influence” of some major industries – such as the automobile manufacturing – “arguably justifies the creation of doctrines that limit their liability for the sale of products that may be sub-optimally safe.”¹¹⁰ Finally, Michael Toke has argued that “declaring a product illegal is a decision that should properly be left to [a] state’s legislature.”¹¹¹

MUD claims are unarguably a strong remedy, appropriate only for truly useless and dangerous products. Synthetic marijuana, however, is just one of those inherently dangerous and pointless goods. Concerns about consumer choice have less force with respect to a product whose risks are virtually unknowable to the average consumer and therefore resistant to rational choice theories.¹¹² Nor are there concerns about the spillover effects of denying the market a valuable and widespread consumer commodity. Moreover, although some strands of synthetic marijuana remain technically legal, legislatures have attempted to prohibit their use. Other concerns about market interference are less pressing in the context of synthetic marijuana. Liability that affects market transactions is more problematic when a product’s design “reflect[s] the design engineer’s deliberate and calculated judgment to accept certain risks in return for an increase in overall

107. See, e.g., Richard C. Ausness, “*Danger Is My Business*”: *The Right To Manufacture Unsafe Products*, 67 ARK. L. REV. 827 (2014).

108. *Id.* at 847 (citing *Rainbow v. Albert Elia Bldg. Co.*, 436 N.Y.S.2d 480 (App. Div. 1981), *aff’d*, 434 N.E.2d 1345 (N.Y. 1982)).

109. Michael J. Toke, Note, *Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d Caveat Should Be Removed from the Restatement (Third)*, 81 CORNELL L. REV. 1181, 1184, 1208 (1996); see also Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. KY. L. REV. 423 (1997) (arguing against categorical liability for products whose risks outweigh their benefits).

110. Ausness, *supra* note 107, at 869.

111. Toke, *supra* note 109, at 1213 (citing *Baughn v. Honda Motor Co.*, 727 P.2d 655, 658 (Wash. 1986)).

112. *Contra* Ausness, *supra* note 109, at 428.

benefit.” For example, the tradeoffs between a car’s fuel economy and its resilience in a collision is a purposeful design choice that presumably incorporates market preferences.¹¹³ Conversely, the motivation behind the risks in synthetic marijuana’s design—such as deceptive labeling and inconsistent formulas—is not to increase social welfare but to avoid criminal prosecution for distributors. Synthetic marijuana therefore ought to prove more resistant to traditional objections to MUD claims than products that have preceded it.

A more significant practical concern is what kinds of plaintiffs will be willing and able to bring claims against synthetic marijuana retailers. Users who experience severe and unexpected health consequences are most directly affected by the drug. However, there may be difficulties in turning consumers into plaintiffs, particularly if litigation requires admitting to illegal drug use in a state that criminalizes the use or possession of synthetic marijuana. It is also possible that courts will consider the perceived “moral position of the victim” in determining who is responsible for the plaintiff’s injuries.¹¹⁴ Nevertheless, such arguments may be less persuasive in light of synthetic marijuana manufacturers’ concealment of information from which users could deduce risks.¹¹⁵ Additionally, other parties may be able to avoid some of these obstacles. Family members of individuals who have died from synthetic drug overdoses have already begun to bring wrongful death lawsuits against drug manufacturers and retailers.¹¹⁶ While at least one of these cases was based on a negligence theory,¹¹⁷ MUD claims represent an additional avenue of recourse for these families. Advocacy groups representing members directly and disproportionately affected by synthetic marijuana—such as people experiencing homelessness or at-risk youth—could also play an important role.

One might object that using MUD claims for synthetic marijuana would only give regulators more tools to prosecute the war on drugs, which has been disastrous for a multitude of reasons and whose casualties have come from marginalized populations.¹¹⁸ However, the inclusion of synthetic drugs within the MUD

113. Toke, *supra* note 109, at 1203.

114. Ausness, *supra* note 109, at 448.

115. See Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1453-54 (1994).

116. See, e.g., *Family Sues Alleged Synthetic Drugmaker*, CBS 46 (Aug. 31, 2012, 10:54 AM), <http://www.cbs46.com/story/19433077/family-sues-alleged-synthetic-drug-maker> [<http://perma.cc/QJ5D-3HZD>]; Puente, *supra* note 41.

