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Another Weapon in the Arsenal to Stop the Production of Methamphetamine

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ANOTHER WEAPON IN THE ARSENAL TO STOP THE PRODUCTION OF METHAMPHETAMINE

INTRODUCTION

In 2002, law enforcement retrieved four children who were asking neighbors for food in their California neighborhood.[1] The deputies determined that the children's parents left them in their home without any supervision, sustenance, or electricity.[2] The children showed the deputies to the parents' methamphetamine laboratory set up in the garage.[3] The parents also used the garage to home school the children.[4] Laws related to eradicating methamphetamine manufacture aim to end such horrific occurrences.[5]

Methamphetamine manufacture is an illegal activity that often impacts both personal property and the health and safety of individuals at the location of manufacture and in nearby areas.[6] Besides marijuana, methamphetamine is the "first major drug to have vast quantities produced in rural regions of the country."[7] The Drug Enforcement Agency ("DEA") indicates that methamphetamine labs are the "most common clandestine [drug] laboratories in the United States."[8] Statutory trends in recent years demonstrate the states' concerns for the negative impact the manufacture of methamphetamine has on society.[9] Methamphetamine manufacture is a "hazard to law enforcement, first responders, occupants of the property, future occupants of the property, neighbors and the community at large."[10] U.S. courts have recently expanded landlords' liability under tort law to encompass injuries resulting from the criminal activity of third parties.[11] This expansion demonstrates support for society's growing acceptance of a landlord's duty to monitor the activities and potential hazards on their

1. *Children at Risk*, U.S. DEP'T OF JUST. INFO. BULL. (Product No. 2002-L0424-001), July 2002, at 4, *available at* http://www.justice.gov/ndic/pubs1/1466/1466p.pdf.

2. *Id.*

3. *Id.*

4. *Id.* While this instance demonstrates the real impact of methamphetamine manufacture and use on society and children, the impact of drug manufacture on children and the implications for family law are outside the scope of this discussion.

5. David Schulte, *Oklahoma Targeting Meth Abuse*, TULSA WORLD, Jan. 5, 2009, www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20090105_12_A1_Astate239826.

6. Nitza E. Coleman, *After the Bust: Landowner's Liability When the Property Is Used for the Manufacture of Methamphetamine*, 13 S.J. AGRIC. L. REV. 109, 109 (2003).

7. Jeremy L. Williams, *Meth Resurgence in the South: A Regional Resource*, S. LEGIS. CONF., July 2010, at 2. While important, other dangerous drugs grown or produced by individuals and the subsequent impact on society of such activities are outside the scope of this article.

8. *Id.*

9. *Cleanup, Remediation, or Demolition of Methamphetamine Houses*, 0070 SURVEYS 9: 50 STATE STATUTORY SURVEYS: ENVIRONMENTAL LAWS: POLLUTION, October 2009.

10. *Id.*

11. Arthur E. Petersen, *The Landlord's Liability for Criminal Injuries—The Duty to Protect*, 24 TULSA L.J. 261, 261 (1988).

property and take steps to prevent injury to innocent parties.[12]

Oklahoma currently has several laws relating to methamphetamine use and manufacture.[13] For example, the "Trooper Nik Green, Rocky Eales and Matthew Evans Act" classifies the precursor pseudoephedrine as a Schedule V drug and allows judges to deny bond for anyone arrested for a methamphetamine production-related crime.[14] However, none of the current laws in Oklahoma requires a landlord to report a suspected methamphetamine lab or suffer legal sanctions for failure to do so.[15] In the arsenal of laws to stop the manufacture and use of methamphetamine, landlord responsibility for inspection of premises and liability for failure to protect innocent tenants from the hazards of methamphetamine manufacture would aid in the state's objective to stop such illegal activities.[16] Additionally, the Oklahoma Supreme Court has demonstrated openness to the imposition of a duty on landlords in this area.[17]

The Oklahoma Legislature should introduce legislation to expand landlord liability to encompass harm resulting from dangerous contaminants in the ventilation systems of multi-unit residences resulting from methamphetamine manufacture. This state statute should require landlords to monitor their properties for evidence of methamphetamine manufacture, and the state should hold landlords liable for ongoing illegal activities on their property that they do not report to law enforcement. Such a law would expand the existing statutory and common law duty a landlord owes to his tenants.

While Oklahoma has a great deal of existing law aimed at stopping the manufacture of methamphetamine, the Legislature has neglected to utilize a crucial weapon in this arsenal: the landlord.[18] This article will discuss law relating to methamphetamine and illegal drugs, landlords and tenants, and the process and dangers associated with methamphetamine manufacture.[19] This comment will demonstrate the potential for landlords to be a crucial tool to assist with the Oklahoma Legislature's goal of eradicating methamphetamine manufacture.[20] Section II presents a summary of the dangers of methamphetamine manufacture and its impact on real property and people living within reach of the fumes released from the manufacturing process.[21] Section III summarizes the current methamphetamine law in Oklahoma.[22] Section IV of this paper presents a summary of modern trends in landlord-tenant law evidencing a movement toward increased liability for landlords who do not take steps to prevent criminal activity

12. *See id.*

13. Uniform Controlled Dangerous Substances Act, OKLA. STAT. tit. 63, §§ 2-101 to 2-701 (2001 & Supp. 2010). The dangers inherent in methamphetamine use is a topic that deserves a great deal more consideration than would be available within the thesis of this paper and is, therefore, outside its scope.

14. Memorandum from Nicole Novotny, Assoc. Research Analyst, to Senator Sessions 1 (Dec. 3, 2004), *available at* http://legisweb.state.wy.us/PubResearch/2004/04TM071.pdf [hereinafter Meth Memorandum].

15. tit. 63, §§ 2-101 to 2-701.

16. *See generally* Schulte, *supra* note 5.

17. *See generally* Evers v. FSF Overlake Assocs., 77 P.3d 581 (Okla. 2003).

18. *See generally* tit. 63, §§ 2-101 to 2-701. Because of the lack of reporting requirements or statutory civil sanctions imposed by the legislature with regards to illegal drug manufacture on rental property, landlords are not held accountable for knowingly allowing these activities to continue.

19. *See generally id.*; Williams, *supra* note 7.

20. *See generally* Schulte, *supra* note 5.

21. *Id.*

22. *See* tit. 63.

that injures other tenants.[23] Section V discusses current landlord-tenant law in Oklahoma.[24] Section VI presents a statutory solution to the perceived gap in landlord-tenant and methamphetamine law.[25] Section VII concludes that the statutory solution will fill the gap and present another effective tool in the arsenal available to law enforcement and society in stopping the manufacture and use of methamphetamine.[26]

METHAMPHETAMINE MANUFACTURE INFORMATION

Methamphetamine is a "highly addictive, synthetically produced, central nervous system stimulant" that the DEA has stated "is the most common synthetic drug manufactured in the United States."[27] Methamphetamine has many nicknames including "'speed,' 'crank,' 'ice,' 'crystal,' 'glass,' 'chalk,' and 'meth.'"[28] Law enforcement has difficulty preventing both methamphetamine distribution and manufacture due to the rural nature of many labs, the fact that manufacturers make most sales indoors, and the fact that most small labs distribute only to close friends.[29] Law enforcements' ability to execute a search warrant at locations of methamphetamine manufacture is dangerous due to the use of hazardous and flammable chemicals in the manufacturing process.[30] Law enforcement officials, when purposely raiding a known methamphetamine lab or when discovering an active lab as part of another operation, must have specialized training and appropriate equipment to safely enter and process the lab.[31]

Many states have enacted methamphetamine-specific laws to control the distribution and use of the drug.[32] Some of these laws relate to remediation of property used previously for methamphetamine manufacture.[33] Remediation means the safe clean-up of property used for the manufacture of methamphetamine to "restore former meth labs to a state in which the property can be [safely] inhabited again."[34] Other laws relate to tracking and regulating precursor components of methamphetamine manufacture.[35] Still, other laws relate to creating registries listing individuals convicted of methamphetamine manufacture or use.[36] Additionally, legislatures have passed laws that relate to the rules for evicting tenants participating in drug-related activities and to disclosing known previous manufacturing activities in a property for sale.[37]

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23. Petersen, *supra* note 11, at 261.

