

**NOTE**  
**PURPLE OR PINK:**  
**TIME TO RETHINK THE AVAILABILITY OF**  
**PROMETHAZINE WITH CODEINE**

I. INTRODUCTION

Imagine driving in your car during the summertime on the open road with the windows down, indulging in the cool breeze on your skin as you belt out the lyrics to a Grammy-nominated song on the radio.<sup>1</sup> “Two white cups and I got that drink, could be purple or could be pink,<sup>2</sup> depending on how you mix that . . . .”<sup>3</sup> For some, singing along to the lyrics is an innocent and joyous endeavor, but for others, the lyrics represent a deep-rooted history of medication misuse.<sup>4</sup>

Both prescription and over-the-counter (“OTC”) medications may be misused.<sup>5</sup> The term “misuse” is used interchangeably with the phrase “nonmedical use.”<sup>6</sup> These terms refer to using medications “other than in

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1. See *2011 Grammy Winners*, RECORDING ACAD., <https://www.grammy.com/awards/54th-annual-grammy-awards> [<https://perma.cc/3VUX-4JLN>] (last visited Dec. 2, 2023).

2. *Purple Drank Sippin Syrup*, SIERRA BY THE SEA, <https://www.sierrabythesea.com/addiction/articles/purple-drank-sippin-syrup> [<https://perma.cc/J6H2-WV73>] (last visited Dec. 2, 2023). Codeine and promethazine hydrochloride syrup (“CPHCS”) is commonly manufactured as a purple syrup, but when lighter-colored beverages such as soft drinks or alcohol are added to it, the purple color is diluted to pink. See *id.*

3. DJ Khaled, *DJ Khaled - I’m On One (Explicit Version) ft. Drake, Rick Ross, Lil Wayne*, YOUTUBE (July 11, 2011), <https://www.youtube.com/watch?v=Z09IYqdxqzo> [<https://perma.cc/6N3M-BD35>].

4. See “*Syrup*,” “*Purple Drank*,” “*Sizzurp*,” “*Lean*,” NAT’L INST. ON DRUG ABUSE (May 26, 2013), <https://archives.nida.nih.gov/news-events/emerging-trend/syrup-purple-drank-sizzurp-lean> [<https://perma.cc/8W9B-U7TG>] (alerting the public to the increasing popularity of recreationally consuming CPHCS among youths across the nation).

5. See Stefania Chiappini & Fabrizio Schifano, *What About “Pharming”? Issues Regarding the Misuse of Prescription and Over-the-Counter Drugs*, BRAIN SCIS., Oct. 2020, at 1, 1.

6. *Misuse of Prescription Drugs Research Report: Overview*, NAT’L INST. ON DRUG ABUSE (June 2020), <https://nida.nih.gov/publications/research-reports/misuse-prescription-drugs/overview> [<https://perma.cc/3NT7-43NK>]. Note that the term “abuse” is considered a form of “misuse” in that the main characteristic of drug abuse “is that the drug is used to obtain psychotropic effects, for example euphoria or sedation.” Ilona Piispa et al., *Nonmedical Use of Prescription Drugs: A Comparison Between Intoxication-Oriented and Other Nonmedical Users*, 39 NORDIC STUD. ON ALCOHOL & DRUGS 64, 65 (2022). In an effort to destigmatize addiction, the National Institute on Drug Abuse recommends replacing the word “abuse” with “misuse” or “use.” *Words Matter - Terms to Use and*

the manner or for the reasons or time period prescribed, or by a person for whom the [medication] was not prescribed.”<sup>7</sup> An individual may misuse medications unintentionally (e.g., by accidentally taking an antibiotic for seven days instead of five days) or intentionally (e.g., for recreational purposes).<sup>8</sup> The act of intentionally taking medications for non-medical uses has been termed “pharming,” and will be the focus of this Note.<sup>9</sup>

Some prescription medications that might instantly come to mind as commonly pharmed are benzodiazepines, such as Xanax (alprazolam);<sup>10</sup> stimulants, such as Adderall (amphetamine/dextroamphetamine);<sup>11</sup> or opioids, such as OxyContin (oxycodone).<sup>12</sup> In addition to these medications, perhaps surprisingly, cough syrups are pharmed.<sup>13</sup> OTC cough syrups, specifically dextromethorphan-containing syrups, such as NyQuil or Delsym, are ingested mainly for their hallucinogenic effects.<sup>14</sup>

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*Avoid When Talking About Addiction*, NAT’L INST. ON DRUG ABUSE (Nov. 29, 2021), <https://nida.nih.gov/nidamed-medical-health-professionals/health-professions-education/words-matter-terms-to-use-avoid-when-talking-about-addiction> [<https://perma.cc/7KPB-MDSX>].

7. UNITED NATIONS OFF. ON DRUGS & CRIME, THE NON-MEDICAL USE OF PRESCRIPTION DRUGS: POLICY DIRECTION ISSUES 1 (2011), <https://www.unodc.org/documents/drug-prevention-and-treatment/nonmedical-use-prescription-drugs.pdf> [<https://perma.cc/EP5C-RKC4>]. An example of misuse is “taking someone else’s prescription, even if for a legitimate medical complaint such as pain.” *Misuse of Prescription Drugs Research Report: Overview*, *supra* note 6.

8. See Piispa et al., *supra* note 6, at 65.

9. See Chiappini & Schifano, *supra* note 5, at 1.

10. DRUG ENF’T ADMIN., PRESCRIPTION FOR DISASTER: HOW TEENS ABUSE MEDICINE 4 (3d ed.), [https://www.dea.gov/sites/default/files/resource-center/Publications/DEA\\_Prescription-For-Disaster\\_508ver.pdf](https://www.dea.gov/sites/default/files/resource-center/Publications/DEA_Prescription-For-Disaster_508ver.pdf) [<https://perma.cc/Z9SV-7MEX>] (last visited Dec. 2, 2023). Benzodiazepines (“downers”) are commonly prescribed as anxiolytics, sedatives, and anticonvulsants. See *id.* at 37. Because they slow brain activity, side effects of benzodiazepines include drowsiness, impaired mental functioning, and blurred vision. See *id.* at 4. Symptoms of an overdose include shallow respiration, weak pulse, clammy skin, coma, and possibly death. See *id.* at 37.

11. *Id.* at 4. Stimulants (“uppers”) increase attention and alertness and are prescribed to treat attention-deficit/hyperactivity disorder (ADHD) and narcolepsy. See *id.* at 33. Side effects of stimulants include paranoia, irregular heartbeat, and increased body temperature. See *id.* at 4. Symptoms of an overdose include agitation, hallucinations, convulsions, and possibly death. See *id.* at 33.

12. *Id.* at 4. Opioids are prescribed to alleviate pain or suppress coughs. See *id.* at 27. Side effects of opioids include drowsiness and slowed breathing. See *id.* Symptoms of an overdose include confusion, convulsions, clammy skin, coma, and possibly death. See *id.*

13. See NAT’L INST. ON DRUG ABUSE, DRUG FACTS: COUGH AND COLD MEDICINE ABUSE 1 (May 2014) [hereinafter DRUG FACTS: COUGH AND COLD MEDICINE ABUSE], <https://perma.cc/8MRL-AKQY> (educating the public on cough syrups that are subject to pharming, the methods employed in pharming, and the associated health consequences).

14. See DRUG ENF’T ADMIN., DEXTROMETHORPHAN (STREET NAMES: DXM, CCC, TRIPLE C, SKITTLES, ROBO, POOR MAN’S PCP) (Dec. 2019), [https://www.deadiversion.usdoj.gov/drug\\_chem\\_info/dextro\\_m.pdf](https://www.deadiversion.usdoj.gov/drug_chem_info/dextro_m.pdf) [<https://perma.cc/V5RU-U3Q8>]. Dextromethorphan acts as a cough suppressant by binding to the *N*-methyl-*d*-aspartate (NMDA) receptors in the body. *Id.* Those who use dextromethorphan experience four dose-dependent plateaus: mild stimulation, followed by euphoria and hallucinations, then distorted visual perceptions and loss of motor control, and finally a dissociative (“out-of-body”) sedation. *Id.*

Codeine-containing cough syrups, such as Robitussin AC (codeine and guaifenesin)<sup>15</sup> or Phenergan V Codeine (codeine and promethazine hydrochloride),<sup>16</sup> are ingested for their euphoric effects.<sup>17</sup>

Codeine-containing cough syrups are unique compared to other opioid-containing medications because, in some states, individuals may legally purchase these syrups from a pharmacy without a prescription.<sup>18</sup> Other opioid-containing medications, in contrast, require a prescription prior to dispensing to the patient.<sup>19</sup> Allowing the sale of codeine-containing cough syrups without a prescription creates another opportunity for users to acquire the syrup for pharming,<sup>20</sup> in addition to perhaps some of the more “conventional” methods such as purchasing it from a drug dealer;<sup>21</sup> stealing the bottle from friends or family members<sup>22</sup> or from a pharmacy;<sup>23</sup> forging a prescription;<sup>24</sup> or obtaining a prescription from a physician.<sup>25</sup>

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In fact, these effects are similar to the ones experienced by users of phencyclidine (“PCP”) and ketamine, hence its street name “Poor Man’s PCP.” *Id.*

15. PRESCRIPTION FOR DISASTER: HOW TEENS ABUSE MEDICINE, *supra* note 10, at 28. Guaifenesin is an expectorant that works by thinning mucus in the air passages, allowing individuals to cough up the mucus and clear the airways. *Guaifenesin*, MEDLINEPLUS, <https://medlineplus.gov/druginfo/meds/a682494.html> [<https://perma.cc/E9A5-5KJJ>] (Jan. 15, 2022).

16. DRUG FACTS: COUGH AND COLD MEDICINE ABUSE, *supra* note 13, at 1. Promethazine is an antihistamine that treats nausea and vomiting, among other conditions. *See infra* Part II.A.

17. DRUG FACTS: COUGH AND COLD MEDICINE ABUSE, *supra* note 13, at 2. The euphoric effects of codeine-containing cough syrups have been described as “extreme relaxation,” “dream-like feelings,” and “a vivid sensation of floating away from the physical body.” Stefania Chiappini et al., *Beyond the ‘Purple Drank’: Study of Promethazine Abuse According to the European Medicines Agency Adverse Drug Reaction Reports*, 35 J. PSYCHOPHARMACOLOGY 681, 682 (2021).

18. *See* Sara Meyer & Moura Maseha, *Behind the Counter Codeine Preparations Require Diligent Care*, PHARMACY TIMES (June 20, 2022), <https://www.pharmacytimes.com/view/behind-the-counter-codeine-preparations-require-diligent-care> [<https://perma.cc/U9E6-LUY8>].

19. *See infra* Part III.A.2.

20. *See* Chiappini et al., *supra* note 17, at 682.

21. *See* William N. Elwood, *Sticky Business: Patterns of Procurement and Misuse of Prescription Cough Syrup in Houston*, 33 J. PSYCHOACTIVE DRUGS 121, 129 (2001).

22. *Id.*

23. *See* Press Release, U.S. Att’y’s Off., E. Dist. of N.Y., 12 Members and Associates of the “Route Boys” Charged with Multiple Burglaries, Drug Trafficking and Firearms Offenses (Apr. 19, 2023), <https://www.justice.gov/usao-edny/pr/12-members-and-associates-route-boys-charged-multiple-burglaries-drug-trafficking-and> [<https://perma.cc/S3AH-8QL3>] (reporting that twelve individuals were arrested after breaking into pharmacies in New York and stealing CPHCS); Press Release, U.S. Att’y’s Off., Dist. of N.J., Ten Jersey City Men Charged in Conspiracy to Burglarize More Than 40 Pharmacies (Apr. 18, 2023), <https://www.justice.gov/usao-nj/pr/ten-jersey-city-men-charged-conspiracy-burglarize-more-40-pharmacies> [<https://perma.cc/EGD4-78PL>] (reporting that ten individuals forcibly entered and burglarized, or attempted to burglarize, more than forty pharmacies throughout northern New Jersey and stole CPHCS).

24. *See* Press Release, San Diego Cnty. Dist. Att’y, California DHCS Investigators Assist in “Operation Purple Haze” (Sept. 24, 2014), <https://cslea.com/2014/09/california-dhcs-investigators-assist-in-operation-purple-haze> [<https://perma.cc/ABN5-2WU8>] (reporting that a group of nineteen

Although it is difficult to quantify the prevalence of pharming codeine cough syrups, the practice of pharming has been documented worldwide, including in the United States, United Kingdom, European Union, India, China, Japan, and South Africa.<sup>26</sup> Attempts to uncover the occurrence of pharming codeine and promethazine hydrochloride cough syrup (“CPHCS”) in the United States led to the following results: between 2000 to 2001, twenty-five percent of 494 seventh to twelfth graders in alternative schools in Texas reported opiate/codeine use in their lifetime, with ten percent reporting use within the thirty days preceding the interview;<sup>27</sup> between 2011 to 2012, 6.5% of 2,349 college students at a large public university in the southeastern United States reported using CPHCS in their lifetime.<sup>28</sup> Similarly, in 2018, CPHCS was the most commonly pharmed medication among 208 adult males in Kentucky,

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to twenty-four-year-olds forged more than fifty prescriptions for CPHCS cough syrup in California); Press Release, U.S. Att’y’s Off., S. Dist. of Ohio, 14 Charged with Making Fake Prescriptions to Obtain & Distribute Codeine Cough Syrups (Apr. 18, 2023), <https://www.justice.gov/usao-sdoh/pr/14-charged-making-fake-prescriptions-obtain-distribute-codeine-cough-syrups> [<https://perma.cc/7JBG-6636>] (reporting that fourteen individuals in their twenties forged fraudulent prescriptions for CPHCS throughout Ohio); Press Release, U.S. Att’y’s Off., Dist. of Neb., Chicago Woman Sentenced for Obtaining Promethazine with Codeine by Fraud (Apr. 19, 2023), <https://www.justice.gov/usao-ne/pr/chicago-woman-sentenced-obtaining-promethazine-codeine-fraud> [<https://perma.cc/M72F-EMRR>] (reporting that a twenty-four-year-old woman forged eleven prescriptions for CPHCS in Illinois).

25. Elwood, *supra* note 21, at 129.

26. See Laura E. Agnich et al., *Purple Drank Prevalence and Characteristics of Misusers of Codeine Cough Syrup Mixtures*, 38 ADDICTIVE BEHAVS. 2445, 2446 (2013) (observing that pharming of CPHCS occurs in the United States, Hong Kong, and India); Chiappini et al., *supra* note 17, at 682 (remarking that in Sweden, the yearly number of promethazine-related overdoses increased from 100 to nearly 700, correlating with a threefold increase in sales over the last decade; in Denmark, the number of antihistamine exposures increased from 2007 to 2013, with promethazine being responsible for most exposures and related fatalities); Jarrett M. Burns & Edward W. Boyer, *Antitussives and Substance Abuse*, 4 SUBSTANCE ABUSE & REHAB. 75, 75 (2013) (noting that codeine cough syrup abuse has been reported in China, Japan, India, and the United States since the 1990s); Press Release, Portia Nkambule, Acting CEO, S. Afr. Health Prods. Regul. Auth., Codeine Cough Syrup (July 2, 2019), <https://www.sahpra.org.za/newsroom/codeine-cough-syrup-press-release> [<https://perma.cc/VB66-6MNS>] (warning of non-medicinal use of codeine-containing cough syrups and reassuring the public that the South African Health Products Regulatory Authority was working with the relevant bodies to combat this misuse). The rate of smuggling codeine-based cough syrup out of India is so high that pharmaceutical companies have decreased the number of bottles manufactured per batch in an effort to combat the issue. Aditya Kalra & Paritosh Bansal, *India to Press Drug Firms to Tackle Cough Syrup Abuse*, REUTERS (Oct. 27, 2015, 7:24 AM), <https://www.reuters.com/article/india-pharma-codeine/india-to-press-drug-firms-to-tackle-cough-syrup-abuse-idINL3N12R2KD20151027> [<https://perma.cc/6A2G-KEEA>].