117. See Jim McBride, *Killer K2: Mother Sues Smoke Shop over Son’s Death*, AMARILLO GLOBE-NEWS (July 19, 2016, 11:38 AM), <http://amarillo.com/news/2013-10-01/mother-sues-local-smoke-shop-over-sons-k2-related-death> [<http://perma.cc/BD9M-X455>].

118. See *supra* notes 68-69 and accompanying text.

framework does not require classifying all drugs, including natural marijuana, as having MUDs. Unlike natural marijuana, for instance, synthetic marijuana has no demonstrated therapeutic benefits, and it poses a substantially higher risk of injury and death.¹¹⁹ More fundamentally, nonsynthetic drugs are rarely presented in conventional marketplaces as “products,” marketed in colorful packaging on store shelves to appeal to teenagers, or labeled as consumer commodities in an attempt to evade regulation. Instead, they are traded and therefore policed in underground economies or, where legalized, sold on the open market in a transparent manner. Because the illicit status of natural marijuana is not in question in most jurisdictions, as it is for synthetic marijuana, there is less need for a complementary civil liability regime to fill the gaps left by criminal enforcement.¹²⁰

Ultimately, providing a legislative basis to equip local attorneys to bring a wide range of tort claims against synthetic marijuana retailers offers advantages over tort litigation by private plaintiffs. Because of synthetic marijuana’s unconventional and haphazard production process, public health and consumer protection officials have a better sense of the product’s overall risks than individual consumers.¹²¹ And, as the previous section has suggested, these consumers may not be well positioned to bring lawsuits.¹²² Moreover, a regulatory regime — particularly one that incorporates multiple definitional bases¹²³ — provides clear notice to retailers of which substances are prohibited and, if it is sufficiently comprehensive, may do more to patch loopholes than a series of individual lawsuits advancing novel legal claims.¹²⁴ Accordingly, a robust regulatory regime coupled with local civil regulatory regimes is preferable as a solution to the challenges law enforcement has faced under chemically-based criminal approaches.

119. See, e.g., Elsheshtawy et al., *supra* note 17; Sherpa et al., *supra* note 17.

120. To the extent that such a regime is needed, it can likely be provided by public nuisance.

121. See Shavell, *supra* note 93, at 359-60 (noting that differences in knowledge about risk are a factor in deciding between regulation and liability; if experts are better informed, regulation is better; and that although private parties might generally be assumed to have better knowledge, this is not the case where “information about risk will not be an obvious by-product of engaging in risky activities”).

122. See Helland & Klick, *supra* note 93, at 3-4 (finding that liability regimes are at a disadvantage relative to regulatory regimes when there is a stronger likelihood that private litigants will not pursue claims when they are harmed).

123. See *supra* Section II.A.

124. See Kyle Graham, *Of Frightened Horses and Autonomous Vehicles: Tort Law and Its Assimilation of Innovations*, 52 SANTA CLARA L. REV. 1241, 1242, 1248-52 (2012) (noting that novel tort claims in court may not address the full range of or most salient risks of a new product and may produce suboptimal rules with “surprising persistence”).

CONCLUSION

New and innovative responses are required to address the challenges posed by synthetic marijuana. This Comment has proposed both short- and long-term strategies for enforcement against synthetic marijuana retailers engaged in deceptive and harmful practices. Underscoring both of these proposals is the idea that regulatory efforts should conceptualize synthetic marijuana not only in terms of its chemical basis but through the ways it is represented as a product in commercial marketplaces. Moving towards this representational understanding allows for more robust regulation of synthetic marijuana retailers, particularly through the expansion of civil liability regimes based in tort and advanced at the local level. Ultimately, lawyers should endeavor to be as creative in their regulatory efforts as retailers of synthetic marijuana have been in their attempts to evade regulation and pursue liability regimes that are up to the task.

SOPHIA HOUSE*

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