24. *See generally* Evers v. FSF Overlake Assocs., 77 P.3d 581 (Okla. 2003).

25. *See generally* tit. 63, §§ 2-101 to 2-701 (2001 & Supp. 2010); Residential Landlord and Tenant Act, OKLA. STAT. tit. 41, §§ 101-136 (2001 & Supp. 2010).

26. *See generally* Schulte, *supra* note 5.

27. Williams, *supra* note 7, at 1.

28. *Id.* at 2.

29. Dana E. Hunt, *Methamphetamine Abuse: Challenges for Law Enforcement and Communities*, NAT'L INST. JUST. J., July 2006, no. 254, at 26.

30. *Id.*

31. *Id.*

32. *See generally Cleanup, Remediation, or Demolition of Methamphetamine Houses*, *supra* note 9.

33. *Id.*

34. U.S. ENV'T PROT. AGENCY, VOLUNTARY GUIDELINES FOR METHAMPHETAMINE LABORATORY CLEANUP 4 (August 2009), *available at* http://www.epa.gov/osweroe1/meth_lab_guidelines.pdf. Remediation processes will be discussed further in this comment.

35. *See generally Cleanup, Remediation, or Demolition of Methamphetamine Houses*, *supra* note 9.

36. *Id.*

37. *Id.*

Amphetamines are drugs designed to suppress appetite.[38] Methamphetamine, however, "creates a sense of euphoria by increasing the release of dopamine in the brain."[39] This euphoria can last from eight to twenty-four hours and includes changes in mood, rate of metabolism, focus, and libido.[40] A "crash" follows the euphoric feeling, and each use of methamphetamine makes it more difficult for the user to achieve euphoria without increased amounts of the drug.[41] Methamphetamine "remains in the brain . . . and causes . . . serious damage to blood vessels and dopamine transporters."[42] Because of this lengthened time in the brain, users can experience "significant visual hallucinations, violent behavior, paranoia and confusion" that are much more excessive than those experienced by users of other illegal drugs.[43] This means there are more extensive lifelong effects on a methamphetamine user than any other drug user, including "profound anxiety, confusion, insomnia, psychotic features, such as delusions, and cardiovascular problems."[44] Methamphetamine use causes these long-term effects due to the actual structural brain damage the drug causes.[45]

Many common household items contain hazardous materials, such as pseudoephedrine, acetone or ethyl alcohol, Freon, anhydrous ammoni, red phosphorus, bypophosphorous acid, lithium metal, hydriodic acid, iodine crystals, and phenylpropanolamine, used in methamphetamine production.[46] Both pseudoephedrine and ephedrine—ingredients used in cold medicine—have identical molecular formulas, but their structures are slightly different.[47] However, manufacturers use them in the same manner when making methamphetamine.[48] Pseudoephedrine, when taken in large quantities, can cause "renal failure and seizures."[49] Nail polish remover contains acetone, which is extremely flammable.[50] Air conditioners use Freon, which can cause cardiac arrest and lung damage when inhaled.[51] Anhydrous ammonia is a common fertilizer and can damage eyes.[52] Matches contain red phosphorous, which can explode.[53] Hypophosphorous acid is readily available online for water treatment and can

38. Coleman, *supra* note 6, at 111.

39. Williams, *supra* note 7, at 2.

40. *Id.*

41. *See id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *See id.*

46. *Children at Risk*, *supra* note 1, at 3 tbl.2. Classification of these components as hazardous might bring to mind a suit under the "toxic tort" theory. However, "toxic torts" are generally only applicable in legal industrial or manufacturing arenas, not when private illegal activity is involved. *See Toxic Torts*, 0070 SURVEYS 12: 50 STATE STATUTORY SURVEYS: ENVIRONMENTAL LAWS: POLLUTION, October 2009.

47. Williams, *supra* note 7, at 1.

48. *Id.*

49. *Children at Risk*, *supra* note 1, at 3 tbl.2 ("Ingestion of doses greater than 240 mg causes hypertension, arrhythmia, anxiety, dizziness, and vomiting. Ingestion of doses greater than 600 mg can to lead renal failure and seizures.").

50. *Id.* ("Extremely flammable, posing a fire risk in and around the laboratory. Inhalation or ingestion of these solvents causes severe gastric irritation, narcosis, or coma.").

51. *Id.* ("Inhalation can cause sudden cardiac death or severe lung damage. It is corrosive if ingested.").

52. *Id.* ("A colorless gas with a pungent, suffocating odor. Inhalation causes edema of the respiratory tract and asphyxia. Contact with vapors damages eyes and mucous membranes.").

53. *Id.* ("May explode on contact or friction. Ignites if heated above 260°C. Vapor from ignited phosphorus

explode and cause fires.[54] Batteries contain lithium metal, which can explode upon contact with water.[55] The salt industry uses hydriodic acid as part of the synthesizing process, and it can irritate the respiratory system.[56] Iodine crystals, used in water treatment, can burn exposed skin.[57] Found in prescription medications, Phenylpropanolamine can, when taken in large quantities, "lead to renal failure, seizures, stroke, and death."[58]

The volatility of these components and a lack of safety precautions in the manufacturing process cause the manufacture of methamphetamine to be highly dangerous.[59] In the first methamphetamine production method, the manufacturer begins by mixing pseudoephedrine with a solvent to "cook" the methamphetamine.[60] The manufacturer then heats, strains, and cools the mixture.[61] Next, the manufacturer adds caustic soda and allows the mixture to cool again.[62] Then, the manufacturer adds Freon to separate the methamphetamine from the other chemicals in the mixture.[63] Finally, the manufacturer introduces hydrogen chloride gas to produce the final methamphetamine crystals.[64]

The "shake-and-bake" method is another method of manufacturing methamphetamine.[65] Manufacturers developed this method in response to laws restricting the sale of ephedrine because it requires much less ephedrine than the traditional cooking method.[66] This method of producing methamphetamine is more portable and replaces the cooking process entirely.[67] The individual shakes the components for methamphetamine inside a bottle to initiate the needed chemical reaction to create the drug.[68] While this method produces a smaller amount of the drug, individuals can accomplish manufacture of methamphetamine in a small space or even in a car, thus reducing the chances of arrest.[69]

The shake-and-bake method has contributed to interstate trafficking of products

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severely irritates the nose, throat, lungs, and eyes.").

54. *See id.* ("Extremely dangerous substitute for red phosphorus. If overheated, deadly phosphine gas is released. Poses a serious fire and explosion hazard.").

55. *Id.* ("Extremely caustic to all body tissues. Reacts violently with water and poses a fire or explosion hazard.").

56. *Id.* ("A corrosive acid with vapors that are irritating to the respiratory system, eyes, and skin. If ingested, causes severe internal irritation and damage that may cause death.").

57. *Id.* ("Gives off vapor that is irritating to the respiratory system and eyes. Solid form irritates the eyes and may burn skin. If ingested, causes severe internal damage.").

58. *Id.* ("Ingestion of doses greater than 75 mg causes hypertension, arrhythmia, anxiety, and dizziness. Quantities greater than 300 mg can lead to renal failure, seizures, stroke, and death.").

59. Coleman, *supra* note 6, at 112.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Williams, *supra* note 7, at 4. Because of the portability of this method, the landlord intervention recommended in this article would not likely have a substantial effect on this type of manufacture, but diligence could still prevent some of this type of production. *See id.*

66. *Id.* at 5.

67. *Id.* at 4-5.

68. *Id.* at 4.