27. Ronald J. Peters, Jr. et al., *Drug Use Among Texas Alternative School Students: Findings from Houston’s Safer Choices 2 Program*, 35 J. PSYCHOACTIVE DRUGS 383, 384-85 (2003).

28. Agnich et al., *supra* note 26, at 2446-48. The study also found that use was more common in males than females. *Id.* at 2448.

with forty-five percent of participants reporting pharming CPHCS in their lifetime.<sup>29</sup>

This Note argues that this public health crisis can be traced to the ease of accessing the syrup.<sup>30</sup> To curb the non-medical use of CPHCS, Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, commonly known as the Controlled Substances Act (“CSA”), and Title 21 of the Code of Federal Regulations (“CFR”) should be amended to require (1) a prescription before dispensing schedule V substances in all states, akin to the requirements already in place for schedule III and schedule IV substances; and (2) photo identification prior to dispensing all controlled substance prescriptions.<sup>31</sup> This Note begins by providing a detailed history of CPHCS misuse.<sup>32</sup> Part III delves further into the issue of misuse by providing an overview of the history of controlled substances regulation in the United States and analyzing the legal loopholes that enable access to the syrup, such as the availability of the medication without a prescription in some states as well as the lack of national, uniform photo identification requirements prior to dispensing controlled substance prescriptions.<sup>33</sup> Part IV urges federal action and suggests a twofold solution in the form of amendments to the CSA and CFR.<sup>34</sup> Lastly, Part V concludes with a recapitulation of the key considerations and reemphasizes the urgent need for the proffered solution.<sup>35</sup>

## II. PROMETHAZINE WITH CODEINE PHARMING: A BRIEF HISTORY

This Part discusses the history of CPHCS use in the United States.<sup>36</sup> Subpart A begins with a summary of the medicinal uses for which CPHCS was first approved by the Food and Drug Administration (“FDA”).<sup>37</sup> Subpart B explores the origins of pharming CPHCS.<sup>38</sup> Subpart C examines current attitudes toward pharming CPHCS by describing the prevalence of news articles highlighting CPHCS misuse and chronicling its glamorization in the lyrics of hip-hop songs, on social

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29. Paris Wheeler et al., *Pre-Incarceration Rates of Nonmedical Use of Prescription Drugs Among Black Men from Urban Counties*, 95 J. URB. HEALTH 444, 446-47 (2018). The study recruited incarcerated Black men and asked about their pre-incarceration pharming habits. *Id.* at 446.

30. *See infra* Part II.D.

31. *See infra* Part IV.

32. *See infra* Part II.

33. *See infra* Part III.

34. *See infra* Part IV.

35. *See infra* Part V.

36. *See infra* Part II.

37. *See infra* Part II.A.

38. *See infra* Part II.B.

media, and on online forums.<sup>39</sup> Subpart D details the methods by which users procure CPHCS, highlighting areas where additional regulation is needed.<sup>40</sup>

### A. Medicinal Purposes of Promethazine with Codeine

Prior to the combination cough syrup, promethazine and codeine were initially both available as single-ingredient products.<sup>41</sup> Codeine is an opioid that has been FDA-approved since 1950 in the management of mild to moderate pain when alternative treatments are inadequate.<sup>42</sup> In 2013, the FDA added a boxed warning<sup>43</sup> to the prescribing information of codeine to include a contraindication against its use in children under the age of eighteen when post-operatively managing pain resulting from a tonsillectomy and/or adenoidectomy because of the increased risk of respiratory depression.<sup>44</sup> In 2017, the FDA added an additional boxed warning to codeine to include a contraindication against its use in children under the age of twelve when treating pain or cough because of the increased risk of respiratory depression and death.<sup>45</sup>

Promethazine is an antihistamine that has been FDA-approved since 1951<sup>46</sup> to treat allergic conditions, nausea and vomiting, and

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39. See *infra* Part II.C.

40. See *infra* Part II.D.

41. See A. Miuli et al., “Purple Drank” (Codeine and Promethazine Cough Syrup): A Systematic Review of a Social Phenomenon with Medical Implications, 52 J. PSYCHOACTIVE DRUGS 453, 454-55 (2020) (describing the chemistry and medicinal uses of each component of CPHCS).

42. FOOD & DRUG ADMIN., CODEINE SULFATE [PACKAGE INSERT] 1, [https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2019/202245s0081b1.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2019/202245s0081b1.pdf) [<https://perma.cc/M5FF-BF6E>] (Oct. 2019).

43. *Id.* A boxed warning (commonly referred to as a black box warning) is “the most serious type of warning mandated by the [FDA].” Nina R. O’Connor, *FDA Boxed Warnings: How to Prescribe Drugs Safely*, 81 AM. FAM. PHYSICIAN 298, 298 (2010). As a result, they are prominently featured in the labeling of drugs in a black box to warn prescribers about serious adverse reactions. *Id.* They are commonly added when (1) an adverse reaction is so serious (such as permanent disability or fatal reaction) in comparison to the drug’s benefits that extra consideration is essential when assessing the risks versus benefits of the drug; (2) an adverse reaction may be prevented or reduced in severity by appropriate prescribing (such as avoiding certain patient populations or entailing additional laboratory monitoring); or (3) mandatory restrictions are in place to ensure safe use (such as certification programs or necessitating administration in supervised or inpatient settings). *Id.* at 299-300.

44. *FDA Restricts Use of Prescription Codeine Pain and Cough Medicines and Tramadol Pain Medicines in Children; Recommends Against Use in Breastfeeding Women*, FOOD & DRUG ADMIN. (Apr. 20, 2017), <https://www.fda.gov/drugs/drug-safety-and-availability/fda-drug-safety-communication-fda-restricts-use-prescription-codeine-pain-and-cough-medicines-and> [<https://perma.cc/DU9Y-F9LH>].

45. *Id.*

46. Peter R. Starke et al., *Boxed Warning Added to Promethazine Labeling for Pediatric Use*, 352 NEW ENG. J. MED. 2653, 2653 (2005).

motion sickness.<sup>47</sup> It may also be used in combination with other analgesics to provide pre- or post-operative sedation.<sup>48</sup> In 2004, a boxed warning was added to the prescribing information of promethazine to include a contraindication for use in children less than two years of age and a strengthened warning with regard to its use in children two years or older due to an increased risk of respiratory depression.<sup>49</sup>

In combination, promethazine with codeine has been available as a syrup since 1952 for the temporary relief of cough and upper respiratory symptoms associated with allergies or the common cold.<sup>50</sup> The usual dose is five milliliters (equivalent to ten milligrams of codeine) every four to six hours as needed for up to five days, with a maximum of six doses (thirty milliliters) in twenty-four hours.<sup>51</sup> The combination was approved for this use because “codeine is believed to act centrally on the cough center” while promethazine prevents edema of the respiratory mucosa.<sup>52</sup> However, since 1997, clinicians have warned against the ineffectiveness of codeine-containing cough syrups in children.<sup>53</sup> Since 2001, studies have called into question codeine’s efficacy as a cough suppressant in the adult population as well.<sup>54</sup>

Moreover, the mixture is far from innocuous, though some may erroneously believe otherwise.<sup>55</sup> The cough syrup can cause addiction<sup>56</sup>

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47. Brittin T. Southard & Yasir Al Khalili, *Promethazine*, STATPEARLS, <https://www.ncbi.nlm.nih.gov/books/NBK544361> [<https://perma.cc/864Q-CV3Y>] (July 21, 2022).

48. *Id.*

49. Starke et al., *supra* note 46, at 2653.

50. FOOD & DRUG ADMIN., PROMETHAZINE HCL AND CODEINE PHOSPHATE [PACKAGE INSERT] 1, [https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2018/008306s034lbl.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2018/008306s034lbl.pdf) [<https://perma.cc/SRQ5-JKFN>] (June 2018).

51. *Id.* at 1, 5. According to the package insert, the syrup should be prescribed for the shortest duration possible, and patients should be reevaluated if their symptoms persist after five days. *Id.* at 1.

52. *Id.* at 23.

53. See Am. Acad. Pediatrics Comm. on Drugs, *Use of Codeine- and Dextromethorphan-Containing Cough Remedies in Children*, 99 PEDIATRICS 918, 919 (1997) (concluding that there have been no well-controlled studies to support the use of these cough remedies in children and that fluids and humidity are effective alternatives for treating short-lived coughs caused by viral infections).

54. See Knut Schroeder & Tom Fahey, *Over-the-Counter Medications for Acute Cough in Children and Adults in Ambulatory Settings*, COCHRANE DATABASE SYSTEMATIC REVIEWS., 2001, at 1, 5 (summarizing that, in two studies, codeine was “no more effective than placebo in reducing cough symptoms”).

55. See Elwood, *supra* note 21, at 126 (explaining that users view CPHCS as less harmful than other illegal drugs such as cocaine because it is a medicinal product that is approved and regulated by the federal government).

56. See Ying-wei Qiu et al., *Reduced Ventral Medial Prefrontal Cortex (vmPFC) Volume and Impaired vmPFC-Default Mode Network Integration in Codeine-Containing Cough Syrups Users*, 134 DRUG & ALCOHOL DEPENDENCE 314, 317-19 (2014) (finding that a longer duration of codeine-containing cough syrup consumption was correlated with decreased gray matter in the pre-

and brain damage.<sup>57</sup> An overdose of codeine can lead to cold and clammy skin; a decrease in respiratory rate, heart rate, and blood pressure; extreme somnolence leading to a coma; seizures; cardiac arrest; and death.<sup>58</sup> Promethazine toxicity can similarly lead to a decrease in respiratory rate and blood pressure, altered mental status, unconsciousness, and even death.<sup>59</sup> If CPHCS is combined with alcohol or other drugs, as is often the case,<sup>60</sup> then the risk of side effects and death is further compounded.<sup>61</sup> In spite of these side effects, the syrup continues to remain on the market.<sup>62</sup>

### B. The Origins of Pharming

It did not take many years after the FDA approved CPHCS for pharming to begin.<sup>63</sup> While some individuals will consume CPHCS in excess quantities straight from the bottle,<sup>64</sup> others seek to mask the bitter taste of the cough syrup<sup>65</sup> by adding additional substances and drinking

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frontal cortex of the brain, leading to increased impulsive behaviors and compulsive drug seeking as well as decreased attentional orientation and self-monitoring).

57. See Haifeng Hou et al., *Decreased Striatal Dopamine Transporters in Codeine-Containing Cough Syrup Abusers*, 118 *DRUG & ALCOHOL DEPENDENCE* 148, 150 (2011) (suggesting that the decreased striatal dopamine transporter levels and reduced volume and weight of bilateral corpus striatum seen in participants dependent on codeine-containing cough syrups is indicative of the fact that the syrup causes brain damage).

58. Burns & Boyer, *supra* note 26, at 79.

59. *Id.* Out of the 1,543 adverse drug reactions related to promethazine contained in the EudraVigilance database from 2003 to 2019, the United States accounted for the most reported promethazine-related “abuse/misuse/dependence” cases. Chiappini et al., *supra* note 17, at 684.

60. See Chiappini et al., *supra* note 17, at 685-86 (listing the drugs commonly used concomitantly with CPHCS: opioids, benzodiazepines, antidepressants, alcohol, and cocaine); Elwood, *supra* note 21, at 127 (describing how users will smoke marijuana treated with codeine cough syrup).

61. *DRUG FACTS: COUGH AND COLD MEDICINE ABUSE*, *supra* note 13, at 2 (warning that mixing CPHCS with alcohol greatly increases the risk of a fatal overdose death due to the additive central nervous system depressant effects).

62. See *Drug Scheduling*, *DRUG ENF’T ADMIN.*, <https://www.dea.gov/drug-information/drug-scheduling> [<https://perma.cc/6Z7S-2DY4>] (last visited Dec. 2, 2023) (listing Robitussin AC as an example of a schedule V controlled substance which has a “lower potential for abuse” relative to substances listed in schedule IV).

63. See *infra* Part II.B.1.

64. Elwood, *supra* note 21, at 126 (pointing out that some individuals prefer to consume codeine cough syrup “undiluted”).

65. See Michael Weintraub & Mauro Moscucci, *Taste Preference for Cough Syrups: A Comparative Study of Three Codeine-Containing Medications*, 8 *CLINICAL THERAPEUTICS* 348, 352 (1986). The bitter taste of CPHCS has been described in literature since at least 1986. See *id.* In this study, participants were asked to rate the taste of CPHCS (along with two other codeine-containing cough syrups) on a scale from +2 (very good) to -2 (very poor). *Id.* at 348, 350. The mean score of CPHCS was 0.14, with participants citing bitterness as a reason for the low score. *Id.* at 351. The bitter taste continued into the 1990s and beyond, with another interview participant proclaiming that one “can’t drink it straight; it tastes *nasty!*” Elwood, *supra* note 21, at 127 (emphasis in original).

the mixture from double Styrofoam cups.<sup>66</sup> These substances include ice; soft drinks (most commonly, Sprite); hard candies (such as Jolly Ranchers); and sometimes alcohol.<sup>67</sup> Some individuals might elect to replace the carbonated soft drinks with juice or sports drinks, in accordance with their taste preferences.<sup>68</sup> Colloquially, this mixture is commonly referred to as “drank,” “purple drank,” “lean,”<sup>69</sup> “syrup,” “sizzurp,” “dirty Sprite,” “Texas tea,” “Act,” and “barre.”<sup>70</sup> With these sweeter substances improving the taste of the syrup, users consume the mixture at a faster rate than they ordinarily would.<sup>71</sup>

Those who consume CPHCS experience euphoria, which occurs when codeine binds to mu-opioid receptors in the body.<sup>72</sup> Users may also feel a calming, sedative effect caused by promethazine’s activity

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66. Susannah Breslin, *How to Drink Your Lean with Slomocup*, FORBES (Sept. 14, 2015, 2:08 PM), <https://www.forbes.com/sites/susannahbreslin/2015/09/14/lean-cup/?sh=6e29747d212c> [<https://perma.cc/83JH-NW7X>]. Two double-stacked Styrofoam cups are employed to keep the ice cold and to prevent leaks. *Id.* To capitalize on the Styrofoam cups, one entrepreneur invented and sold a plastic, reusable, colorfully designed cup named “Slomocup,” primarily for consumption of CPHCS. *Id.*

67. See Ronald J. Peters et al., *Beliefs and Social Norms About Codeine and Promethazine Hydrochloride Cough Syrup (CPHCS) Onset and Perceived Addiction Among Urban Houstonian Adolescents: An Addiction Trend in the City of Lean*, 33 J. DRUG EDUC. 415, 422 (2003) [hereinafter Peters et al., *Houston Adolescents Study*]; *Fast Facts: Sizzurp*, METRO DRUG COAL., <https://metrodrug.org/fast-facts-sizzurp> [<https://perma.cc/U34T-GRH6>] (last visited Dec. 2, 2023).

68. U.S. DEP’T OF JUST., DRUG ALERT WATCH: RESURGENCE IN ABUSE OF ‘PURPLE DRANK’ 1 (2011), <https://www.justice.gov/archive/ndic/pubs43/43924/sw0008p.pdf> [<https://perma.cc/4PKH-ZJZP>].

69. *Lean*, NAT’L ASS’N DRUG DIVERSION INVESTIGATORS, <https://www.naddi.org/glossary/lean> [<https://perma.cc/889R-R4QW>] (last visited Dec. 2, 2023). The street name “lean” is thought to have come about due to the posture that users assume when intoxicated because of their inability to stand up straight. *Id.*

70. See *id.*; DRUG FACTS: COUGH AND COLD MEDICINE ABUSE, *supra* note 13, at 2; DRUG ENF’T ADMIN., DRUG SLANG CODE WORDS 7 (2017), <https://www.dea.gov/sites/default/files/2018-07/DIR-020-17%20Drug%20Slang%20Code%20Words.pdf> [<https://perma.cc/HC4R-2KCJ>].

71. See Letter from Tonia Thompson, Superintendent of Schs., Binghamton City Sch. Dist., to Binghamton Families (Dec. 2018), [https://cdn5-ss14.sharpschool.com/UserFiles/Servers/Server\\_512723/File/For%20Parents/Community%20Alerts/2018-2019/Lean%20Purple%20Drank.pdf](https://cdn5-ss14.sharpschool.com/UserFiles/Servers/Server_512723/File/For%20Parents/Community%20Alerts/2018-2019/Lean%20Purple%20Drank.pdf) [<https://perma.cc/2R43-QJCG>] (warning parents that combining the cough syrup with sugary drinks promotes rapid consumption, leading to harmful effects).

72. DRUG FACTS: COUGH AND COLD MEDICINE ABUSE, *supra* note 13, at 2. To date, five types of opioid receptors have been discovered: mu (MOR), kappa (KOR), delta (DOR), nociception (NOR), and zeta (ZOR). Armaan Dhaliwal & Mohit Gupta, *Physiology, Opioid Receptor*, STATPEARLS, <https://www.ncbi.nlm.nih.gov/books/NBK546642> [<https://perma.cc/9FW4-H4DT>] (July 25, 2022). The mu-receptors are involved in analgesia and euphoria, the kappa receptors in analgesia and dysphoria, the delta receptors in analgesia and a reduction in gastric motility, the nociception receptors in both analgesia and hyperalgesia, and the zeta receptors in the development of normal and tumorigenic tissues and cells. *Id.*

function as a central nervous system (“CNS”) depressant.<sup>73</sup> Slight giddiness, disorientation, and hallucinations have also been reported.<sup>74</sup> Some have even described the high as “close as [one] can come to heroin, even better than Dilaudid[] [hydromorphone].”<sup>75</sup>

Experimentation with CPHCS continues to persist because of the attitudes and beliefs surrounding the syrup.<sup>76</sup> The media, peer pressure, accessibility, and the euphoric effects of the syrup contribute to pharming in middle and high school students.<sup>77</sup> The perception of CPHCS as “cool” leads to pharming among college students.<sup>78</sup> Among older adults, CPHCS is seen as a “status symbol,” due to its high street price, and the “drug of choice for people who can afford the so-called better drugs.”<sup>79</sup>

### 1. Texas in the 1960s

CPHCS has been consumed recreationally since the 1960s primarily in and around Houston, Texas, as well as other parts of the Southern United States.<sup>80</sup> During this time, blues musicians began experimenting with cough syrup and beer, later replacing beer with wine coolers and soda to mask the taste of the syrup.<sup>81</sup> Others, primarily those in their youth, began experimenting with the cough syrup as well, purchasing

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73. DRUG FACTS: COUGH AND COLD MEDICINE ABUSE, *supra* note 13, at 2. Other examples of CNS depressants include benzodiazepines and barbiturates. *Prescription CNS Depressants DrugFacts*, NAT’L INST. ON DRUG ABUSE (Mar. 2018), <https://nida.nih.gov/publications/drugfacts/prescription-cns-depressants> [https://perma.cc/QFC4-8UE5]. CNS depressants are so named because they slow brain activity, making them useful treatments for anxiety, panic, and sleep disorders. *See id.*

74. Chiappini et al., *supra* note 17, at 682.

75. Elwood, *supra* note 21, at 128.

76. *See* Ronald Peters, Jr. et al., *Beliefs and Social Norms About Codeine and Promethazine Hydrochloride Cough Syrup (CPHCS) Use and Addiction Among Multi-Ethnic College Students*, 39 J. PSYCHOACTIVE DRUGS 277, 281 (2007) [hereinafter Peters et al., *College Students Study*] (finding that because CPHCS ingestion can be seen as a “normal social event,” it is difficult for users to cease consumption).

77. Peters et al., *Houston Adolescents Study*, *supra* note 67, at 417-18.

78. Peters et al., *College Students Study*, *supra* note 76, at 281.

79. Associated Press, *Purple Drank Popularity Growing in NFL Arena*, ESPN (July 9, 2010, 5:42 PM), [http://www.espn.com/espn/wire/\\_/section/nfl/id/5367695](http://www.espn.com/espn/wire/_/section/nfl/id/5367695) [https://perma.cc/C9DV-TZR4] (quoting Dr. Ronald Peters).

80. DRUG ALERT WATCH: RESURGENCE IN ABUSE OF ‘PURPLE DRANK,’ *supra* note 68, at 2.

81. Timothy Bella, *Hip-Hop’s Unlikeliest Icons: Promethazine Codeine Syrup Manufacturers*, BLOOMBERG (Mar. 9, 2017, 5:00 AM), <https://www.bloomberg.com/news/features/2017-03-09/hip-hop-s-unlikeliest-icons-promethazine-codeine-syrup-manufacturers> [https://perma.cc/6Y58-U6AL]; Max Blau, *The Story of How Lean Became Hip-Hop’s Heroin*, SPLINTER (Aug. 9, 2016), <https://splinternews.com/the-story-of-how-lean-became-hip-hops-heroin-1793861031> [https://perma.cc/6J7Q-QVHF].

bottles from pharmacies by signing a logbook, often under a fake name.<sup>82</sup>

At some point, the practice declined in popularity.<sup>83</sup> It has been proposed that this shift can be attributed to changes in dispensing requirements.<sup>84</sup> Though it has not been explicitly stated, it is not difficult to fathom that the impetus behind this change was the introduction of scheduled controlled substances in the CSA which made it more difficult to procure controlled substances, including CPHCS, in general.<sup>85</sup>

## 2. Resurgence in the 1990s

In the 1990s, CPHCS pharming was revived.<sup>86</sup> This revival is attributed to the lyrics of songs belonging to a new genre of hip-hop music in the Houston-based underground music scene.<sup>87</sup> The genre, created by artist DJ Screw, was called “chopped and screwed,” or “screw” for short, and featured slow beats.<sup>88</sup> The songs referenced lean with such regularity that screw music became synonymous with lean consumption as listeners sought to emulate the behavior discussed in the lyrics.<sup>89</sup>

After experimenting with the syrup, users continued pharming for a myriad of reasons.<sup>90</sup> In a study of CPHCS use in Houston, those over the age of thirty preferred to consume lean in solitude to fall asleep and

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82. Elwood, *supra* note 21, at 126 (interviewing a Texan woman in her late forties who recalled that, in her youth, she and her friends would pool their money together, go to the drug store, sign a register log with “any name [they] wanted . . . never sign[ing their] own,” and purchase a bottle of CPHCS).

83. See DRUG ALERT WATCH: RESURGENCE IN ABUSE OF ‘PURPLE DRANK,’ *supra* note 68, at 2 (mentioning that there was a “revival” of CPHCS use, implying that it had fallen out of favor for a period of time).

84. Elwood, *supra* note 21, at 126 (relaying that interview participants “recalled their adolescence and young adulthood, when there were fewer restrictions on codeine cough syrup than the present and one could purchase the substance off the shelf in pharmacies”).

85. See *infra* Part III.A.

86. DRUG ALERT WATCH: RESURGENCE IN ABUSE OF ‘PURPLE DRANK,’ *supra* note 68, at 2.

87. Peters et al., *Houston Adolescents Study*, *supra* note 67, at 416.

88. Agnich et al., *supra* note 26, at 2445. The slowed-down beats were described by DJ Screw as representing the effects of smoking marijuana, though some who listen to the music associate it with the CNS depressant effects of CPHCS. Jesse Serwer, *DJ Screw: From Cough Syrup to Full-Blown Fever*, GUARDIAN (Nov. 11, 2010, 5:05 PM), <https://www.theguardian.com/music/2010/nov/11/dj-screw-drake-fever-ray> [https://perma.cc/79J7-QXY5].

89. See Serwer, *supra* note 88; see also Miuli et al., *supra* note 41, at 453 (explaining that mass media can influence the perceptions, attitudes, beliefs, and behaviors associated with drug abuse, since the “proximity [of the behavior] leads to imitation”). The connection between screw music and lean was cemented after DJ Screw passed away at the age of twenty-nine in 2000 from an overdose of codeine, attributed to CPHCS use. See Serwer, *supra* note 88.

90. See Elwood, *supra* note 21, at 126-27.

escape “the harsh realities of life.”<sup>91</sup> Those under the age of thirty preferred to consume lean with friends at their homes to relax or in dance clubs for the prestige that comes with drinking shot glasses half-filled with alcohol and half-filled with CPHCS.<sup>92</sup> Users often paid more for the syrup in nightclubs, with the price in nightclubs averaging fifty-five to sixty-five dollars per eight-ounce bottle in 1997, compared with twenty-five dollars on the street.<sup>93</sup> Though, as the popularity of pharming CPHCS became more widespread, the street price rose to between sixty to eighty dollars in 1998 and to \$200 in 1999.<sup>94</sup>

### C. Pharming Today

Today, there is open discourse about CPHCS pharming in news articles, in the lyrics of hip-hop songs, on social media, and on online forums.<sup>95</sup> This dialogue can have a beneficial effect on public health efforts since researchers have employed social listening<sup>96</sup> to ascertain public sentiments about pharming of both controlled and non-controlled medications.<sup>97</sup> The increased transparency also caused some manufacturers of CPHCS, specifically Actavis, to cease manufacturing the product altogether in an effort to curb the misuse.<sup>98</sup> Moreover, community pharmacies, including Rite Aid and Walmart, have stopped stocking CPHCS in their own effort to combat its misuse.<sup>99</sup>

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91. *Id.* at 126.

92. *Id.* at 124, 127.

93. *Id.* at 124.

94. *Id.*

95. *See infra* Part II.C.

96. Laurie S. Anderson et al., *Using Social Listening Data to Monitor Misuse and Nonmedical Use of Bupropion: A Content Analysis*, J. MED. INTERNET RSCH. PUB. HEALTH & SURVEILLANCE, 2017, at 51, 53. Social listening is the process of identifying what individuals are saying on electronic interactive media regarding a company, product, brand, or individual. *See id.*

97. *See id.*

98. Jason MacNeil, *Actavis Reportedly Pulls Cough Syrup After Musicians Cast Product in Bad Light*, HUFFPOST (Apr. 23, 2014, 12:58 PM), [https://www.huffpost.com/archive/ca/entry/actavis-reportedly-pulls-cough-syrup-after-musicians-cast-product\\_n\\_5199240](https://www.huffpost.com/archive/ca/entry/actavis-reportedly-pulls-cough-syrup-after-musicians-cast-product_n_5199240) [<https://perma.cc/GW3W-YWQM>] (detailing that Actavis ceased production and sales of CPHCS because of media attention which “glamorized the unlawful and dangerous use of the product,” contrary to its FDA-approved indication).

99. *See* COMMONWEALTH OF MASS. BD. OF REGISTRATION IN PHARMACY, NOTICE OF THE REGULARLY SCHEDULED MEETING OF THE BOARD OF REGISTRATION IN PHARMACY 9 (Sept. 1, 2022), <https://www.mass.gov/doc/board-of-pharmacy-meeting-agenda-and-minutes-september-1-2022/download> [<https://perma.cc/45LK-BRSQ>] (indicating that Rite Aid and Walmart “petitioned the [Massachusetts Board of Registration in Pharmacy] not to stock promethazine with codeine”); *see also* Space (@sacrib), TWITTER (June 27, 2022, 7:00 PM), <https://twitter.com/sacrib/status/1541557096910815233/photo/1> [<https://perma.cc/7DE2-RZFG>] (posting a photograph of a sign in a Walmart that read, “We no longer stock Promethazine with Codeine” with the caption “nooo [W]almart caught on,” implicitly referring to lean consumption).

## 1. News Media Attention

The media directs its focus to CPHCS and its health effects when a celebrity, be it a musician or football player in the National Football League (“NFL”), is linked to CPHCS use.<sup>100</sup> For instance, in 2008, magazines such as *Rolling Stone* reported that rapper Pimp C’s cause of death was partly attributed to an overdose of CPHCS.<sup>101</sup> In 2010, the sports outlet ESPN detailed the growing popularity of CPHCS use in the NFL after a player, JaMarcus Russell, was arrested for possession of the cough syrup.<sup>102</sup> In 2013, newspapers such as the *Los Angeles Times* described the recreational use of CPHCS in the music industry after rapper Lil Wayne, a known CPHCS user, was hospitalized following a seizure.<sup>103</sup> And, again, in 2020, news sites focused their attention on CPHCS after musician Justin Bieber admitted to past use of CPHCS, among other drugs.<sup>104</sup>

## 2. Hip-Hop Culture

CPHCS is embedded in hip-hop culture.<sup>105</sup> Some artists have elected to intertwine their entire identity with CPHCS by choosing stage

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100. See Jeff Rossen & Josh Davis, *What’s ‘Sizzurp’? A Dangerous Way for Kids to Get High*, TODAY (Jan. 23, 2014, 8:38 AM), <https://www.today.com/news/whats-sizzurp-dangerous-way-kids-get-high-2D11976739> [<https://perma.cc/J7QZ-NXT6>] (warning parents about the dangers of CPHCS misuse after rapper Lil Wayne was hospitalized after reportedly overdosing on codeine); see also Bryan Lee Miller et al., *Marketing a Panic: Media Coverage of Novel Psychoactive Drugs (NPDs) and Its Relationship with Legal Changes*, 40 AM. J. CRIM. JUST. 523, 530-31, 534 (2015) (examining print media coverage of novel psychoactive drugs in the United States between 2005 and 2013 and finding that CPHCS was the topic of thirteen percent of 715 articles studied, and that the primary focus of these articles was a demographic profile of users).

101. Daniel Kreps, *Coroner: Pimp C Died of Accidental Cough Syrup Overdose, Sleep Apnea*, ROLLING STONE (Feb. 4, 2008), <https://www.rollingstone.com/music/music-news/coroner-pimp-c-died-of-accidental-cough-syrup-overdose-sleep-apnea-75980> [<https://perma.cc/G272-7LT4>].

102. *Purple Drank Popularity Growing in NFL Arena*, *supra* note 79 (quoting Marcellus Wiley, a former NFL player, as commenting that CPHCS use “invaded” the sports locker room when the late Terrence Kiel, another former NFL player, pleaded guilty in 2007 to felony and misdemeanor drug charges for shipping prescription cough syrup to Texas, and had been “picking up some steam” in the NFL because “[i]t doesn’t have the negative connotation it should”).

103. Chris Lee, *Lil Wayne Seizure Puts Spotlight on Rappers’ Use of ‘Sizzurp,’* L.A. TIMES (Mar. 23, 2013, 5:00 AM), <https://www.latimes.com/entertainment/music/posts/la-et-ms-lil-wayne-sizzurp-codeine-20130321-story.html> [<https://perma.cc/B3GM-PG9T>].

104. Anna Medaris, *Justin Bieber Said Security Had to Check His Pulse Every Night at the Height of His Addiction to Weed, Lean, and Pills*, INSIDER (Feb. 3, 2020, 1:17 PM), <https://www.insider.com/justin-bieber-talks-about-addiction-to-weed-lean-pills-2020-2> [<https://perma.cc/5Z4T-DRHV>] (quoting Bieber as saying that his substance abuse was “serious” and he “felt like [he] was . . . dying”).