69. *Id.* at 4-5.

containing ephedrine.[70] Also contributing to this trafficking is a practice called "smurfing."[71] Smurfing occurs when groups circumvent quantity limits on products containing ephedrine, used as precursors to methamphetamine manufacture by making frequent purchases in small amounts of those products.[72] Often, groups organize their smurfing operations by obtaining enough of a precursor component to sell to actual methamphetamine producers for cash or even actual methamphetamine.[73]

Exposure to the gases released from the components of methamphetamine during the heating and cooling processes in traditional cooking methods can result in a host of symptoms and illnesses when the chemicals in the gases are absorbed via the lungs.[74] The human body can absorb methamphetamine by purposeful use, inhalation, accidental injection, or through skin contact with a contaminated surface.[75] Walls and carpets also absorb the fumes released during manufacture, rendering the house uninhabitable.[76] Absorption is an especially dangerous risk for children living where the manufacture of methamphetamine occurs because absorption can result in toxic levels of the chemical without purposeful ingestion.[77]

In order for a former methamphetamine lab location to be remediated and safe for occupation, law enforcement must remove contaminated materials including anything used to make or contain the illegal drugs or hazardous precursor materials.[78] Remediation is the step that really makes a property ready for reoccupation.[79] Part of remediation involves sampling for hazardous chemicals and methamphetamine to determine the best approach to remediate the property.[80] Those collecting the samples must look to their individual state laws and guidelines for the standards to follow.[81] Different hazardous materials require different levels of contamination when determining if destruction, rather than cleaning a portion of the property, may be necessary.[82]

Merely smoking methamphetamine in a location where no manufacture of the substance has occurred can contaminate a structure, depending on the amount smoked and the smoking technique used.[83] The Environmental Protection Agency ("EPA") suggests a list of steps to follow for remediation of methamphetamine-contaminated property, which includes instructing the remediation team to "[c]lean and seal the heating, ventilation and air conditioning (HVAC) system" and not to run that system until remediation is fully complete.[84] Additionally, the EPA recommends that the

70. *Id.* at 4.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Children at Risk*, *supra* note 1, at 3.
75. *Id.* at 2.
76. Douglas Jacobson, *Regional Resource: Methamphetamine Production and Abuse in Southern States*, S. LEGIS. CONF., April 2001, at 2.
77. *Children at Risk*, *supra* note 1, at 2.
78. U.S. ENV'T PROT. AGENCY, *supra* note 34, at 4.
79. *Id.*
80. *See id.* at 23.
81. *Id.*
82. *See id.*
83. *Id.* at 4.
84. *Id.* at 7.

individuals involved in the remediation work wear respirators and that they do not ingest anything, including eating or cigarette smoking, in the former methamphetamine lab while completing remediation.[85] If a methamphetamine lab was located in a multi-unit building with a shared ventilation system, the EPA recommends that the remediation expert take samples from "all areas/rooms/units serviced by the HVAC system to determine the spread of contamination."[86]

Hazardous waste from manufacture can also damage nearby property.[87] Because the components of methamphetamine are flammable, lab fires and explosions can result in damage to surrounding property.[88] In addition, manufacturers of methamphetamine often discard the hazardous waste outdoors.[89] Law enforcement has a difficult time identifying potentially harmful compounds because individuals use many "basic kitchen items like plastic bags, glass cookware, funnels and soda bottles" to manufacture methamphetamine.[90] The individuals then discard these otherwise innocuous items still containing residual hazardous waste in areas where unsuspecting individuals can come in contact with the residue.[91] The waste is expensive to clean up and costs an average of $3,500 for law enforcement to safely remove and remediate the methamphetamine contamination.[92]

The shake-and-bake method has contributed to the problem of hazardous waste in innocuous containers.[93] Because manufactures achieve this method in such a portable manner, the individuals, after manufacture has been completed, often throw the hazardous waste out in a plastic bag, which law enforcement has nicknamed "trash labs."[94] The hazardous waste from these trash labs is an enormous problem because producers discard up to six pounds of hazardous material from roughly every pound of methamphetamine manufactured.[95] These plastic bags of waste are extremely dangerous—"animals as large as deer have been found dead near disposal sites."[96] Law enforcement officials have indicated that the majority of methamphetamine lab seizures in recent years are shake-and-bake operations.[97]

There are three typical sampling methods used to determine how remediation will proceed: wipe sampling, discrete sampling, and composite sampling.[98] Wipe sampling involves wiping a surface and then analyzing what is picked up from the surface.[99]

85. *Id.* at 9.
86. *Id.* at 13.
87. Hunt, *supra* note 29, at 26.
88. Oklahoma State Senate & Sen. Cal Hobson, *Trooper Nik Green, Rocky Eales and Matthew Evans Act, H.B. 2176: Pseudoephedrine and Meth Labs*, OKLA. STATE SENATE LEGISLATIVE BRIEF (June 2004), *available at* http://www.oksenate.gov/publications/legislative_briefs/legis_brief_2004/meth_labs.html.
89. *Children at Risk*, *supra* note 1, at 2.
90. Williams, *supra* note 7, at 1 (noting that these common articles are used to manufacture methamphetamine).
91. *See Children at Risk*, *supra* note 1, at 2.
92. Meth Memorandum, *supra* note 14, at 2.
93. Williams, *supra* note 7, at 5.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. U.S. ENV'T PROT. AGENCY, *supra* note 34, at 25.
99. *Id.*

Remediation personnel only perform discrete sampling at "hot spots" where it is more likely the manufacturer exposed the surface to a hazardous chemical.[100] Composite sampling takes multiple discrete samples and treats them as one when analyzed.[101] In addition to these sampling techniques, there is equipment available for onsite testing of suspicious items for detection of trace amounts of drugs.[102] Law enforcement personnel typically use this type of sampling equipment in airports or border crossings.[103] One of the most widely utilized technologies is ion mobility spectrometry ("IMS"), which can easily detect one microgram of methamphetamine.[104]

CURRENT METHAMPHETAMINE LAW IN OKLAHOMA

Methamphetamine manufacture and use is an increasingly important issue in modern society, particularly in Oklahoma.[105] Methamphetamine use in Oklahoma ranks about forty-two percent higher than the national average.[106] Methamphetamine use is an important issue because even experimenting once with methamphetamine can result in life-long addiction.[107] The Oklahoma legal and law enforcement communities in recent years have launched a statewide campaign to stop methamphetamine abuse.[108] Individuals can easily produce methamphetamine by following a simple "cooking" process with chemicals commonly found in most households.[109] Regulation of these precursor components of methamphetamine is difficult due to their common use in households for legal purposes.[110] However, certain components, such as pseudoephedrine, a common ingredient in cold medication, are now the subject of state and federal regulations, which track sales to limit availability for methamphetamine purposes.[111]

Almost all methamphetamine-related activities are illegal in Oklahoma.[112] It is illegal in Oklahoma "to distribute, dispense, transport with intent to distribute or dispense, possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance."[113] The Oklahoma Legislature has listed pseudoephedrine, the main component in methamphetamine, as a Schedule V controlled dangerous

100. *Id.*

101. *Id.*

102. *See generally* NAT'L INST. OF JUSTICE, TRACE DETECTION OF NARCOTICS USING A PRECONCENTRATOR/ION MOBILITY SPECTROMETER SYSTEM REP. 602-00 (2001), *available at* https://www.ncjrs.gov/pdffiles1/nij/187111.pdf.

103. *See id.* at 3. The prevalence and dangers associated with drug use and even the manufacture of drugs inside prisons and in the air travel arena, while numerous and of great importance, are outside the scope of this article.

104. *Id.* at 1.

105. Jacobson, *supra* note 76, at 7.

106. *Id.* at 6.