105. See Bella, *supra* note 81 (chronicling how CPHCS first became ingrained in hip-hop culture and continues to be prevalent today); see also Rossen & Davis, *supra* note 100 (observing that

names such as “Yung Lean.”<sup>106</sup> Some have named entire songs after CPHCS, such as “Drank in My Cup.”<sup>107</sup> Others reference CPHCS, along with other substances such as ecstasy, oxycodone, and Xanax, in the lyrics of a multitude of songs.<sup>108</sup> The lyrics have not gone unnoticed, and as a result, articles have been written in the lay media discussing such songs.<sup>109</sup> Furthermore, researchers have studied the connection between music and lean consumption, finding that college students who were raised in urban environments and prefer rap/hip-hop music or rock/alternative music are at higher risk for reporting lean use than listeners of other types of music, such as country music or jazz.<sup>110</sup>

Researchers also reviewed the lyrics of forty of these songs in an effort to identify common themes within them that can be utilized to guide future interventions to counteract the influence of these songs.<sup>111</sup> The eight identified themes promote pharming CPHCS.<sup>112</sup> The most common theme involves combining lean with other drugs (37.5%),<sup>113</sup> which, as previously noted, increases the likelihood of overdose or health complications.<sup>114</sup> The second most common theme is the general mention of lean without a connection to a behavior, activity, emotion, or another substance (27.5%), which normalizes recreational use and makes it enticing to listeners.<sup>115</sup> The third most common theme is the use of lean during sexual activity (15%), which is troubling since individuals

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the growing popularity of CPHCS misuse has been exacerbated by the syrup’s glamorization in songs and internet videos).

106. Naa-Solo Tettey et al., *Purple Drank, Sizzurp, and Lean: Hip-Hop Music and Codeine Use, A Call to Action for Public Health Educators*, INT’L J. PSYCH. STUD., Mar. 2020, at 42, 43.

107. *See id.* at 45-49 (analyzing songs, some of which are titled “Servin’ Lean,” “Lean,” “2 Cups,” “Dirty Sprite,” “Zan with that Lean,” “Molly with Lean,” “Just Lean,” and “Sippin on Some Syrup”).

108. *See id.* at 43, 50.

109. *See A History of ‘Sizzurp’ in Song*, L.A. TIMES, <https://www.latimes.com/entertainment/music/posts/la-et-ms-lean-purple-drank-sizzurp-pictures-photogallery.html> [<https://perma.cc/F358-5KB7>] (last visited Dec. 2, 2023) (listing seven songs that mention CPHCS); *see also 57 Songs About Lean (Pop, Rap & More)*, FOUNDS. MUSIC (Aug. 19, 2022), <https://foundationsofmusic.org/songs-about-lean> [<https://perma.cc/9JYF-JMG4>].

110. Melanie Hart et al., ‘*Me and My Drank: Exploring the Relationship Between Musical Preferences and Purple Drank Experimentation*, 39 AM. J. CRIM. JUST. 172, 179-80 (2014). The study was conducted in 2012 and surveyed 2,349 students at a large public university in the southeastern United States. *Id.* at 174, 177.

111. Tettey et al., *supra* note 106, at 42-43.

112. *Id.* at 49.

113. *Id.* One such lyric, “Zan with that lean,” from Soulja Boy’s song of the same name, references the mixture of Xanax with CPHCS. *Id.* at 47.

114. *See supra* note 61 and accompanying text.

115. Tettey et al., *supra* note 106, at 50. An example of this type of lyric can be found in A\$AP Rocky’s song titled “Servin’ Lean”: “Since my early teens, I been sitting clean, mixing, sipping lean.” *Id.* at 45.

are more likely to make poor sexual health decisions when under the influence of drugs due to decreased inhibitions.<sup>116</sup>

The remaining themes are also worrisome.<sup>117</sup> Lyrics regarding the mixture of lean with soda (12.5%) again may lure listeners into trying the mixture due to a false perception that combining lean with soda and candy makes the mixture innocuous.<sup>118</sup> The theme of drinking lean as an alternative to alcohol (5%) promotes the misconception that it is not dangerous when in actuality one harmful substance is being replaced with another.<sup>119</sup> Songs depicting the use of lean while driving (5%) are also problematic because the consequences of driving while impaired can be grave.<sup>120</sup> The remaining themes of drinking lean to help with sleep (5%) and for mental distress (5%) endorse unhealthy coping strategies for mental and emotional states.<sup>121</sup>

### 3. Social Media Platforms

Social media sites offer real-time understanding of the attitudes, beliefs, and culture around pharming of medications, including how it is occurring and being perpetuated through social platforms.<sup>122</sup> For instance, studies of Twitter conversations about the nonmedical use of prescription opioids revealed that Twitter users commonly post about polysubstance use as well as trafficking prescription opioids.<sup>123</sup> Similarly, an analysis of 100 public Instagram posts related to codeine

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116. *Id.* at 50. An example of this type of lyric is seen in Nas's song titled "Hip Hop": "She slowed me down and had me guzzling on cups of lean." *Id.* at 48.

117. *See id.* at 50-51.

118. *Id.* at 50. An example of this type of lyric is evidenced by Migos's song titled "Hannah Montana": "I'm drinking the lean out the Fanta." *Id.* at 44.

119. *Id.* at 50. An example of this type of lyric is highlighted by Chief Keef's song titled "Ight Doe": "I don't drink liquor but I sip lean, though . . . I [paid] 600 for this pint, though." *Id.* at 44.

120. *Id.* at 50. A representative lyric from this category is found in Juicy J's song titled "Smoke": "Cali weed in a dutch/Purple lean in my cup/Smokin' while I'm drivin'." *Id.* at 46.

121. *Id.* at 50. A lyric discussing sleep is included in French Montana's song "Work": "I'm drinkin' lean, it help me sleep." *Id.* at 44. A lyric involving mental distress is referenced in Lil Bibby's song "Stressin'": "Ain't enough smoke/Ain't enough lean/You ain't did what I did/You ain't seen what I've seen." *Id.* at 46-47.

122. Roy Cheria et al., *Representations of Codeine Misuse on Instagram: Content Analysis*, J. MED. INTERNET RSCH. PUB. HEALTH & SURVEILLANCE, 2018, at 97, 98.

123. *See* Janani Kalyanam et al., *Exploring Trends of Nonmedical Use of Prescription Drugs and Polydrug Abuse in the Twittersphere Using Unsupervised Machine Learning*, 65 ADDICTIVE BEHAVS. 289, 293 (2017) (noting that out of 2.3 million tweets with content related to nonmedical use of prescription medications or drugs, the most common theme was polydrug abuse); Tim K. Mackey et al., *Twitter-Based Detection of Illegal Online Sale of Prescription Opioid*, 107 AM. J. PUB. HEALTH 1910, 1912 (2017) (finding that out of 619,937 tweets containing references to prescription opioids, 1,778 were associated with illicit online drug sale, and 1,608 included embedded hyperlinks for purchase).

demonstrated that common themes on that platform included polysubstance use, illicit sales, and commercialization (such as selling a wine koozie with a “Sizzurp” embroidery).<sup>124</sup>

The Instagram study also illustrated behaviors that indicate how pharming has become integrated into the lives of users as a normalized, everyday activity and may lead new users to believe that the substance is harmless.<sup>125</sup> The greatest proportion of posts depicted the consumption of codeine or lean in everyday places such as homes, cars, or public locations such as the beach.<sup>126</sup> The second-most prevalent group of images represented the preparation of lean.<sup>127</sup> Additionally, popular culture icons, such as Bart Simpson, Mickey Mouse, and Pokémon were frequently portrayed in connection with lean consumption.<sup>128</sup>

#### 4. Online Forums

Harm-reduction forums, such as Erowid and Bluelight, provide substantial insight into the specifics of how individuals pharm codeine-containing cough syrups.<sup>129</sup> The forums enable individuals to acquire information relating to drugs, including how to reduce the harms of those drugs.<sup>130</sup> These forums also allow individuals to share drug experiences with and obtain support from others who might be able to relate to those experiences, thus creating a sense of community.<sup>131</sup>

For instance, one user detailed his first time experimenting with sixty milliliters of CPHCS on an empty stomach six hours prior to leaving for work.<sup>132</sup> He expressed his excitement over trying the syrup but lamented over the fact that the promethazine-induced drowsiness led to his inability to “break the psychadelic [sic] threshold.”<sup>133</sup> He also described his difficulty concentrating at work and sluggish movements, and asserted that now that he returned home from work, he was going to finish the rest of the bottle.<sup>134</sup> This posting epitomizes the fact that users

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124. Cherian et al., *supra* note 122, at 99, 101.

125. *Id.* at 102.

126. *Id.* at 101.

127. *Id.*

128. *Id.*

129. Anderson et al., *supra* note 96, at 52-53, 59.

130. *Id.* at 52-53.

131. *Id.*

132. Mutiny, *Floating Inside a Marshmallow: An Experience with Promethazine & Codeine* (exp47183), EROWID (May 10, 2006), <https://www.erowid.org/experiences/exp.php?ID=47183> [<https://perma.cc/8MDE-G26L>].

133. *Id.*

134. *Id.*

far exceed the recommended daily dose when consuming lean,<sup>135</sup> thus putting themselves at risk of an overdose.<sup>136</sup>

#### *D. Methods of Procurement*

Research studies, news articles, and online harm-reduction forums have elucidated the myriad of sources individuals exploit in order to procure codeine-containing cough syrups.<sup>137</sup> These sources include drug dealers, friends and family members, physicians, and pharmacies.<sup>138</sup> Individuals will utilize one or more of these methods of procurement to obtain the syrup for personal consumption or for profit by selling a bottle of or a prescription for the syrup to others.<sup>139</sup>

##### 1. Underground Market

Some users in Texas have reported obtaining the syrup through the underground illegal drug market.<sup>140</sup> Initially, the illegal market consisted of so-called “syrup houses,” residences where codeine-containing cough syrups are sold, similar to “crack houses.”<sup>141</sup> After a police raid in the 1990s closed many of these syrup houses, individuals continued to sell the syrup—often diverted from hospitals and pharmacies or smuggled into the country from Mexico—on the street.<sup>142</sup> While the price of buying CPHCS on the streets of Houston was reportedly twenty-five dollars per half-pint in 1997,<sup>143</sup> by 2017, the cost rose to \$750 to \$1,000 per pint.<sup>144</sup>

##### 2. Thievery

Brazen bandits are willing to steal physical bottles of the cough syrup.<sup>145</sup> Their victims may include friends or family members,

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135. See *supra* note 51 and accompanying text.

136. See *supra* notes 58-59 and accompanying text.

137. See *infra* Part II.D.

138. See *supra* notes 21-25 and accompanying text.

139. Elwood, *supra* note 21, at 129; see also Francisco Alvarado, *Inside Florida's Codeine Black Market*, VICE (July 6, 2016, 2:30 PM), <https://www.vice.com/en/article/gqkp34/purple-drunk-florida-lean-codeine-dirty-sprite-black-market> [https://perma.cc/8G4X-C49E] (interviewing a user in Miami who stated that he obtains a pint of CPHCS with a prescription for twenty-one dollars and will sometimes sell it for \$1,000).

140. Elwood, *supra* note 21, at 128.

141. *Id.* at 129.

142. *Id.*

143. See *supra* note 93 and accompanying text.

144. Bella, *supra* note 81. After Actavis ceased manufacturing CPHCS, the remaining bottles of cough syrup sold for \$2,500 to \$3,000 per pint. See *id.*

145. See *supra* note 23 and accompanying text.

including sick, elderly relatives.<sup>146</sup> A second subset of victims includes pharmacies.<sup>147</sup> Burglaries and armed robberies may occur in broad daylight while a pharmacy is open<sup>148</sup> or at night while it is closed.<sup>149</sup>

Physicians comprise yet another set of targets.<sup>150</sup> Once users pilfer prescription pads from doctors' offices, they will forge their own written prescriptions for CPHCS.<sup>151</sup> When fabricating these prescriptions, users will usually include an excessive quantity equivalent to one full bottle

146. Elwood, *supra* note 21, at 129-30.

147. See ARIZ. STATE BD. OF PHARMACY, NEWSLETTER TO PROMOTE PHARMACY AND DRUG LAW COMPLIANCE 2 (Oct. 2021), <https://nabp.pharmacy/wp-content/uploads/2021/10/October-2021-Arizona-Newsletter.pdf> [<https://perma.cc/ZJ3F-X4TG>] (explaining that “[s]everal areas across the country are also seeing an increase in pharmacy burglaries and armed robberies targeting [CPHCS].”).

148. See Janet Anderson, *Thieves Targeted and Stole Promethazine with Codeine*, WASH. STATE PHARMACY ASS'N (Oct. 9, 2017), <https://www.wsparx.org/news/369302/Thieves-targeted-and-stole-promethazine-with-codeine.htm> [<https://perma.cc/NXZ8-MZS7>] (warning pharmacists of a recent string of robberies in which the perpetrators jumped the pharmacy counter during open business hours and stole CPHCS bottles “right off the shelf”); UTAH BD. OF PHARMACY, PROMETHAZINE WITH CODEINE ROBBERY AND FORGERY ALERT 1-2 (Nov. 2020), <https://nabp.pharmacy/wp-content/uploads/2020/11/November-2020-Utah-Newsletter.pdf> [<https://perma.cc/8DF8-3YQE>] (similarly warning pharmacists of daytime robberies); Larry Celona & Jorge Fitz-Gibbon, *Teens Storm NYC Pharmacies in Grab-and-Go Prescription Drug Heists*, N.Y. POST (Mar. 24, 2022, 6:40 PM), <https://nypost.com/2022/03/24/nyc-pharmacies-hit-by-teens-in-grab-and-go-prescription-drug-heists> [<https://perma.cc/Q96N-J8XA>] (chronicling the robberies of CPHCS from five Duane Reade locations in New York City within a month).

149. See Alvarado, *supra* note 139. A group of three men broke into a Walgreens pharmacy in Florida around 4 AM by prying open the door with a crowbar and stole 1,587 opiate pills and a pint of CPHCS in under two minutes. *Id.* They were caught a month later after a second Walgreens less than ten miles away was robbed, thanks to tracking devices that had been installed on bottles of CPHCS. *Id.* Tracking devices on bottles of prescription cough syrup have also been utilized in California to locate and arrest thieves after six pharmacies were broken into in 2016. Veronica Rocha, *Cough Syrup with GPS Tracker Helps Police Nab Suspected Pharmacy Burglars*, L.A. TIMES (Dec. 2, 2016, 1:50 PM), <https://www.latimes.com/local/lanow/la-me-ln-cough-syrup-gps-arrests-20161201-story.html> [<https://perma.cc/6ELR-N2T2>].

150. See WASH. STATE DEP'T OF HEALTH, RX FRAUD ALERT REPORT (July 2018), <https://doh.wa.gov/sites/default/files/legacy/Documents/Pubs/690313-FraudReport.pdf> [<https://perma.cc/7KFK-QKVH>] (enumerating the physicians who have been the target of forged prescriptions).

151. See *supra* note 24 and accompanying text; see also UTAH BD. OF PHARMACY, *supra* note 148 (warning pharmacists of the increasing number of forged CPHCS prescriptions in Utah and other states); Press Release, State of Ohio Bd. of Pharmacy, Important Notice to All Licensees Regarding Fraudulent Prescriptions - UPDATED (June 2020), <https://www.pharmacy.ohio.gov/Documents/Pubs/Newsletter/2020/Important%20Notice%20to%20All%20Licensees%20Regarding%20Fraudulent%20Prescriptions%20-%20UPDATED.pdf> [<https://perma.cc/7EMG-K4WS>] (updating pharmacists that there has been an increasing number of fraudulent prescriptions for CPHCS written on a valid prescription pad); Press Release, Iowa Bd. of Pharmacy, Fraudulent Promethazine with Codeine Prescriptions--New Reports of Faxed Prescriptions (Aug. 26, 2021), <https://dial.iowa.gov/press-release/2021-08-26/fraudulent-promethazine-codeine-prescriptions-new-reports-faxed> [<https://perma.cc/UF2X-TWCE>] (alerting pharmacists to the fraudulent paper CPHCS prescriptions being faxed into pharmacies with authentic-looking signatures).

(one pint), which is indicative that the prescription is forged.<sup>152</sup> In an attempt to enhance the illusion that the patient is afflicted with an infection, users will write another prescription for a non-controlled substance as well, such as the antibiotic Z-Pak (azithromycin).<sup>153</sup>

### 3. Prescriptions

Physicians sometimes write prescriptions for CPHCS to users who complain of respiratory symptoms.<sup>154</sup> Physicians who are more willing to prescribe the syrup than others will develop a reputation within the community for doing so.<sup>155</sup> While some physicians may be complicit<sup>156</sup> in this diversion,<sup>157</sup> others unwittingly prescribe the medication for deceptive patients who exaggerate or falsify their illnesses.<sup>158</sup>

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152. UTAH BD. OF PHARMACY, *supra* note 148.

153. See Press Release, Iowa Bd. of Pharmacy, *supra* note 151; see also Press Release, Krista Capehart, Dir. of Pro. & Regul. Affs., W. Va. Bd. of Pharmacy, Fraudulent Script Alert, (Feb. 4, 2022), <https://www.wvbop.com/article.asp?id=67> [<https://perma.cc/3G6P-DGZA>] (apprising pharmacists of the fact that numerous prescriptions sent for azithromycin and CPHCS with a quantity of one pint were fraudulent).

154. Elwood, *supra* note 21, at 129.

155. See *id.* (recounting the experiences of one interview participant who stated that some doctors will give patients whichever medication they desire so long as they pay cash for their visit, while others will refuse to prescribe codeine-containing cough syrups). In fact, once one clinic learned that some of its patients were diverting prescriptions of codeine-containing medications, the clinic implemented a policy that prohibited all physicians except a select few from prescribing codeine-containing medications. *Id.*

156. See Order of Revocation of License at 3, Oklahoma *ex rel.* Okla. State Bd. of Med. Licensure & Supervision v. Rozsa, Case No. 14-08-5033 (Jan. 29, 2016), [https://secure.okmedicalboard.org/subscriber/disc\\_pdfs/17499\\_2016\\_01\\_29\\_Tamerlane\\_Rozsa\\_MD.pdf](https://secure.okmedicalboard.org/subscriber/disc_pdfs/17499_2016_01_29_Tamerlane_Rozsa_MD.pdf) [<https://perma.cc/5NJB-CGQZ>] (ordering the medical license revocation of a physician who was the number-one prescriber of CPHCS in Oklahoma for the three years leading up to her hearing); Press Release, U.S. Att’y’s Off., E. Dist. Mich., Former Doctor Sentenced to 75 Months in Prison for Illegally Prescribing Opiates and Committing Health Care Fraud, <https://www.justice.gov/usao-edmi/pr/former-doctor-sentenced-75-months-prison-illegally-prescribing-opiates-and-committing> [<https://perma.cc/P5V9-UEXR>] (Apr. 18, 2023) (reporting that a physician in Michigan was responsible for illegally distributing more than two million milliliters of CPHCS from 2010 to 2015); Press Release, Pinellas Cnty. Sheriff’s Off., Narcotics Detectives Arrest Doctor in Clearwater, <https://www.pcsoweb.com/22-071-narcotics-detectives-arrest-doctor-in-clearwater> [<https://perma.cc/66F2-NUC9>] (last visited Dec. 2, 2023) (reporting the arrest of a physician who sold more than 550 prescriptions of CPHCS from January to May 2022 in Florida).

157. See U.S. DEP’T OF HEALTH & HUM. SERVS., DRUG DIVERSION: WHAT IS A PRESCRIBER’S ROLE IN PREVENTING THE DIVERSION OF PRESCRIPTION DRUGS? 1 (Feb. 2016), <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/DrugDiversioFS022316.pdf> [<https://perma.cc/4KD2-D8JX>]. Drug diversion is defined as the illegal distribution or abuse of prescription drugs or the use of prescription drugs for purposes not intended by the prescriber. *Id.* The most common types of drug diversion are selling prescription drugs, doctor shopping, drug theft, prescription pad theft and forgery, and illicit prescribing. *Id.*

158. Elwood, *supra* note 21, at 125 (emphasizing that although some physicians comply with the diversion process, other physicians unsuspectingly write prescriptions for individuals who “simply know how to use the health care system to suit their aims”).

Sometimes, users are able to obtain a prescription while eliminating the physician as the middleman.<sup>159</sup> They can pay for prescriptions others had received.<sup>160</sup> Alternatively, they can forge their own prescriptions on stolen prescriptions pads.<sup>161</sup> Or, they may masquerade as a physician when calling a pharmacy to phone in a prescription for themselves.<sup>162</sup>

By procuring CPHCS via a prescription, users have the benefit of avoiding the high street price of the medication.<sup>163</sup> When utilizing their government or private insurance plans, the syrup only costs the price of the copayment, which, in some instances, is zero dollars.<sup>164</sup> This low cost is an added incentive for users to continue their habit.<sup>165</sup>

#### 4. Sales Without a Prescription

An exchange on Bluelight, the harm-reduction forum, exemplifies the ease of obtaining codeine-containing cough syrups in a pharmacy without a prescription.<sup>166</sup> A user indicated that he prefers Cheratussin AC (codeine and guaifenesin) to CPHCS, and boasted that he could purchase a four-ounce bottle without a prescription at the low price of sixteen dollars plus tax at pharmacies in both Massachusetts and Pennsylvania.<sup>167</sup> However, he acknowledged that he had “been going in too much this winter” and that it was probably “not safe” to go back until two months later in order to decrease suspicion of misuse.<sup>168</sup>

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159. *See id.* at 128.

160. *Id.* at 129.

161. *See supra* notes 150-53 and accompanying text.

162. *See* VA. BD. OF PHARMACY, POTENTIAL DIVERSION OF PROMETHAZINE WITH CODEINE 1 (Nov. 2017), <https://www.dhp.virginia.gov/pharmacy/newsletters/2017/VA112017.pdf> [<https://perma.cc/2LR8-H6C2>] (alerting pharmacists to the “rapid” increase in fraudulent prescriptions being phoned in to pharmacies for CPHCS with correct physician information but with invalid patient names and dates of birth). Suspects download applications to generate Voice over Internet Protocol (VoIP) phone numbers, which enable them to impersonate prescribers and fictitious patients when fraudulently phoning-in prescriptions for CPHCS. *See* Press Release, State of Ohio Bd. of Pharmacy, *supra* note 151.

163. *See* Elwood, *supra* note 21, at 125.

164. *Id.*

165. *See id.*

166. *See* Bigsammy610, *Who Enjoys Drinking Lean???*, BLUELIGHT (Jan. 5, 2016), <https://bluelight.org/xf/threads/who-enjoys-drinking-lean.780344> [<https://perma.cc/R2WZ-8S44>].

167. *Id.*

168. *Id.*

### III. LEGAL ISSUE: CURRENT LEGISLATION SURROUNDING CONTROLLED SUBSTANCES

This Part discusses current federal and state legislation governing controlled substances.<sup>169</sup> Subpart A provides an overview of the classes of controlled substances and the current federal prescription requirements (or lack thereof) for controlled substances under the CSA and CFR.<sup>170</sup> Subpart B delineates the states that have elected to allow the sale of controlled substances without a prescription as well as those states that have implemented an identification requirement prior to dispensing a prescription for a controlled substance.<sup>171</sup>

#### *A. Federal Laws Governing Controlled Substances*

Together, the CSA and CFR govern the manufacture, distribution, importation, exportation, and use of controlled substances.<sup>172</sup> Controlled substances are categorized into five schedules.<sup>173</sup> Each schedule corresponds to differing constraints on distribution, including prescription requirements.<sup>174</sup>

#### 1. Classes of Controlled Substances

In determining which schedule a substance should be placed into or whether a substance should be decontrolled or rescheduled, the Attorney General will consider eight factors, including, in relevant part, the substance's actual or relative potential for abuse; its history and current pattern of abuse; the scope, duration, and significance of abuse; and the risk, if any, to the public health.<sup>175</sup> Schedule I controlled substances, such as heroin and lysergic acid diethylamide ("LSD"), are characterized by their high potential for abuse, a lack of accepted safety for use of the drug or substance under medical supervision, and a lack of accepted medical use in treatment in the United States.<sup>176</sup> Schedule II controlled substances, such as opioids and amphetamines, have a high potential for abuse and may lead to severe psychological or physical dependence if

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169. *See infra* Part III.

170. *See infra* Part III.A.

171. *See infra* Part III.B.

172. *See* Controlled Substances Act, 21 U.S.C. §§ 801–971; 21 C.F.R. §§ 1300–1321 (2022).

173. 21 U.S.C. § 812(a).

174. *See id.* § 801(a)(3).

175. *Id.* § 811(c).

176. *Id.* § 812(b)(1); *Drug Scheduling*, *supra* note 62 (listing heroin and LSD as examples of schedule I controlled substances).

abused, but have a medical use in the United States.<sup>177</sup> Schedule III controlled substances, such as ketamine and Tylenol with codeine, have less potential for abuse than schedule I or II substances, with abuse leading to moderate or low physical dependence or high psychological dependence, and have a currently accepted medical use in the United States.<sup>178</sup> Schedule IV substances—such as benzodiazepines, Ambien (zolpidem), and tramadol—have a low potential for abuse relative to schedule III substances, may lead to limited physical or psychological dependence, and have medical uses currently accepted in the United States.<sup>179</sup> Schedule V substances, such as CPHCS and Lyrica (pregabalin), are defined as having a low potential for abuse relative to schedule IV substances, limited physical or psychological dependence if abused, and current medical uses in the United States.<sup>180</sup>

## 2. Prescription Requirements for Controlled Substances

Prescription requirements vary by class of controlled substance, with the most restrictions imposed on schedule I substances and the least on schedule V.<sup>181</sup> Because schedule I controlled substances do not have a medical use, no prescriptions may be written for this class.<sup>182</sup> Only written and electronic prescriptions are allowed for schedule II controlled substances; no oral prescriptions are permitted for schedule II substances except in emergency situations.<sup>183</sup> Written, electronic, or oral

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177. 21 U.S.C. § 812(b)(2); *Drug Scheduling*, *supra* note 62 (listing opioids and amphetamines as examples of schedule II controlled substances).

178. 21 U.S.C. § 812(b)(3); *Drug Scheduling*, *supra* note 62 (listing ketamine and Tylenol with codeine as examples of schedule III controlled substances).

179. 21 U.S.C. § 812(b)(4); *Drug Scheduling*, *supra* note 62 (listing benzodiazepines, Ambien, and tramadol examples of schedule IV controlled substances).

180. 21 U.S.C. § 812(b)(5); *Drug Scheduling*, *supra* note 62 (listing CPHCS and Lyrica as examples of schedule V controlled substances).

181. *See* 21 U.S.C. § 829(a)–(c).

182. *See id.* §§ 812(b)(1), 829(a)–(c) (listing prescription requirements for schedules II–V but not schedule I).

183. *Id.* § 829(a). An emergency situation is defined as one in which the prescribing practitioner determines that immediate administration of the schedule II medication is necessary for the proper treatment of the intended user, that no appropriate alternative treatment is available, and that it is not reasonably possible for the prescribing practitioner to provide a written prescription to the pharmacy prior to dispensing the substance. 21 C.F.R. § 290.10 (2022). A pharmacist may only dispense a schedule II controlled substance upon receiving the oral authorization of a prescriber if the pharmacist: (1) limits the quantity prescribed and dispensed to the amount adequate to treat the patient during the emergency period and not beyond this period; (2) immediately reduces the prescription to writing; (3) makes a reasonable effort to determine that the oral authorization came from a registered practitioner if that practitioner is not known to the pharmacist; and (4) attaches the written prescription, which should be sent to the pharmacist within seven days of the date of the oral emergency prescription, to the oral prescription that had been reduced to writing. *Id.* § 1306.11(d)(1)–(4).

prescriptions *are* allowed for schedule III and schedule IV substances.<sup>184</sup> However, no reference to any particular prescription requirement is made in the subsection addressing schedule V controlled substances.<sup>185</sup> Instead, the CSA simply states that “[n]o controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose.”<sup>186</sup> By not referring to a prescription requirement, this language is in stark contrast with the preceding language governing other schedules.<sup>187</sup>

### 3. Dispensing Controlled Substances Without a Prescription

Title 21 of the CFR exempts certain controlled substances from needing a prescription prior to being dispensed to the patient.<sup>188</sup> These include “preparation[s] containing not more than 200 milligrams of codeine per 100 milliliters or per 100 grams that also includes one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the . . . preparation valuable medicinal qualities other than those possessed by codeine alone.”<sup>189</sup> These controlled substances may be dispensed by a pharmacist without a prescription to a purchaser at retail, provided that certain conditions are met.<sup>190</sup> The portion of the regulation setting forth the conditions reads:

- (a) Such dispensing is made only by a pharmacist . . . and not by a nonpharmacist employee even if under the supervision of a pharmacist (although after the pharmacist has fulfilled his professional and legal responsibilities set forth in this section, the actual cash, credit transaction, or delivery, may be completed by a nonpharmacist);
- (b) Not more than 240 cc. ([eight] ounces) of any such controlled substance containing opium, nor more than 120 cc. ([four] ounces) of any other such controlled substance nor more than [forty-eight] dosage units of any such controlled substance containing opium, nor more than [twenty-four] dosage units of any other such controlled substance may be dispensed at retail to the same purchaser in any given [forty-eight]-hour period;
- (c) The purchaser is at least [eighteen] years of age;

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If the practitioner fails to deliver a written prescription to the pharmacist, then the pharmacist must notify the nearest Drug Enforcement Administration (“DEA”) office. *Id.* § 1306.11(d)(4).

184. 21 U.S.C. § 829(b).

185. *See id.* § 829(c).

186. *Id.*

187. *See id.* § 829(a)–(c).

188. 21 C.F.R. § 290.2 (2022).

189. *Id.*

190. *Id.* § 1306.26.

(d) The pharmacist requires every purchaser of a controlled substance under this section not known to him to furnish suitable identification (including proof of age where appropriate);

(e) A bound record book for dispensing of controlled substances under this section is maintained by the pharmacist, which book shall contain the name and address of the purchaser, the name and quantity of controlled substance purchased, the date of each purchase, and the name or initials of the pharmacist who dispensed the substance to the purchaser . . . .<sup>191</sup>

Many state laws are modeled after this regulation.<sup>192</sup>

At first glance, the regulation appears quite comprehensive as it discusses restrictions on who may sell the controlled substance, to whom they may sell it, the documents they must inspect prior to the sale, the quantity they may sell, and the records they must keep after the sale.<sup>193</sup> However, some crucial aspects are missing.<sup>194</sup> For instance, the regulation makes no mention that the sale must be for a legitimate purpose.<sup>195</sup> Nor does it mandate any specific identification requirements prior to dispensing the controlled substance without a prescription.<sup>196</sup>

### *B. State Laws Governing Controlled Substances*

In addition to the obligations set forth by federal laws and regulations, states may also impose their own requirements, fines, and restrictions regarding controlled substances.<sup>197</sup> Some of the state requirements may be more stringent than federal law—for instance, states may reclassify controlled substances into a stricter schedule<sup>198</sup> or require photo identification prior to dispensing controlled substances.<sup>199</sup> When compared to each other, some states are stricter than others, with some allowing the sale of schedule V controlled substances without a prescription while others do not.<sup>200</sup>

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191. *Id.* § 1306.26(a)–(e).