107. Schulte, *supra* note 5.

108. *Id.*

109. Hunt, *supra* note 29, at 25.

110. *Id.*

111. *Id.*

112. Uniform Controlled Dangerous Substances Act, OKLA. STAT. tit. 63, § 2-401(A)(1) (2001 & Supp. 2010).

113. *Id.*

substance.[114] Conviction for any crime involving a Schedule V drug is a felony punishable by up to five years in prison and a fine of up to one thousand dollars.[115] Those convicted of manufacturing more than fifty grams of methamphetamine are guilty of "aggravated manufacturing [of] a controlled substance."[116]

Not only is methamphetamine manufacture against the law, but courts also deem it an inherently dangerous activity, thus allowing application of the felony-murder rule if a homicide occurs during the manufacturing process.[117] In Oklahoma, when a murder occurs during the commission of a felony that is not enumerated in the first-degree murder statute, that murder is automatically second-degree murder based on the felony-murder rule.[118] The perpetrated felony must possess one of the following characteristics to fall under the felony-murder rule: be "inherently or potentially dangerous to human life, inherently dangerous as determined by the elements of the offense or potentially dangerous in light of the facts and circumstances surrounding both the felony and the homicide."[119]

Many states currently have forfeiture laws that impose a heavy fine—state seizure of the real property knowingly used to manufacture methamphetamine—for owners of real property who violate state drug laws.[120] Oklahoma follows the federal model used by many states regarding forfeiture of property knowingly used in the manufacture of methamphetamine.[121] An owner of real property forfeits the ownership to the state when certain activities in violation of the Uniform Controlled Dangerous Substances Act occur on his land with his knowledge or consent.[122] The purpose of this statute is the recognition in property law that a landowner has a duty to supervise his property.[123] However, these laws only apply to real property where the owner had knowledge of the activity, so these laws do not apply currently to leased property used for illegal purposes without the landlord's knowledge.[124]

Individuals can also litigate for the harm resulting from methamphetamine manufacture under the tort theory of nuisance as it illegally endangers the health and safety of others.[125] Oklahoma's Legislature modeled the state nuisance statute after general tort law.[126] An act that constitutes a nuisance is one that "[a]nnoys, injures or endangers the comfort, repose, health, or safety of others," "[o]ffends decency," or "interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or

114. tit. 63, § 2-212(A)(2).
115. tit. 63, § 2-401(B)(3).
116. tit. 63, § 2-401(G)(3)(h).
117. OKLA. STAT. tit. 21, § 701.8 (2001 & Supp. 2010).
118. *Id.*
119. Wade v. State, 581 P.2d 914, 916 (Okla. Crim. App. 1978).
120. Coleman, *supra* note 6, at 118.
121. Uniform Controlled Dangerous Substances Act, OKLA. STAT. tit. 63, § 2-503 (2001 & Supp. 2010).
122. *Id.* § 2-503(A)(8).
123. Coleman, *supra* note 6, at 118.
124. tit. 63, § 2-503.
125. OKLA. STAT. tit. 50, § 1 (2001 & Supp. 2010).
126. *Id.*

highway."[127] While there is no case law in Oklahoma, a court might find the manufacture of methamphetamine would likely both endanger the health of others and offend decency.[128]

The "Trooper Nik Green, Rocky Eales and Matthew Evans Act," in addition to classifying pseudoephedrine as a Schedule V drug, requires that anyone wishing to purchase such medication do so by showing identification to a pharmacist.[129] Individuals must then sign a log entry showing the date and amount of the medication purchased.[130] After the new tracking regulations went into effect in 2004, law enforcement reported a "significant reduction" in methamphetamine production and methamphetamine lab seizures.[131] In addition, in an attempt to control a primary precursor to methamphetamine manufacture, on June 1, 2000, then Governor Frank Keating signed a law making "possession of anhydrous ammonia in an unauthorized container a felony."[132] The legislature repealed that particular law, but possession of anhydrous ammonia in an unauthorized container is still demonstrative of an individual's intent to manufacture.[133]

Recently, Oklahoma's Bureau of Narcotics also instituted a position to help prevent methamphetamine manufacture from gaining a stronger foothold in Oklahoma, particularly outside of metropolitan areas.[134] Federal stimulus money is funding this position.[135] While the number of methamphetamine lab seizures in Oklahoma drastically dropped between 2004 and 2007, there was a marked increase in 2008.[136] Recent changes in landlord-tenant law demonstrate another area of the law that state legislatures can use to further reduce the number of these seizures by law enforcement.[137]

MODERN TRENDS IN LANDLORD-TENANT LAW

The landlord-tenant relationship offers an additional means of policing the manufacture of methamphetamine because a landowner should have a duty to remain knowledgeable about the activities on his leased property.[138] In general, a property owner, even a tenant leasing property from the fee owner, is a "mini-sovereign" in his home.[139] However, general rules of property law temper such sovereignty.[140] Property law has limitations on ownership to protect the interests of neighboring landowners,

127. *Id.*
128. *Id.*
129. Meth Memorandum, *supra* note 14, at 1.
130. *Id.* at 1-2.
131. *Id.* at 2.
132. Jacobson, *supra* note 76, at 6.
133. Uniform Controlled Dangerous Substances Act, OKLA. STAT. tit. 63, § 2-401(G)(2) (2001 & Supp. 2010).
134. Williams, *supra* note 7, at 7-8.
135. *Id.* at 8.
136. *Id.* at 8 (stating six hundred and fifty-nine labs were seized in 2004, ninety-two in 2007, and one hundred and two in 2008).
137. *See generally* Petersen, *supra* note 11.
138. *See* Coleman, *supra* note 6, at 118.
139. STEPHEN R. MUNZER, A THEORY OF PROPERTY 91(1990).
140. David B. Ezra, *"Get Your Ashes out of my Living Room!": Controlling Tobacco Smoke in Multi-Unit Residential Housing*, 54 RUTGERS L. REV. 135, 156-63 (2001).

including nuisance law, civil codes, and common law limitations regarding dangerous activities.[141] An owner of real property is "strictly responsible" for any harm to neighboring property resulting from a dangerous activity on his property.[142] Property law imposes such limitations to prevent a neighbor from "pay[ing] the costs of activities whose benefits are enjoyed by another one."[143]

In the landlord-tenant relationship, landlords can achieve limitations on a tenant's sovereignty by use of a "conspicuous writing independent of the rental agreement."[144] These additional clauses must meet state statutory requirements regulating the process a landlord must follow for periodic inspections of premises and possible eviction for violation of specific terms of the lease.[145] For example, in Oklahoma, any additional requirements either in the lease or adopted subsequent to the start of the lease term must also meet certain statutory requirements regarding the substance of the limitation.[146] The purpose of a limitation must "promote the convenience, peace, safety or welfare of the tenants in the premises, preserve the landlord's property from abusive use, or make a fair distribution of services and facilities held out for the tenants generally."[147] The limitation a landlord selects must also be reasonably related to the reason for the limitation's addition, apply the same way to all tenants, and be clear in its language without ambiguity of interpretation.[148]

When it comes to illegal activities, such as the manufacture of methamphetamine, landlords are uniquely positioned to report suspected activity to prevent both distribution of the drug and potential dangers to their property, as well as other tenants' property, due to their duty to maintain watch over their property.[149] Additionally, general property law does not allow landlords to enter into leases for illegal purposes because such leases are unenforceable in court against the tenant.[150] This means a landlord with knowledge that a tenant plans to manufacture methamphetamine on the premises cannot evict a tenant for such behavior and receive a judgment for the remainder of the rent owed for the lease period.[151]

However, no states currently impose a duty on a landlord to report suspected methamphetamine activity to law enforcement.[152] Tenants involved in the manufacture of methamphetamine expose other innocent tenants to the toxic fumes released during the manufacturing process via shared ventilation systems in apartment buildings.[153] Currently, these innocent parties must prove a tort theory of negligence to recover

141. UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 164 (2000).
142. *Id.*
143. *Id.* at 165.
144. *See* Residential Landlord and Tenant Act, OKLA. STAT. tit. 41, § 118(B) (2001 & Supp. 2010).
145. *See id.*
146. tit. 41, § 126.
147. *Id.*
148. *Id.*
149. *See* Coleman, *supra* note 6, at 118.
150. *See generally* RESTATEMENT (SECOND) OF PROP.: Landlord & Tenant § 9.1 (1977).
151. *Id.*
152. *Cleanup, Remediation, or Demolition of Methamphetamine Houses*, *supra* note 9.
153. U.S. ENV'T PROT. AGENCY, *supra* note 34, at 13.

damages from a landlord who was likely in the best position to prevent such activity in the first place.[154] The tort theory requires proof that the danger was foreseeable and that the landlord had an obligation regarding the dangerous condition that caused the injury via the lease.[155] Such proof also requires the landlord to have a duty to maintain safety in the area where the injury occurred.[156]

A negligence tort action is typically available only for common areas that the landlord retains control of for use in common by all tenants.[157] Therefore, the tenant must show that the location where the injury occurred was under the control of the landlord, that the dangerous condition was "readily discoverable," and that the landlord had a duty to inspect for the dangerous condition or was on notice of the existence of the dangerous condition.[158] Courts have not previously considered shared ventilation systems in multi-unit apartment buildings to be a common area the landlord has control of and a duty to maintain in a safe manner.[159]

The modern lease has become no more than a deed with a time-limit; leases are now more contracts between landlords and tenants than transfers of real property.[160] Historically, courts have not allowed tenants to claim constructive eviction for inaction on the landlord's part.[161] Traditionally, courts have not required a landlord to stop other tenants from making noise that disturbs a co-tenant.[162] However, recent decisions show that where the landlord has the "legal power to terminate the noise" he has an obligation to do so.[163] That legal power comes from either "a covenant in the lease of the offending tenant, a statute, or the landlord's control over common areas."[164]

Common areas are those spaces used by more than one tenant, such as a lobby or laundry room.[165] Landlords generally have a duty to maintain common areas.[166] However, no case law addresses shared ventilation systems as meeting the common area classification.[167] Landlords often have a statutory duty to keep HVAC systems functional, but nothing requires the landlord to perform checks to ensure the air quality within the ventilation system.[168] Courts have extended the landlord's duty to maintain

154. *See* Coleman, *supra* note 6, at 120-22.

155. *See* Tracy A. Bateman & Susan Thomas, Annotation, *Landlord's Liability for Failure to Protect Tenant from Criminal Acts of Third Person*, 43 A.L.R. 5th 207 § 3 (1996).

156. *See id.* § 4.

157. *Id.*

158. 44 AM. JUR. 3D *Proof of Facts* 449 § 1 (1997) (updated 2010).

159. *See generally* Evers v. FSF Overlake Assocs., 77 P.3d 581 (Okla. 2003) (remanding a case decided on summary judgment regarding the existence of a landlord's duty to protect tenants from fumes from an adjoining apartment).

160. *See* JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 235 (3d ed. 1989).

161. *Id.* at 248. Constructive eviction may be based on the "failure by the landlord to perform a lease covenant substantially affecting use of the premises, such as a covenant to supply heat." *Id.*

162. *Id.* at 249.

163. *Id.*

164. *Id.* (footnotes omitted).

165. *See* 52A C.J.S. *Landlord & Tenant* § 897 (2010).

166. *Id.*

167. Evers v. FSF Overlake Assoc., 77 P.3d 581 (Okla. 2003). This is the only case that discusses shared ventilation systems and a potential duty for a landlord to maintain them like any common area he or she retains control over.

168. Residential Landlord and Tenant Act, OKLA. STAT. tit. 41, § 118 (2001 & Supp. 2010).

the common areas in a safe condition to include a duty regarding criminal acts of others.[169] Today, in many jurisdictions, once a landlord has notice of the potential for criminal activity he can reasonably take steps to prevent, he must do so.[170]

Historically, courts did not interpret leases to include an implication that the property would be suitable for the tenant's intended use.[171] Courts did not provide a remedy to landlords or tenants if, subsequent to transfer of title, the premises became unfit for use because of destruction by fire or flood.[172] Today, unless the tenant agrees in the lease otherwise, the "obligation to pay rent is conditioned upon fitness of the premises."[173] Courts use housing codes to determine if a property is fit for the intended use.[174] The housing code requirements fall under the warranty of habitability, which, to date, has not included fumes resulting from another tenant's illegal activity flowing through a shared ventilation system.[175]

Landlord liability has also expanded under tort law.[176] Generally, private individuals do not have a duty to protect others from the criminal activities of third parties.[177] However, a landlord could, for example, assume this duty via contract.[178] Traditionally, the landlord-tenant relationship fell under the general principle of no liability for third party actions, and courts would impose no duty on landlords with respect to criminal activities of third parties.[179] Additionally, landlords were never liable for injuries to a tenant that resulted from the negligent behavior of another tenant so long as the landlord did not endorse the activity.[180] The recent expansion of landlord liability for third party criminal activity imposes liability where landlords have failed to "comply with the safety aspect of their habitability duty."[181] Courts recognize liability where a landlord's own "affirmative negligent act" has caused the tenant to be injured in addition to when the landlord's failure to act has increased the risk for a criminal act to occur.[182] The tenant must, however, prove that the landlord had a duty to provide security and that the criminal activity that resulted in the tenant's injury was foreseeable to the landlord.[183] Under a traditional negligence analysis, the landlord's breach must be the proximate cause of the tenant's injury.[184] The landlord's failure to keep his property free of criminal activity must result in the harm to the tenant in order to meet the proximate cause requirement of the analysis.[185]

169. Bateman & Thomas, *supra* note 155, § 4[c].
170. *See* Coleman, *supra* note 6, at 122.
171. CRIBBET & JOHNSON, *supra* note 160, at 250.
172. *Id.*
173. *Id.*
174. Petersen, *supra* note 11, at 273.
175. *See id.*
176. CRIBBET & JOHNSON, *supra* note 160, at 256.
177. 57A AM. JUR. 2D *Negligence* § 96 (2010).
178. *Id.*
179. *See id.*
180. 12 AM. JUR. 2D *Proof of Facts* 497 § 2 (1977) (updated 2010).
181. CRIBBET & JOHNSON, *supra* note 160, at 258.
182. Bateman & Thomas, *supra* note 155, § 7.
183. CRIBBET & JOHNSON, *supra* note 160, at 259.
184. Petersen, *supra* note 11, at 261.
185. *Id.*

Courts have recently begun invalidating lease clauses in which a landlord states he has no liability for the criminal acts of third parties.[186] Courts have found the landlord's expanded duty to provide protection from the criminal acts of third parties from "the warranty of habitability implied in the lease, statutes governing safety and security in multiple family dwellings, the special landlord-tenant relationship, the landlord's contractual control over portions of the premises, and the landlord's assumption of a duty to provide security."[187] While courts are expanding tort liability for the criminal acts of third parties, the requirement that the landlord must have assumed a duty makes it more difficult for an injured tenant to prove liability.[188] The assumption of duty requirement results in no liability for a landlord who has not taken any steps to help protect his tenants from criminal activity, thus leaving the tenant without any substantial recourse against anyone but the criminal.[189] Courts are likely hesitant to extend landlord liability any further than those cases where the landlord assumes a duty because such extension is typically up to the legislature to enact.[190]

The traditional view that a tenant's illegal activity does not affect the landlord-tenant relationship informs the courts' hesitancy to extend landlord liability.[191] While the American Law Institute ("ALI") adopts the view that courts should imply "prohibitory law into the lease," its view has not been widely accepted.[192] The ALI's reasoning would appear sensible as the landlord is in the best position to prevent illegal activity on the leasehold and should have a duty to do so in order to protect innocent tenants.[193]