192. *See infra* Part III.B.1.

193. *See* 21 C.F.R. § 1306.26 (2022).

194. *See id.*

195. *See id.*

196. *See id.* § 1306.26(d).

197. *See infra* Part III.B.

198. *See, e.g.*, Memorandum from James Giglio, Dir., Bureau of Narcotic Enf't, State of N.Y. Dep't of Health, to All N.Y. State Pharmacies 1 (Nov. 2006), <https://www.health.ny.gov/professionals/narcotic/newsletters/docs/2006-11.pdf>

[<https://perma.cc/X6PX-DBX2>] (noting that anabolic steroids, including testosterone, have been classified as schedule II controlled substances in New York State despite being classified as schedule III federally).

199. *See infra* Part III.B.2.

200. *See infra* Part III.B.1.

### 1. States That Allow Schedule V Sales Without a Prescription

Because the CSA, as it currently stands, does not explicitly mandate a prescription prior to dispensing a schedule V substance,<sup>201</sup> and because the CFR explicitly permits the sale of schedule V substances without a prescription,<sup>202</sup> at least fifteen states follow the CFR and allow such a sale.<sup>203</sup> However, not all states follow the CFR exactly, and consequently, there is some variation among states in their sale requirements, mostly involving quantity limits and recordkeeping information.<sup>204</sup> Notably, Kentucky imposes a unique condition by mandating that the preparation not be displayed in areas open to the public.<sup>205</sup> Illinois imposes another unique condition by mandating that the pharmacy limit its stock of these schedule V substances to 4.5 liters for each substance, plus the additional quantity necessary to fill the largest number of prescription orders filled by that pharmacy for such controlled substances in any one week in the previous year.<sup>206</sup>

One aspect commonly regulated by the states in the sale of schedule V controlled substances without a prescription is determining who may conduct such a sale.<sup>207</sup> Arkansas, Florida, Illinois, Kansas, Kentucky, Maine, Mississippi, New Jersey, North Carolina, Oklahoma, Pennsylvania, South Carolina, and Virginia follow the CFR and permit only a registered pharmacist to sell a schedule V substance at retail.<sup>208</sup> In Arizona and Iowa, in addition to the pharmacist, the pharmacist-intern<sup>209</sup> may

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201. 21 U.S.C. § 829(c).

202. 21 C.F.R. §§ 290.2, 1306.26 (2022).

203. See Meyer & Maseha, *supra* note 18 (recognizing that some states allow dispensing finite quantities of codeine-containing cough syrup without a prescription). These states include Arizona, Arkansas, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Mississippi, New Jersey, North Carolina, Oklahoma, Pennsylvania, South Carolina, and Virginia. See *infra* Part III.B.1.

204. See Meyer & Maseha, *supra* note 18.

205. 902 KY. ADMIN. REGS. 55:015E § 6(5) (2022).

206. 720 ILL. COMP. STAT. 570/312(c)(8) (2022).

207. See Meyer & Maseha, *supra* note 18.

208. 070-00-07 ARK. CODE R. § 07-04-0007(a) (LexisNexis 2022); FLA. STAT. § 893.08(1)(a) (2022); 720 ILL. COMP. STAT. 570/312(c)(2) (2022); KAN. ADMIN. REGS. § 68-20-22(a) (2022); 902 KY. ADMIN. REGS. 55:015E § 6(6) (2022); 02-392-22 ME. CODE R. § 2 (LexisNexis 2022); 30-030 MISS. CODE R. § 3001(18)(2)(A) (LexisNexis 2022); N.J. ADMIN. CODE § 13:45H-7.19(a)(1) (2022); N.C. GEN. STAT. § 90-93(b) (2022); OKLA. ADMIN. CODE § 475:30-1-14(1) (2022); 28 PA. CODE § 25.57(1) (2022); S.C. CODE ANN. REGS. 61-4.1208(a) (2022); VA. CODE ANN. § 54.1-3416(1) (2022).

209. IOWA ADMIN. CODE r. 657-10.33(1) (2022). A pharmacist-intern is statutorily defined in Iowa as “a person enrolled in a college of pharmacy or actively pursuing a pharmacy degree, or as otherwise provided by the board, who is registered with the board for the purpose of obtaining instruction in the practice of pharmacy from a preceptor . . .” *Id.* r. 657-4.1(155A). A pharmacist-intern also includes “a graduate of an approved college of pharmacy, or a foreign graduate who has established educational equivalency . . . who is registered with the board for the purpose of obtaining practical experience as a requirement for licensure as a pharmacist in Iowa.” *Id.*

also conduct the sale under the direct supervision of the pharmacist.<sup>210</sup> Once the pharmacist has fulfilled their professional and legal obligations, Arkansas, Iowa, Kansas, Kentucky, New Jersey, North Carolina, and Oklahoma follow the CFR and explicitly allow the actual cash or credit transaction to be conducted by a non-pharmacist.<sup>211</sup>

States also regulate to whom schedule V controlled substances may be sold.<sup>212</sup> With the exception of Illinois, where the legal age of purchase is twenty-one years, all other states have an age requirement of eighteen years.<sup>213</sup> In spite of this, there is no proof of age requirement in Oklahoma.<sup>214</sup> Proving age with identification is required in Arizona, Arkansas, Florida, Iowa, Kansas, Kentucky, New Jersey, Pennsylvania, and South Carolina only when the purchaser of the schedule V controlled substance is not known to the pharmacist.<sup>215</sup> By contrast, Illinois, Maine, Mississippi, North Carolina, and Virginia mandate that every retail purchaser furnish suitable identification, regardless of whether the purchaser is known to the pharmacist.<sup>216</sup> Further still, identification requirements vary widely among states—for instance, in Mississippi, the identification must include the purchaser's name, address, and date of birth; in Iowa, the identification must be a valid government-issued photo identification; and in Illinois, the purchaser must furnish *two* forms of identification.<sup>217</sup>

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210. ARIZ. REV. STAT. § 36-2525(J) (LexisNexis 2022); IOWA ADMIN. CODE r. 657-10.33(1) (2022).

211. 070-00-07 ARK. CODE R. § 07-04-0007(a) (LexisNexis 2022); IOWA ADMIN. CODE r. 657-10.33(1) (2022); KAN. ADMIN. REGS. § 68-20-22(a) (2022); 902 KY. ADMIN. REGS. 55:015E § 6(6) (2022); N.J. ADMIN. CODE § 13:45H-7.19(a)(1) (2022); N.C. GEN. STAT. § 90-93(c) (2022); OKLA. ADMIN. CODE § 475:30-1-14(1) (2022).

212. See Meyer & Maseha, *supra* note 18.

213. See 720 ILL. COMP. STAT. 570/312(c)(2) (2022); ARIZ. REV. STAT. § 36-2525(J) (LexisNexis 2022); 070-00-07 ARK. CODE R. § 07-04-0007(c) (LexisNexis 2022); FLA. STAT. § 893.08(3)(a) (2022); IOWA ADMIN. CODE r. 657-10.33(3) (2022); KAN. ADMIN. REGS. § 68-20-22(c) (2022); 902 KY. ADMIN. REGS. 55:015E § 6(7) (2022); 02-392-22 ME. CODE R. § 2 (LexisNexis 2022); 30-030 MISS. CODE R. § 3001(18)(2)(F) (LexisNexis 2022); N.J. ADMIN. CODE § 13:45H-7.19(a)(3) (2022); N.C. GEN. STAT. § 90-93(d) (2022); OKLA. ADMIN. CODE § 475:30-1-14(5) (2022); 28 PA. CODE § 25.57(3) (2022); S.C. CODE ANN. REGS. 61-4.1208(c) (2022); VA. CODE ANN. § 54.1-3416(2) (2022).

214. See OKLA. ADMIN. CODE § 475:30-1-14(5) (2022).

215. ARIZ. REV. STAT. § 36-2525(J)(4) (LexisNexis 2022); 070-00-07 ARK. CODE R. § 07-04-0007(d) (LexisNexis 2022); FLA. STAT. § 893.08(3)(a) (2022); IOWA ADMIN. CODE r. 657-10.33(4) (2022); KAN. ADMIN. REGS. § 68-20-22(d) (2022); 902 KY. ADMIN. REGS. 55:015E § 6(8) (2022); N.J. ADMIN. CODE § 13:45H-7.19(a)(4) (2022); 28 PA. CODE § 25.57(4) (2022); S.C. CODE ANN. REGS. 61-4.1208(d) (2022).

216. 720 ILL. COMP. STAT. 570/312(c)(2) (2022); 02-392-22 ME. CODE R. § 2 (LexisNexis 2022); 30-030 MISS. CODE R. § 3001(18)(2)(F) (LexisNexis 2022); N.C. GEN. STAT. § 90-93(d) (2022); VA. CODE ANN. § 54.1-3416(3) (2022).

217. 30-030 MISS. CODE R. § 3001(18)(2)(F) (LexisNexis 2022); IOWA ADMIN. CODE r. 657-10.33(4) (2022); 720 ILL. COMP. STAT. 570/312(c)(2) (2022).

States may impose limits on the total quantity of schedule V controlled substances that may be sold to a single purchaser.<sup>218</sup> It is imperative to note that the majority of these limits exceed the maximum recommended dose by the FDA, which is thirty milliliters of syrup, equivalent to sixty milligrams of codeine, in a twenty-four hour period.<sup>219</sup> Arizona, Arkansas, Iowa, Kansas, Kentucky, Maine, and New Jersey adhere to the CFR and mandate the forty-eight-hour limit of any opium-containing controlled substance to be 240 milliliters.<sup>220</sup> South Carolina restricts the sale to 120 milliliters within a forty-eight-hour time frame while Pennsylvania's 240-milliliter limit applies to a seventy-two-hour time frame.<sup>221</sup> Within a forty-eight-hour period, the codeine limit is 270 milligrams in Virginia, 160 milligrams in Oklahoma, and 120 milligrams in Florida.<sup>222</sup> In Mississippi, the constraints are more rigid, with a 120-milliliter limit in a seventy-two-hour period, a two-sale limit in a seven-day period, and a three-sale limit in a thirty-day period.<sup>223</sup> The Illinois requirements are also strict, with a 120-milliliter limit in a ninety-six-hour period.<sup>224</sup>

Specific recordkeeping requirements of schedule V controlled substance sales also differ among states.<sup>225</sup> For example, some states do not adhere to the CFR: Florida and Maine only mention that a record of sale must be maintained, without delineating the information to be recorded; North Carolina only requires the recording of the individual's name and address; and Oklahoma does not require the recording of the name and quantity of the controlled substance.<sup>226</sup> By contrast, Arizona, Arkansas, Iowa, Kansas, Kentucky, New Jersey, Pennsylvania, South Carolina, and Virginia do adhere to the CFR.<sup>227</sup> Mississippi, Kansas, and Iowa adhere

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218. See Meyer & Maseha, *supra* note 18.

219. See *supra* note 51 and accompanying text. Because every five milliliters of syrup contain ten milligrams of codeine, thirty milliliters of syrup contain sixty milligrams of codeine. See PROMETHAZINE HCL AND CODEINE PHOSPHATE [PACKAGE INSERT], *supra* note 50, at 1.

220. 21 C.F.R. § 1306.26(b) (2022); ARIZ. REV. STAT. § 36-2525(J)(2) (LexisNexis 2022); 070-00-07 ARK. CODE R. § 07-04-0007(b) (LexisNexis 2022); IOWA ADMIN. CODE r. 657-10.33(2) (2022); KAN. ADMIN. REGS. § 68-20-22(b) (2022); 902 KY. ADMIN. REGS. 55:015E § 6(2) (2022); 02-392-22 ME. CODE R. § 3(1) (LexisNexis 2022); N.J. ADMIN. CODE § 13:45H-7.19(a)(2) (2022).

221. S.C. CODE ANN. REGS. 61-4.1208(b) (2022); 28 PA. CODE § 25.57(2) (2022).

222. VA. CODE ANN. § 54.1-3416(4) (2022); OKLA. ADMIN. CODE § 475:30-1-14(2) (2022); FLA. STAT. § 893.08(3)(c) (2022).

223. 30-030 MISS. CODE R. § 3001(18)(2)(B)-(C) (LexisNexis 2022).

224. 720 ILL. COMP. STAT. 570/312(c)(4) (2022).

225. See Meyer & Maseha, *supra* note 18.

226. See 21 C.F.R. § 1306.26(e) (2022); FLA. STAT. § 893.08(3)(a) (2022); 02-392-22 ME. CODE R. § 2 (LexisNexis 2022); N.C. GEN. STAT. § 90-93(d) (2022); OKLA. ADMIN. CODE § 475:30-1-14(6) (2022).

227. See 21 C.F.R. § 1306.26(e) (2022); ARIZ. REV. STAT. § 36-2525(J)(5) (LexisNexis 2022); 070-00-07 ARK. CODE R. § 07-04-0007(e) (LexisNexis 2022); IOWA ADMIN. CODE r. 657-10.33(5)

as well but with added requirements: in Mississippi, the purchaser's signature must be included in the logbook; in Kansas<sup>228</sup> and Iowa, the sales must also be reported to the prescription monitoring program ("PMP").<sup>229</sup> Illinois replaces the requirement of the pharmacist's initials with the pharmacist's signature and includes the additional stipulation that the purchaser sign a form attesting that he or she has not purchased any schedule V controlled substances within the immediately preceding ninety-six hours.<sup>230</sup>

Several states, including Arizona, Arkansas, Florida, Kentucky, Maine, Mississippi, North Carolina, and South Carolina, impose an additional restriction that is not included in the CFR, namely that the sale of schedule V substances be made for (legitimate) medical purposes only.<sup>231</sup> Thus, the pharmacist is entitled to refuse the sale if they suspect that the product is being obtained for the purposes of misuse.<sup>232</sup> Arkansas provides further guidance to pharmacists, noting that indicators of

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(2022); KAN. ADMIN. REGS. § 68-20-22(e) (2022); 902 KY. ADMIN. REGS. 55:015E § 6(9)(a)–(d) (2022); N.J. ADMIN. CODE § 13:45H-7.19(a)(5) (2022); 28 PA. CODE § 25.57(5) (2022); S.C. CODE ANN. REGS. 61-4.1208(e) (2022); VA. CODE ANN. § 54.1-3416(4) (2022).

228. *Kansas Wants to Track Promethazine Sales*, DRUG TOPICS (July 30, 2014), <https://www.drugtopics.com/view/kansas-wants-track-promethazine-sales> [<https://perma.cc/XEA8-XPHN>]. Since 2015, Kansas has listed CPHCS as a "drug of concern," meaning one that has a potential for abuse, because of the growing misuse by high school students. *See id.*; KAN. ADMIN. REGS. § 68-21-7(a)(4) (2022); KAN. STAT. ANN. § 65-1682(e) (2022).

229. 30-030 MISS. CODE R. § 3001(18)(2)(G) (LexisNexis 2022); KAN. ADMIN. REGS. § 68-21-2(a)(1) (2022); IOWA ADMIN. CODE r. 657-37.9, 37.2 (2022). PMPs, also known as prescription drug monitoring programs (PDMPs), are state-operated electronic databases that collect information on dispensed controlled substance medications, including the patient's name and address and the name, quantity, and dose of the medication. *See Issues at a Glance: Prescription Drug Monitoring Programs (PDMP)*, AM. ASS'N OF NURSE PRACS., <https://www.aanp.org/advocacy/advocacy-resource/policy-briefs/issues-at-a-glance-prescription-drug-monitoring-programs-pdmp> [<https://perma.cc/C8XN-4AE7>] (Oct. 2022). All fifty states and the District of Columbia have implemented PMPs. *Id.* However, each state imposes its own mandates on whether prescribers and/or pharmacists are required to check the PMP before prescribing or dispensing controlled substances. *Id.*

230. 720 ILL. COMP. STAT. 570/312(c)(3)–(4) (2022).

231. *See* 21 C.F.R. § 1306.26 (2022); ARIZ. REV. STAT. § 36-2525(J)(1) (LexisNexis 2022); 070-00-07 ARK. CODE R. § 07-04-0006(b) (LexisNexis 2022); FLA. STAT. § 893.08(3)(b) (2022); 902 KY. ADMIN. REGS. 55:015E § 6(4) (2022); 02-392-22 ME. CODE R. § 2 (LexisNexis 2022); 30-030 MISS. CODE R. § 3001(18)(2)(E) (LexisNexis 2022); N.C. GEN. STAT. § 90-93(c) (2022); S.C. CODE ANN. REGS. 61-4.1208(g) (2022). Even though Texas does not allow the sale of CPHCS without a prescription, as the birthplace of lean, its laws explicitly require that a schedule V controlled substance not be dispensed "except for a valid medical purpose." TEX. HEALTH & SAFETY CODE § 481.072 (2022).

232. *See* ARIZ. REV. STAT. § 36-2525(J)(1) (LexisNexis 2022); 070-00-07 ARK. CODE R. § 07-04-0006(b) (LexisNexis 2022); FLA. STAT. § 893.08(3)(b) (2022); 902 KY. ADMIN. REGS. 55:015E § 6(4) (2022); 02-392-22 ME. CODE R. § 2 (LexisNexis 2022); 30-030 MISS. CODE R. § 3001(18)(2)(E) (LexisNexis 2022); N.C. GEN. STAT. § 90-93(c) (2022); S.C. CODE ANN. REGS. 61-4.1208(g) (2022).

inappropriate self-medicating may include receiving a schedule V controlled substance without a prescription for more than ten days, more than twice in a thirty-day period, more than four times in two consecutive months, or every month.<sup>233</sup>

## 2. Identification Requirements Prior to Dispensing Controlled Substance Prescriptions

Although the CSA and CFR are comprehensive in most other respects, one area in which legislation is insufficient concerns photo identification requirements prior to dispensing a prescription for a controlled substance.<sup>234</sup> Due to the lack of federal mandates regarding identification requirements, about half of the state legislatures have taken it upon themselves to pass their own laws regulating if and when pharmacy staff members are required to verify the identity of the person seeking to obtain a controlled substance.<sup>235</sup> Unsurprisingly, these regulations lack uniformity.<sup>236</sup>

State laws differ regarding when the pharmacist is required to ask for identification.<sup>237</sup> Mandating pharmacists or employees under their supervision to verify the identity of the receiver of every controlled substance prescription is a rare requirement, found only in the laws of Delaware (without exception) and Massachusetts (with exception).<sup>238</sup> Instead, in some states, the mandatory identification requirement is imposed based on the class of the controlled substance: in Georgia, this mandate applies to schedule II controlled substances; in North Carolina, to schedule II or opioid-containing schedule III controlled substances; and in West Virginia, to schedule II-IV controlled substances.<sup>239</sup> Other states only impose this requirement depending on the person obtaining the controlled substance; for instance, in New Jersey, identification must

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233. 070-00-07 ARK. CODE R. § 07-04-0006(c)(2) (LexisNexis 2022).

234. *See generally* 21 U.S.C. §§ 801–971 (lacking any mention of identification requirements); 21 C.F.R. §§ 1300–1321 (2022) (lacking any mention of identification requirements).

235. *See generally* NAT'L ALL. FOR MODEL STATE DRUG L., STATES THAT REQUIRE ID PRIOR TO DISPENSING CONTROLLED SUBSTANCES OR NON-CONTROLLED PRESCRIPTION DRUGS, <https://namsdl.org/wp-content/uploads/States-that-Require-ID-Prior-to-Dispensin.pdf> [<https://perma.cc/2EV7-4BGW>] (Mar. 2016) (enumerating the states with photo identification requirements); CTRS. FOR DISEASE CONTROL & PREVENTION, MENU OF STATE PRESCRIPTION DRUG IDENTIFICATION LAWS (June 2013), <https://www.cdc.gov/phlp/docs/menu-pdil.pdf> [<https://perma.cc/F6G4-AZFU>] (comparing state photo identification requirements).

236. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 235, at 2.

237. *See id.* at 3.

238. *See* 24 DEL. ADMIN. CODE. § 4.10.1 (2022); 105 MASS. CODE REGS. 700.012(A)(3) (2022).

239. GA. CODE ANN. § 26-4-80(1) (2022); N.C. GEN. STAT. § 90-106.1(a) (2022); W. VA. CODE § 60A-9-4a (2022).

be presented if the person picking up the controlled substance prescription is someone other than the patient.<sup>240</sup>

The remaining states (with the exception of New York) only require the pharmacist to ask for identification when the person picking up the controlled substance prescription is unknown to the pharmacist.<sup>241</sup> The states that impose this requirement on all controlled substance prescriptions include California, Connecticut, Florida, Hawaii, Indiana, Louisiana, Michigan, Minnesota, Nevada, New Mexico, North Dakota, Oklahoma, and South Carolina.<sup>242</sup> At least five states limit this requirement to certain conditions: in Virginia, to schedule II controlled substances; in Maine, to schedule II controlled substances written by out-of-state practitioners on a prescription blank that does not meet minimum security requirements; in Wisconsin, to schedule II and III controlled substances; in Vermont, to schedule II-IV controlled substances; and in Tennessee, to schedule II-IV opioid, benzodiazepine, zolpidem, barbiturate, or carisoprodol prescriptions exceeding a seven-day supply.<sup>243</sup> New York's requirement is less stringent in that it does not require the individual to furnish identification, but only that the pharmacist make a "good faith effort" to verify the identity of any person picking up a controlled substance if that person is not known to the pharmacist.<sup>244</sup>

Some states allow pharmacists complete discretion to ask for identification prior to dispensing controlled substances.<sup>245</sup> In Illinois, it is up to the pharmacy to maintain a policy regarding the type of identification necessary, if any, to receive a prescription in accordance with state and

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240. N.J. STAT. ANN. § 45:1-46.1(a)(2)(b) (West 2022).

241. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 235, at 3.

242. CAL. BUS. & PROF. CODE § 4075 (Deering 2022); CONN. GEN. STAT. § 20-612a (2022); FLA. STAT. § 465.0155(2)(a) (2022); HAW. REV. STAT. § 329-41(a)(6)(A) (2022); IND. CODE ANN. § 25-26-24-17(c) (West 2022); LA. STAT. ANN. § 40:971(E) (2022); MICH. ADMIN. CODE r. 338.3162(2) (2022); MINN. STAT. § 152.11(2d) (2022); NEV. ADMIN. CODE § 639.748(2)(c) (2022); N.M. CODE R. § 16.19.20.42(E) (LexisNexis 2022); N.D. ADMIN. CODE 61-04-03.1-01 (2022); OKLA. ADMIN. CODE § 475:30-1-15 (2022); S.C. CODE ANN. § 44-53-360(j) (2022).

243. VA. CODE ANN. § 54.1-3420.1(B) (2022); ME. REV. STAT. tit. 32, § 13786-A(2)(B) (West 2022); WIS. STAT. § 450.11(1b)(b) (2022); VT. STAT. ANN. tit. 18, § 4215b (2022); TENN. CODE ANN. § 53-11-310(a) (2022). Barbiturates are prescribed to induce sleep, relieve anxiety, or prevent seizures, but are commonly abused to decrease inhibitions and treat unwanted effects of illicit drugs. *Drug Fact Sheet: Barbiturates*, DRUG ENF'T ADMIN. (Apr. 2020), [https://www.dea.gov/sites/default/files/2020-06/Barbiturates-2020\\_0.pdf](https://www.dea.gov/sites/default/files/2020-06/Barbiturates-2020_0.pdf) [<https://perma.cc/VBK6-66LA>]. Carisoprodol is a muscle relaxer that is also commonly abused for its euphoric effects. *Carisoprodol (Trade Name: Soma)*, DRUG ENF'T ADMIN. (Dec. 2019), [https://www.deadiversion.usdoj.gov/drug\\_chem\\_info/carisoprodol/carisoprodol.pdf](https://www.deadiversion.usdoj.gov/drug_chem_info/carisoprodol/carisoprodol.pdf) [<https://perma.cc/7DNG-JXMT>].

244. See N.Y. COMP. CODES R. & REGS. tit. 10, §§ 80.73(e), 80.74(f) (2022) (detailing dispensing requirements for schedule II and schedule III-V controlled substances, respectively).

245. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 235, at 4.

federal law.<sup>246</sup> In Oregon, a pharmacist *may* refuse to dispense a prescription to any person who lacks proper identification.<sup>247</sup> Other states allow pharmacists discretion to ask for identification from patients in certain circumstances: in North Carolina, pharmacists may ask for identification prior to dispensing non-controlled or controlled substances that are not implicated by the mandatory identification law; in Virginia, pharmacists may ask for identification prior to dispensing schedule III-V controlled substances.<sup>248</sup>

State laws vary widely on the acceptable types of required identification.<sup>249</sup> Few states, such as California and New York, only broadly pronounce that the purchaser must furnish “proper[]” or “appropriate” identification, respectively.<sup>250</sup> Some states, such as Louisiana, generally mandate that the purchaser furnish “photo” identification while others, such as Connecticut and Minnesota, stipulate that the photo identification be “valid,” and still others, such as Michigan, specify that the identification include a photograph and the individual’s date of birth.<sup>251</sup> Some states permit either government-issued identification or other valid forms of identification: Florida’s law allows verification of health plan eligibility through a real-time inquiry to serve as proper identification; Georgia’s law allows identification which legibly indicates the full name of the person taking possession of the controlled substance; and Virginia’s law allows a non-governmental photo identification along with documentation of the individual’s current address.<sup>252</sup> Other states, such as Delaware, Hawaii, Maine, Massachusetts, Nevada, New Mexico, North Dakota, South Carolina, Vermont, West Virginia, and Wisconsin specifically require the identification to be government-issued, with some states imposing limitations on the types of government-issued identifications that will suffice.<sup>253</sup>

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246. 720 ILL. COMP. STAT. 570/312(a) (2022).

247. OR. ADMIN. R. 855-019-0210(3) (2022).

248. 21 N.C. ADMIN. CODE 46.1817(a) (2022); VA. CODE ANN. § 54.1-3420.1(A) (2022).

249. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 235, at 5.

250. CAL. BUS. & PROF. CODE § 4075 (Deering 2022); N.Y. COMP. CODES R. & REGS. tit. 10, §§ 80.73(e), 80.74(f) (2022).

251. LA. STAT. ANN. § 40:971(E) (2022); CONN. GEN. STAT. § 20-612a (2022); MINN. STAT. § 152.11(2d) (2022); MICH. ADMIN. CODE r. 338.3162(2), 338.3102(g) (2022).

252. FLA. STAT. § 465.0155(2)(a) (2022); GA. CODE ANN. § 26-4-80(l) (2022); VA. CODE ANN. § 54.1-3420.1(B) (2022).

253. See 24 DEL. ADMIN. CODE. § 4.10.1 (2022) (defining valid photographic identification as a Delaware driver’s license or identification card; U.S. passport; or passport or driver’s license of another U.S. state or country that contains a photograph, the individual’s date of birth, and an identification number and is tamper-resistant); HAW. REV. STAT. § 329-41(a)(6) (2022) (requiring that the government-issued identification contain the photograph, printed name, identification number, and signature of the individual obtaining the controlled substance); ME. REV. STAT. tit. 32, § 13786-A(3) (West 2022) (defining valid photographic identification similarly to Delaware); 105

States may also regulate whether the pharmacist must record the provided identification.<sup>254</sup> For instance, in Delaware, the pharmacist must record the identification number found on the presented driver's license or identification card in the patient record.<sup>255</sup> In Hawaii, the pharmacist must document the full name, identification number, identification type, and signature of the individual obtaining the controlled substance in a logbook or an electronic database.<sup>256</sup> In Nevada, the pharmacist must make a copy of the identification or record the full name and identification number of the person obtaining the prescription on the prescription or in the counseling log, patient record, or any other readily retrievable document.<sup>257</sup> In Florida, the pharmacist must record in the PMP the name of the individual picking up the controlled substance prescription and the type and issuer of the identification provided.<sup>258</sup> In Kentucky, the person obtaining the controlled substance must provide their Social Security number or driver's license number for entry into the PMP.<sup>259</sup>

Few states allow exceptions to the identification requirement.<sup>260</sup> In Florida, if the person picking up the prescription does not have proper identification, then the pharmacist may verify the identity of the patient

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MASS. CODE REGS. 700.001 (2022) (delineating a non-exclusive list of valid government-issued identification, including state-issued identification, military identification card, permanent resident card, passport, and driver's license); NEV. ADMIN. CODE § 639.748(1) (2022) (noting that valid forms of identification are ones issued by a federal, state, or local government agency that contains a photograph of the person); N.M. CODE R. § 16.19.20.42(E) (LexisNexis 2022) (characterizing acceptable identification as a current state-issued driver's license or other government-issued photo identification); N.D. ADMIN. CODE 61-04-03.1-01 (2022) (describing positive identification as one issued by a governmental agency which contains a description and/or photograph of the person); S.C. CODE ANN. § 44-53-360(i) (2022); VT. STAT. ANN. tit. 18, § 4215b (2022); W. VA. CODE § 60A-9-4a (2022); WIS. STAT. § 450.11(1b)(a)(2) (2022) (allowing a driver's license, an identification card issued by a state or U.S. uniformed service, a U.S. or foreign passport, or a tribal identification card to serve as valid identification cards).

254. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 235, at 7.

255. 24 DEL. ADMIN. CODE. §§ 4.10.1.1-2 (2022).

256. HAW. REV. STAT. § 329-41(a)(6)(A) (2022). South Carolina's law is comparable, requiring that the identification type and number be recorded on the prescription or in a readily retrievable log. S.C. CODE ANN. § 44-53-360(i) (2022).

257. NEV. ADMIN. CODE § 639.748(3) (2022). Virginia's law is analogous, requiring the pharmacist to make a copy of the individual's identification or record the individual's full name and address if that person is seeking to obtain a schedule II controlled substance, is not the person for whom the substance was prescribed, and is not known to the pharmacist. VA. CODE ANN. § 54.1-3420.1(B) (2022).

258. FLA. STAT. § 893.055(3)(a)(7) (2022). New Mexico's law is similar, mandating that the individual's name, identification type and number, and state be recorded, but does not specify where this information must be recorded. N.M. CODE R. § 16.19.20.42(E) (LexisNexis 2022).

259. 902 KY. ADMIN. REGS. 55:110 § 5(1)-(2) (2022).

260. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 235, at 6.

with the prescriber or their authorized agent.<sup>261</sup> In Vermont, the pharmacist may request “alternative evidence” of the individual’s identity.<sup>262</sup> Massachusetts and Michigan allow the pharmacist to dispense a controlled substance without reviewing the identification if the pharmacist has reason to believe that the failure to dispense the controlled substance would result in “serious hardship” or would be “detrimental” for the ultimate user, respectively.<sup>263</sup> If the pharmacist does so, in Massachusetts, the pharmacist must document that reason, and the ultimate user or their agent must provide their signature.<sup>264</sup>

#### IV. PROPOSED LEGISLATIVE AMENDMENTS

Currently, the CSA contains gaps, which the CFR fills in, allowing individuals to misuse CPHCS.<sup>265</sup> This Note asserts that a federal approach is necessary to improve public health and safety.<sup>266</sup> The CSA and the CFR should be amended to require prescriptions prior to dispensing any schedule V controlled substance and to require photo identification prior to dispensing all controlled substances.<sup>267</sup>

Subpart A argues the necessity for federal action.<sup>268</sup> Subpart B sets forth the proposed prescription requirements for schedule V controlled substances.<sup>269</sup> Subpart C details the proposed photo identification requirements that an individual must follow prior to taking possession of a controlled substance.<sup>270</sup>

##### *A. Federal Action Required*

Due to the severity and pervasiveness of the issue,<sup>271</sup> a federal approach is necessary to ensure that the public is protected from the potential harms of CPHCS.<sup>272</sup> As a result of the language of the CSA as written and the CFR, each state has passed varying legislation regarding

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261. FLA. STAT. § 465.0155(2)(a) (2022). Hawaii’s law is similar, except that in those circumstances, the pharmacist must verify the identity of the patient with the prescriber or their authorized agent. HAW. REV. STAT. § 329-41(a)(6)(A) (2022).