CURRENT OKLAHOMA LANDLORD-TENANT LAW

Oklahoma followed the common law doctrine of "caveat emptor" which states that when "the right of possession and enjoyment of the leased premises passes to the lessee . . . the tenant takes the premises in whatever condition they may be in."[194] Several exceptions, adopted by the Oklahoma Supreme Court, to the rule of caveat emptor slowly eroded its acceptance.[195] These exceptions include cases where a landlord "negligently made repairs," did not maintain common areas under landlord control, or where a landlord allowed the criminal acts of a third party to affect another tenant.[196] The Oklahoma Supreme Court stated that "reasonableness and foresight" on the part of the landlord is a more important consideration than the doctrine of caveat emptor.[197] The Court therefore replaced the doctrine of caveat emptor with a "general duty of care upon

186. CRIBBET & JOHNSON, *supra* note 160, at 259
187. Petersen, *supra* note 11, at 261.
188. *See id.* at 272.
189. *See id.*
190. *Id.* at 279.
191. CRIBBET & JOHNSON, *supra* note 160, at 267.
192. *Id.*
193. Petersen, *supra* note 11, at 280.
194. Miller v. Grace, Inc., 212 P.3d 1223, 1228 (Okla. 2009).
195. *Id.*
196. *Id.*
197. *Id.* at 1228-29.

landlords to maintain the leased premises."[198] Like other courts, the Oklahoma Supreme Court premises the general duty of care on the landlords' knowledge of the existing dangerous condition.[199] The duty to remedy a dangerous condition exists if the landlord "knew or by the exercise of reasonable diligence would have known" of that condition.[200]

In Oklahoma, courts apply a common law negligence analysis to determine landlord liability for tenant injuries.[201] Oklahoma has followed the national trend and expanded this negligence doctrine to include criminal acts of third parties.[202] Liability can exist where the landlord has undertaken to provide a service such as a security system on the property or has received notice from a tenant that, for example, the locks on the doors are inadequate.[203] The Oklahoma Supreme Court bases this expanded liability on the fact that the landlord "has the exclusive power to take preventive action" regarding criminal activity on the premises.[204] This liability analysis still turns on a determination of foreseeability and "exclusivity of control," which means the landlord must have taken proactive steps to provide a service or disregarded notice of a dangerous situation.[205]

Some jurisdictions have eviction statutes that allow for eviction of tenants arrested for drug-related crimes on the property.[206] Where these statutes exist, the landlord bears the burden of proof to show the tenant used the property for drug-related activities.[207] Oklahoma is a jurisdiction with a drug-related activity eviction statute.[208] In Oklahoma, a landlord can terminate the lease and evict a tenant for "any drug-related criminal activity on or near the premises by the tenant or by any member of the tenant's household or any guest or other person under the tenant's control."[209] Under the Residential Landlord and Tenant Act, a landlord must provide either thirty days written notice of eviction if the tenant is on a month-to-month lease or seven days written notice if the tenant has less than a month-to-month lease.[210] A landlord must deliver that notice directly to the tenant; or if the landlord cannot find the tenant, he can deliver the notice to a family member over age twelve or post it openly on the actual residence.[211]

As mentioned in Section IV, Oklahoma allows landlords to adopt regulations in the lease relating to the use of the rental property as long as the regulations meet certain statutory requirements, including that the purpose of the lease regulation is to "promote the convenience, peace, safety or welfare of the tenants in the premises."[212]

198. *Id.* at 1230.
199. *Id.*
200. *Id.* at 1231.
201. Petersen, *supra* note 11, at 262.
202. *See* Lay v. Dworman, 732 P.2d 455, 458 (Okla. 1986).
203. *See id.*
204. *Id.* at 457.
205. Cordes v. Wood, 918 P.2d 76, 79 (Okla. 1996).
206. 49 AM. JUR. 2D *Landlord and Tenant* § 859 (2010).
207. *Id.*
208. Residential Landlord and Tenant Act, OKLA. STAT. tit. 41, § 132(D) (2001 & Supp. 2010).
209. *Id.*
210. tit. 41, § 111(A) & (B).
211. tit. 41, § 111(E).
212. tit. 41, § 126.

Additionally, tenants in Oklahoma have certain statutory duties, including a requirement not to "engage in criminal activity that threatens the health, safety or right of peaceful enjoyment of the premises by other tenants or is a danger to the premises."[213] This same statutory provision prohibits "drug-related criminal activity on or near the premises either personally or by any member of the tenant's household."[214] Such criminal activity is grounds for immediate eviction.[215] The tenant also has a duty to use plumbing and other facilities in a "safe and nondestructive manner," which makes the disposal of methamphetamine waste into household drains a violation of that statutory duty.[216]

In Oklahoma, landlords must give one-day notice before entering a tenant's premises "except in case of emergency or unless it is impracticable to do so."[217] If a tenant refuses a landlord access to the premises, such refusal may result in termination of the lease.[218] In addition, landlords have statutory duties to tenants under Oklahoma law.[219] A landlord must keep plumbing and other equipment he supplies in "good and safe working order," just as the tenant must use such facilities safely.[220]

The Oklahoma Supreme Court almost fully summarizes current Oklahoma landlord-tenant law in the discussion in *Evers v. FSF Overlake Associates*.[221] In *Evers*, the petitioners alleged medical ailments resulted from the fumes released as a result of methamphetamine manufacture in the next apartment.[222] The apartments shared "a wall and ventilation system."[223] Petitioners and other tenants complained to management about strange smells in and around the building, but it took two months for a representative of management to investigate the odors.[224] The security officer identified the smells as indicative of "illegal drug activity" and notified police.[225] Law enforcement performed a search of the adjoining apartment and discovered an active methamphetamine lab.[226] The petition charged the building's management company with negligent failure to warn and protect tenants from a known dangerous condition.[227] Defendant management argued it owed no duty to "maintain an apartment community free from criminal activity."[228] The trial court granted the management's motion for summary judgment after which the plaintiffs appealed.[229] The Court of Civil Appeals agreed with the trial court that petitioners "failed to provide sufficient evidence of injury and failed to adequately link any alleged injuries to exposure to methamphetamine or its

213. tit. 41, § 127.
214. *Id.*
215. tit. 41, § 132(D).
216. tit. 41, § 127(4).
217. tit. 41, § 128(C).
218. tit. 41, § 128(E).
219. tit. 41, § 118.
220. *Id.*
221. *See generally* Evers v. FSF Overlake Assocs., 77 P.3d 581 (Okla. 2003).
222. *Id.* at 583.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at 584
229. *Id.*

components."[230] However, the Oklahoma Supreme Court reversed and remanded for further consideration on several issues.[231]

A court should only grant a summary judgment motion when "there is no genuine issue as to any material fact."[232] In support of their motion, Defendant cited to current general landlord tenant law, arguing that a landlord does not owe a duty to guarantee a tenant's safety from the criminal acts of third party and is only required to demonstrate reasonable care in keeping common areas maintained in a safe condition.[233] Petitioners responded by arguing that management had retained control of the ventilation systems in the building for the common use of all tenants.[234] The Oklahoma Supreme Court held that the criminal activity on the premises did not remove any duty the landlord may have had and that there was a factual determination to be made as to whether the activity in question could be viewed as a supervening act, absolving the landlord of responsibility.[235]

ANALYSIS

State legislatures strive to develop "comprehensive schemes" related to methamphetamine cleanup.[236] Close to half of the state legislatures have passed laws relating to cleanup, remediation, or demolition of property previously used to manufacture methamphetamine.[237] States began enacting these laws as early as 1989.[238] According to a fifty state statutory survey from 2009, twenty-seven states still do not have any laws relating to notification requirements for previous methamphetamine manufacture at a property, owner responsibility to disclose or remediate, law enforcement requirements relating to remediation, or standards for that remediation and cleanup.[239] Of the states that do have such laws, only thirteen have enacted laws relating to remediation standards for cleanup of previous methamphetamine labs.[240] In this same survey, only nine states appear to have a notice requirement relating to previous methamphetamine manufacture on a property.[241] According to the Southern Legislative Conference, as of July 2010, thirty-nine states have legislated "general restrictions on the sale of ephedrine, and two others—Oregon and Mississippi—require a prescription for their purchases."[242]

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230. *Id.*
231. *Id.* at 587.
232. *Id.* at 584-85.
233. *Id.* at 585.
234. *Id.*
235. *Id.* at 586.
236. *Cleanup, Remediation, or Demolition of Methamphetamine Houses*, *supra* note 9.
237. *Id.*
238. *Id.*
239. *Id.* The twenty-seven states are Alabama, Alaska, Arizona, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Mississippi, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, Wisconsin, and Wyoming. *Id.*
240. *Id.*
241. *Id.*
242. Williams, *supra* note 7, at 5.

There are also more specific examples of legislation across the nation.[243] In West Virginia, property owners who take steps to remediate methamphetamine contamination on their property discovered themselves rather than discovered by police have immunity from liability, just like property owners who have a state agency complete remediation.[244] In Montana, an owner must, when providing notice to a subsequent occupant of prior methamphetamine manufacture on the premises, provide documentation relating to the remediation standards used in removal of the contamination.[245] Nebraska requires a property owner to report knowledge of any clandestine drug lab but does not impose a civil penalty for failure to do so.[246] Nebraska also allows for eviction of tenants if a landowner and/or law enforcement finds a drug lab on the leased property.[247] Oklahoma has been part of this general nationwide trend to pass additional legislation to put an end to methamphetamine manufacture.[248]

Even legislatures that are looking to make positive changes to expand the comprehensive scheme of drug laws punishing those involved in these illegal activities are restricted in some ways by existing property law.[249] Most states, including Oklahoma, have statutes restricting a landlord's access to tenant residences.[250] These restrictions, and their basis in property law, are similar to the idea that society allows smoking in private residences even though a majority of states restrict smoking in public in some way.[251] However, the freedom inherent in a private residence can be subject to certain restrictions where protection of society in general is more important.[252] This tension between private activities and the public good can be seen in the public debate over the legal activity of smoking.[253]

Currently, in many public places smokers cannot expose nonsmokers to "environmental tobacco smoke."[254] In the majority of shared environments, legislatures have dictated that smokers must go outside or to other designated areas to smoke.[255] At the moment, smokers still enjoy "unfettered freedom" to smoke at home.[256] However, smoking in residential locations is causing "intense conflict between smokers and nonsmokers."[257] This is especially true in multi-unit housing such as apartments that have "shared ventilation systems, meaning that smoke can filter into residences where children and nonsmoking adults live."[258] This conflict arises because cigarette smoke

243. Uniform Controlled Substances Act, W. VA. CODE § 60A-11-5 (2005 & Supp. 2010).
244. *Id.*
245. MONT. CODE ANN. § 75-10-1305 (Westlaw through 2009 legislation).
246. NEB. REV. STAT. § 71-2433 (2009).
247. § 71-2435.
248. Williams, *supra* note 7, at 7-8.
249. *See* MUNZER, *supra* note 139, at 91.
250. Residential Landlord and Tenant Act, OKLA. STAT. tit. 41, § 128 (2001 & Supp. 2010).
251. Ezra, *supra* note 140, at 137.
252. *See id.* at 139.
253. *Id.* at 137.
254. *Id.* at 136.
255. *Id.* at 137.
256. *Id.*
257. *Id.*
258. Christine S. Moyer, *AMA Meeting: E-cigarettes Need FDA Regulation, Limits on Sales*, AM. MED. NEWS, June 28, 2010, www.ama-assn.org/amednews/2010/06/28/prsd0628.htm.

moves easily through ventilation systems, driven by air currents resulting from air conditioning or heating, and can infiltrate the apartments of nonsmokers.[259] Like methamphetamine, the smoke from cigarettes can adhere to many surfaces.[260] In the summer of 2010, the American Medical Association ("AMA") moved to adopt a policy recommending the prohibition of smoking in multi-unit housing because it believes there is an "emerging social justice framework requiring [it] to protect others from secondhand smoke."[261] Current law does allow landlords to "restrict or eliminate smoking" on their property.[262]

Similar to methamphetamine, the same general causes of action under tort and property law can apply to secondhand smoke exposure, including nuisance, breach of covenant of quiet enjoyment or warranty of habitability, or failure to maintain safe premises based on a duty the landlord owes the tenant.[263] The general feeling of property owners seems to be moving in the direction that secondhand smoke does not belong in rental property where exposure can affect nonsmokers.[264] Because the law generally allows private landlords to restrict smoking, landlords who take a proactive approach to prevent exposure of nonsmoking tenants to cigarette smoke will generally be in the best position to avoid litigation from those nonsmokers.[265]

The U.S. Supreme Court previously ruled exposure to secondhand smoke, or environmental tobacco smoke, may be a violation of a prisoner's Eighth Amendment rights due to the health risks associated with such exposure.[266] The Surgeon General's 2006 report states that "[e]xposure of adults to secondhand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer."[267] Public sentiment, as evidenced by public non-smoking laws, scientific reports, and the U.S. Supreme Court's holding, demonstrates an obvious trend toward limiting personal freedom to smoke, even within an individual's private residence.[268] This public sentiment could support laws allowing additional access to landlords looking to prevent the illegal manufacture of drugs on their leased property.

The multitude of differing statutes from states attempting to respond to the existing gap in landlord-tenant law regarding illegal drug manufacturing has inspired this comment's proposed statutory solution to fill that gap.[269] Nebraska has a statute that places a duty on the landowner to report any clandestine drug labs, but there is no civil penalty associated with failure to report.[270] In addition, this statute only asks that the landowner report the lab "as soon as practicable" rather than as quickly as possible or

259. *See* Ezra, *supra* note 140, at 152.
260. *Id.*
261. Moyer, *supra* note 258.
262. Ezra, *supra* note 140, at 139.
263. *Id.* at 156-63.
264. *Id.* at 177.
265. *Id.* at 189.
266. Helling v. McKinney, 509 U.S. 25, 35-37 (1993).
267. OFFICE OF THE SURGEON GEN., DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL 11 (2006), *available at* http://www.surgeongeneral.gov/library/secondhandsmoke/report/.
268. *See generally* Ezra, *supra* note 140.
269. *Cleanup, Remediation, or Demolition of Methamphetamine Houses*, *supra* note 9.
270. NEB. REV. STAT. § 71-2433 (2009).

within a more definite timeframe.[271] Nebraska does have a statute that imposes a fine of up to one thousand dollars on a landowner who knowingly rents out a property that law enforcement has not completely remediated and released.[272]

Oregon has a statute relating to the ability of the local health authority or fire marshal to enter property known or "for which there are reasonable grounds to believe" an individual previously used for the manufacture of illegal drugs.[273] Some of the language in this statute should be included in the proposed legislation to give landlords more leeway in both investigating suspicious activity and reporting that activity to law enforcement.[274] This proposed statute should use the "reasonable grounds" language to give landlords more flexibility to access their property in situations related to suspected drug manufacture, as well as to provide law enforcement grounds for the issuance of a warrant.[275] The reasonable grounds standard needs to allow law enforcement to enter the property—even if the landlord has not performed a physical inspection—to ensure the landlords safety from both toxic chemicals and potential armed criminals involved in the manufacturing process in facilitating the removal of illegal drug manufacture. Law enforcement personnel receive specialized training and have more experience in entering unstable situations to stop illegal activities than the average landlord.[276]

Montana has a statute that provides immunity from suit for landowners who provide notice to subsequent occupants or purchasers of property previously used as clandestine drug labs.[277] With the addition of a forty-eight hour rule that requires landlords to disclose that a tenant is manufacturing methamphetamine to law enforcement and the other tenants of the same building within forty-eight hours of its discovery, immunity, such as that provided by Montana's statute, would likely encourage landlords to report suspected drug manufacture more quickly. Immunity might provide even more encouragement for landlord disclosure than the potential one thousand dollar penalty for failure to report alone. In addition, current Oklahoma forfeiture law does not impact leased premises where the landlord had no knowledge or involvement in the illegal activity.[278] The proposed statute would extend potential liability under state forfeiture laws for repeated violations of this new law.

As for a traditional negligence duty analysis, proof of the landlord's knowledge of illegal activity to show breach of an existing duty is part of most statutes involving reporting or inspecting of property suspected of drug manufacture use.[279] The *Evers* case detailed the use of negligence duty analysis in Oklahoma.[280] *Evers* also demonstrated the Oklahoma Supreme Court's continued openness to the current national expansion in tort

271. *Id.*
272. § 71-2434.
273. OR. REV. STAT. § 453.873 (2009).
274. *See id.*
275. *See id.*
276. Hunt, *supra* note 29, at 26.
277. MONT. CODE ANN. § 75-10-1305 (Westlaw through 2009 legislation).
278. Uniform Controlled Dangerous Substances Act, OKLA. STAT. tit. 63, § 2-503(A)(8) (2001 & Supp. 2010).
279. *See id.*
280. *See generally* Evers v. FSF Overlake Assocs., 77 P.3d 581 (Okla. 2003).

law, which expands landlords' liability for criminal acts of third parties.[281] *Evers* also demonstrated the Court's openness to the view that shared ventilation systems used in multi-unit housing are a common area the landlord retains control of and has a duty to exercise reasonable care over to keep safe.[282] Monitoring of shared ventilation systems for chemicals related to illegal methamphetamine manufacture could not be achieved using the sampling methods discussed in regards to remediation.[283] However, because of the unusual odor associated with the manufacture of methamphetamine a landlord could simply periodically smell the air coming out of the vents on the various floors in a multi-unit complex and detect if any unusual smells were present.[284]

In addition to notification by other tenants of suspicious activity, landlords should have a duty to proactively monitor for such activity because a landlord is in the best position to prevent criminal activity on the premises.[285] This provision would require frequent monitoring by the landlords. Such monitoring would not necessarily require expensive equipment or laboratory tests of air quality or surface residue because the traditional cooking process of methamphetamine gives off an unusual odor that is easily noticeable by anyone near the residence.[286] Detection of this type of odor would not necessarily even require the entry into the tenant's residence, as the odors are generally detectable near doorways or windows. More frequent visits by landlords to their tenants would serve a dual purpose of detecting existing illegal activity, as well as deterrence of future illegal activity. The forty-eight hour requirement for reporting suspected drug activity would require landlords to respond quickly to any complaints.

The proposed statute, as premised on the above statutes from other states, would read in full:

> A property owner or agent of such owner with knowledge of a clandestine drug laboratory on his or her property shall report such knowledge and the property's location within forty-eight hours to the local law enforcement agency.[287] The property owner or agent of such owner may: 1) Enter and inspect, at reasonable times, any property for which there are reasonable grounds to believe it is being used as an illegal drug manufacturing site without meeting the standard notice requirements of the residential landlord-tenant act; 2) Periodically check the air quality of shared ventilation systems in multi-unit residences through either the use of air-sampling technology or simply via first hand observance of any unusual odors requiring further investigation to determine the source thereof; 3) Request law enforcement to enter a property for which there are reasonable grounds to believe illegal drug manufacturing is occurring on the premises,

281. *Id.*
282. *Id.*
283. U.S. ENV'T PROT. AGENCY, *supra* note 34.
284. *The Methamphetamine Problem: Question-And-Answer Guide*, INST. FOR INTERGOVERNMENTAL RES., http://www.iir.com/Justice_Training/centf/guide.aspx (last visited Nov. 27, 2010).
285. *See* Coleman, *supra* note 6, at 120-22.
286. *The Methamphetamine Problem: Question-And-Answer Guide*, *supra* note 284.
287. NEB. REV. STAT. § 71-2433 (2009).

> whether or not the owner or owner's agent has previously physically entered the property, and such request will be sufficient for grant of a warrant to law enforcement.[288] Shared ventilation systems in multi-unit residences will be, per this statute, considered a common area over which a landlord retains control and has a duty to maintain in a safe manner. A property owner or agent of such owner who knowingly violates this section may be subject to a civil penalty not to exceed one thousand dollars.[289] Any property owner or agent of such owner, who was not involved in the illegal drug manufacture on the premises, will have immunity from subsequent civil suits provided all provisions of this section are fulfilled and that, within forty-eight hours of law enforcement intervention on the property, notice is provided to all tenants in the same building of the presence of an illegal drug lab.[290] A property owner or agent of such owner who knowingly violates the provisions of this section repeatedly will be subject to state forfeiture proceedings authorized against real property under Title 63 of the Oklahoma Statutes.[291]

By passing this statute, the Oklahoma Legislature would achieve the goal of expanding landlord liability to encompass harm resulting from methamphetamine manufacture and its dangerous contaminants in the ventilation systems of multi-unit residences. The legislature would also now be requiring landlords to monitor their properties for evidence of methamphetamine manufacture, and the state would hold landlords liable for ongoing illegal activities on their property that they do not report to law enforcement. The overall statute expands both the existing statutory and common law duties a landlord owes his tenants.

CONCLUSION

In February 2001, law enforcement responded to a home fire, which fatally burned an infant.[292] The infant's parents ran from authorities, but law enforcement apprehended them several months later when they attempted to purchase more methamphetamine precursor components.[293] Stories like this one are common.[294] Methamphetamine manufacture has a devastating effect on "vulnerable populations," which is one of the reasons methamphetamine manufacture is such a significant concern to law enforcement.[295] Because of the dangers that methamphetamine manufacture and use present to society, particularly to those innocent individuals who have no control over their accidental exposure to the dangers associated with nearby manufacture, the more

288. OR. REV. STAT. § 453.873 (2009).
289. NEB. REV. STAT. § 71-2434 (2009).
290. MONT. CODE ANN. § 75-10-1305 (Westlaw through 2009 legislation).
291. *See generally* Uniform Controlled Dangerous Substances Act, OKLA. STAT. tit. 63, § 2-503 (2001 & Supp. 2010).
292. *Children at Risk*, *supra* note 1, at 3-4.
293. *Id.*
294. *See generally id.* at 3-4.
295. Williams, *supra* note 7, at 2.

tools the law enforcement possesses to stop these activities the better.[296]

Trends in landlord-tenant law, laws preventing methamphetamine manufacture, and societal and legal trends regarding the social acceptability of exposure to second-hand smoke all demonstrate openness to the expansion of the law in the manner proposed here. Landlord-tenant law has expanded in the last one hundred years to include higher expectations of landlords regarding monitoring and accessing their property in preventing illegal activities from impacting innocent tenants.[297] All fifty states are moving toward more comprehensive schemes regarding illegal drug manufacture in an attempt to eliminate this dangerous activity.[298] Recently, second-hand smoke has become a polarizing issue that implicates the realm of restricting private activity within the residence, thereby circumscribing the general concept that individuals are sovereigns in their own homes and thus, are only accountable in minimal ways for otherwise legal activities.[299]

The Oklahoma Legislature should introduce the legislation proposed in this article to expand landlord liability to include responsibility for harms caused by dangerous contaminants in the ventilation systems of multi-unit residences resulting from methamphetamine manufacture. Additionally, this state statute, if adopted, should require landlords to monitor their properties for evidence of methamphetamine manufacture, and the state should hold them liable for ongoing illegal activities on their property that they do not report to law enforcement. Such a law would expand the existing statutory and common law duty a landlord owes his tenants in a manner consistent with legal trends currently receiving acceptance from society as a whole.

—Shannon Holman*

296. *See id.*

297. *See generally* Petersen, *supra* note 11.

298. *See generally Cleanup, Remediation, or Demolition of Methamphetamine Houses*, *supra* note 9.

299. *See generally* Ezra, *supra* note 140.

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