262. VT. STAT. ANN. tit. 18, § 4215b (2022).

263. 105 MASS. CODE REGS. 700.012(A)(3) (2022); MICH. ADMIN. CODE r. 338.3162(2) (2022).

264. 105 MASS. CODE REGS. 700.012(A)(3) (2022).

265. *See supra* Part III.

266. *See infra* Part IV.

267. *See infra* Part IV.

268. *See infra* Part IV.A.

269. *See infra* Part IV.B.

270. *See infra* Part IV.C.

271. *See supra* Part II.

272. *See supra* notes 55-62 and accompanying text.

controlled substances, leading to disharmony in regulation.<sup>273</sup> The fact that the vast majority of states do not permit the sale of schedule V substances without a prescription and already do require the presentation of some form of identification prior to dispensing a controlled substance ought to make harmonizing the outliers with the majority a relatively seamless process.<sup>274</sup>

Support for reforms to legislation surrounding codeine-containing cough syrups is present at the federal, state, and individual levels.<sup>275</sup> Federally, the FDA has recognized that children's exposure to codeine-containing cough syrups can lead to addiction.<sup>276</sup> States have also long recognized the occurrence of CPHCS pharming.<sup>277</sup> In 2017, Wisconsin, conceding the need to make potentially dangerous medications less accessible to those looking to misuse them, took action by ending the availability of codeine-containing cough syrups without a prescription with an amendment to its statutes.<sup>278</sup> Individual prescribers, too, have expressed concern over the availability of codeine-containing products without a prescription and believe that it should be prescription-only.<sup>279</sup>

Critics may argue that a federal approach is not necessary because the United States does not make all codeine formulations available

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273. See *supra* Part III.B.

274. See *supra* Part III.B.

275. See, e.g., U.S. DEP'T OF JUST., REVIEW OF THE DRUG ENFORCEMENT ADMINISTRATION'S REGULATORY AND ENFORCEMENT EFFORTS TO CONTROL THE DIVERSION OF OPIOIDS 29-30, <https://oig.justice.gov/reports/2019/e1905.pdf> [<https://perma.cc/V7HG-98XX>] (Sept. 2019) (explaining that officials in both the Department of Justice and DEA believe that their opioid diversion efforts would be better served if manufacturers were required to report the distribution of schedule V codeine-containing controlled substances to the DEA).

276. See Press Release, Food & Drug Admin., FDA Acts to Protect Kids from Serious Risks of Opioid Ingredients Contained in Some Prescription Cough and Cold Products by Revising Labeling to Limit Pediatric Use (Jan. 11, 2018), <https://www.fda.gov/news-events/press-announcements/fda-acts-protect-kids-serious-risks-opioid-ingredients-contained-some-prescription-cough-and-cold> [<https://perma.cc/W8MJ-2YDD>] (mentioning that one reason for the labeling change to limit the use of prescription opioid cough and cold medicines containing codeine in children younger than eighteen years old was to protect children from unnecessary exposure to opioids).

277. See, e.g., JANE CARLISLE MAXWELL, TCADA RESEARCH BRIEF: SUBSTANCE ABUSE TRENDS IN TEXAS: DECEMBER 1999 11 (Dec. 1999), <https://socialwork.utexas.edu/wp-content/uploads/2021/06/trends1299.pdf> [<https://perma.cc/W3ER-B3HB>] (concluding that codeine cough syrup was growing in popularity in Houston among adults who are polydrug abusers and youth who are primarily abusers of cough syrup, and that abuse was on the rise in Waco as well).

278. See WIS. STAT. § 961.38(4)(b) (2022); *Legislation*, HOPE AGENDA, <https://legis.wisconsin.gov/assembly/hope/legislation> [<https://perma.cc/B85A-WWRW>] (last visited Dec. 2, 2023) (explaining that the rationale behind the amendment was to "ensure these potentially dangerous medications are less accessible to those looking to misuse/abuse them").

279. See Michelle Foley et al., *Medical Professionals' Perspectives on Prescribed and Over-the-Counter Medicines Containing Codeine: A Cross-Sectional Study*, *BMJ OPEN*, July 2016, at 1, 5.

without a prescription, unlike other countries.<sup>280</sup> After all, the United States was among the countries with the lowest average sales of OTC codeine over a six-year period in the 2010s and was far surpassed by countries such as South Africa and Japan.<sup>281</sup> Therefore, in theory, the amount of sales may not be large enough to warrant regulation.<sup>282</sup>

However, because overdoses remain a leading cause of injury-related death in the United States and opioids are implicated in the majority of overdose deaths, it is necessary to address regulations surrounding all forms of opioids.<sup>283</sup> It took only two CPHCS-related deaths for France to restrict codeine as prescription-only in 2017.<sup>284</sup> Since February 2018, Australia has terminated the availability of codeine-containing cough syrups without a prescription,<sup>285</sup> and accordingly, the following year saw a seventy-nine percent decrease in codeine poisonings from preparations that were once available without a prescription.<sup>286</sup> Since November 2020, New Zealand, acknowledging that the harms associated with OTC codeine outweighed the benefits, also reclassified all OTC codeine-containing products as prescription-only.<sup>287</sup>

Taking similar action to restrict the availability of CPHCS would be within the purview of the United States federal government's authority, as stringent changes to controlled substance regulations have been made in the past when public health and safety were at issue.<sup>288</sup> For

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280. See Georgia C. Richards et al., *Sales of Over-the-Counter Products Containing Codeine in 31 Countries, 2013-2019: A Retrospective Observational Study*, 45 *DRUG SAFETY* 237, 244 (2022) (observing that codeine is one of the most widely accessible opioids worldwide).

281. *Id.* at 239, 242.

282. *See id.* at 242.

283. See *Understanding Drug Overdoses and Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/epidemic/index.html> [<https://perma.cc/L74Z-H4W9>] (May 8, 2023).

284. See Carmen Cracknell, *Codeine Now Restricted to Prescription-Only*, CONNEXION (July 13, 2017, 9:43 AM), <https://www.connexionfrance.com/article/French-news/Codeine-now-restricted-to-prescription-only> [<https://perma.cc/7Z6F-JWPR>].

285. *Over-the-Counter Codeine: Changes to Supply*, NPS MEDICINEWISE (Aug. 18, 2017), <https://www.nps.org.au/professionals/over-the-counter-codeine-changes-to-supply> [<https://perma.cc/29E4-82ER>].

286. Rose Cairns & Nicholas Buckley, *Here's What Happened When Codeine Was Made Prescription Only. No, the Sky Didn't Fall In*, CONVERSATION (Oct. 2, 2019, 4:03 PM), <https://theconversation.com/heres-what-happened-when-codeine-was-made-prescription-only-no-the-sky-didnt-fall-in-124169> [<https://perma.cc/6A3F-HXDC>].

287. *Codeine Reclassified as a Prescription-Only Medicine: A Community Pharmacy Perspective*, BPAC NZ (Oct. 9, 2020), <https://bpac.org.nz/2020/codeine-rx.aspx> [<https://perma.cc/YP55-MTFS>].

288. See generally *DRUG ENF'T ADMIN., DEA HISTORY: THE EARLY YEARS*, <https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%20%2012-29.pdf> [<https://perma.cc/BB89-SMEJ>] (last visited Dec. 2, 2023) (chronicling early attempts to combat the misuse of drugs).

instance, the DEA rescheduled hydrocodone combination products from schedule III controlled substances to schedule II controlled substances due to the potential for abuse.<sup>289</sup> In addition, recognizing its potentially fatal side effects, the FDA has increased the age limit for codeine use.<sup>290</sup>

### *B. Schedule V Prescription Requirement*

The CSA and CFR ought to be amended to require an oral, written, or electronic prescription before dispensing schedule V substances in all states, akin to the requirements already in place for schedule III and schedule IV substances.<sup>291</sup> To accomplish this, 21 U.S.C. § 829 should be amended to repeal subsection (c) and modify subsection (b) to include schedule V substances.<sup>292</sup> This would have the effect of mandating a prescription prior to dispensing a controlled substance in schedules II-V.<sup>293</sup> In addition, Sections 290.2 and 1306.26 of 21 C.F.R. should be repealed as well, which would have the effect of preventing the sale of any controlled substance in schedules II-V without a prescription.<sup>294</sup>

Opponents might claim that requiring a prescription prior to dispensing schedule V substances will make it more difficult for those who legitimately rely on these medications to manage their chronic conditions.<sup>295</sup> However, these proposed amendments would not affect numerous controlled substances—only codeine-containing cough syrups.<sup>296</sup> Patients who require treatment for a chronic cough are not left at a loss because other OTC cough and cold remedies are just as effective, or perhaps even more effective, than CPHCS.<sup>297</sup>

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289. Schedules of Controlled Substances: Rescheduling of Hydrocodone Combination Products from Schedule III to Schedule II, 79 Fed. Reg. 49661, 49680 (Aug. 22, 2014) (to be codified at 21 C.F.R. pt. 1308).

290. See *supra* notes 44-45 and accompanying text.

291. See 21 U.S.C. § 829(b)–(c). Under this proposal, penalties for possessing CPHCS without a prescription will follow current penalties for simple possession. See *id.* § 844(a).

292. See *id.* § 829(b)–(c).

293. See *id.* § 829(a)–(c).

294. See 21 C.F.R. §§ 290.2, 1306.26 (2022).

295. See Adrian Reynolds, *Opinion Piece - End to Over-the-Counter Purchase of Codeine*, RACP, <https://www.racp.edu.au/news-and-events/media-releases/opinion-piece---end-to-over-the-counter-purchase-of-codeine> [<https://perma.cc/P6FS-KVCU>] (last visited Dec. 2, 2023) (stating that those opposed to making codeine prescription-only are concerned that restricted access will inconvenience many consumers).

296. See W. Steven Pray & Gabriel E. Pray, *Behind-the-Counter Products: A Third Class of Drugs*, U.S. PHARMACIST (Sept. 20, 2011), <https://www.uspharmacist.com/article/behind-the-counter-products-a-third-class-of-drugs> [<https://perma.cc/YT7K-WHTW>] (observing that the vast majority of schedule V medications, once accessible without a prescription, are now discontinued, leaving CPHCS as the only remaining schedule V medication available without a prescription).

297. See *supra* notes 53-54 and accompanying text.

Some may argue that the proposed changes might lead to an increase in illegitimate prescriptions because patients will continue to exaggerate and falsify illnesses to gain prescriptions or collude with physicians for prescriptions.<sup>298</sup> If this comes to fruition, it must be combatted at the pharmacy counter since pharmacists have a corresponding responsibility to ensure the proper prescribing and dispensing of controlled substances.<sup>299</sup> Pharmacists are trained to detect red flags in prescriptions and can refuse to dispense prescriptions laden with red flags, such as large quantities, cash-paying patients, and out-of-area prescribers.<sup>300</sup> Moreover, an identification requirement prior to dispensing a controlled substance prescription could serve as an effective deterrent.<sup>301</sup>

Some may also express concern that individuals will replace CPHCS with more dangerous controlled substances if CPHCS is no longer readily available.<sup>302</sup> While this is a genuine possibility, it is important to bear in mind that many CPHCS pharmerms are *already* pharming other controlled substances.<sup>303</sup> CPHCS users generally do not consume lean alone, and instead, mix it with other drugs.<sup>304</sup> Consequently, by limiting the number of substances available for mixture, the risk of potentially deadly side effects will also be reduced.<sup>305</sup>

### C. Federal Identification Requirement

The CSA and CFR ought to be amended to include new sections requiring photo identification prior to dispensing controlled substances, which can be modeled after the more stringent state identification laws in the nation.<sup>306</sup> This amendment would mandate:

The pharmacist or an employee under the pharmacist's direct supervision shall verify the identification of all receivers of controlled substance prescriptions by reference to valid photographic identification, which may include government-issued photographic identification. The pharmacist or employee must scan, swipe, or manually enter the document such that the issuer; identification type; and the full name, address, date of birth, and identification number of the individual

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298. See *supra* Part II.D.3. and accompanying text.

299. See 21 C.F.R. § 1306.04(a) (2022).

300. UTAH BD. OF PHARMACY, *supra* note 148.

301. See *infra* Part IV.C.

302. See Foley et al., *supra* note 279, at 9 (acknowledging that other prescription opioids “are also misused, so removal of OTC codeine is unlikely to eliminate the problem [of misuse] entirely”).

303. See *supra* note 60 and accompanying text.

304. See *supra* note 60 and accompanying text.

305. See *supra* note 61 and accompanying text.

306. See *supra* Part III.B.2.

obtaining the controlled substance is recorded in the prescription monitoring program and/or patient profile.<sup>307</sup>

The types of government-issued identification that would be acceptable could include any federal, state, or local government identification that contains an identification number and includes the individual's full name, address, date of birth, and photograph.<sup>308</sup> If the individual seeking to obtain possession of the controlled substance does not present the requisite identification and is the person to whom the prescription was issued, then real-time verification of insurance eligibility may serve as an alternate form of identification.<sup>309</sup> If the individual's identity cannot be verified through insurance, then it is up to the professional judgment of the pharmacist in determining whether to release the controlled substance, and that reason must be documented in the patient profile.<sup>310</sup>

Some might doubt that these requirements will guard against individuals who present fake identification cards when procuring controlled substances.<sup>311</sup> However, it is precisely because of the fact that fictitious patients are often involved that these requirements are necessary.<sup>312</sup> By mandating that individuals present their identification documents for scanning and recording, individuals will be deterred from using fraudulent identification cards since they are more likely to be caught while doing so.<sup>313</sup> If technical measures are in place to detect fraudulent identification cards, then individuals will be forced to present valid identification or forego picking up the controlled substance at all, which will make it easier to identify patients who are receiving prescriptions outside of the scope of usual medical practice.<sup>314</sup>

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307. See 24 DEL. ADMIN. CODE. § 4.10.1 (2022) (amended); HAW. REV. STAT. § 329-41(a)(6)(A) (2022) (amended). Penalties for violations will align with current penalties imposed on pharmacists who fail to fulfill their corresponding responsibility. See 21 C.F.R. § 1306.04(a) (2022).

308. See HAW. REV. STAT. § 329-41(a)(6) (2022) (amended); ME. REV. STAT. tit. 32, § 13786-A(3) (West 2022) (amended).

309. See FLA. STAT. § 465.0155(2)(a) (2022).

310. See 105 MASS. CODE REGS. 700.012(A)(3) (2022).

311. See Press Release, U.S. Att'y's Off., Dist. of Neb., *supra* note 24 (reporting that two women were seen on surveillance video obtaining CPHCS using fake IDs).

312. See *id.*

313. See John Burke, *Showing Identification at the Pharmacy Counter*, PHARMACY TIMES (Jan. 13, 2012), <https://www.pharmacytimes.com/view/showing-identification-at-the-pharmacy-counter> [<https://perma.cc/3JGH-XRWM>] (positing the argument that professional prescription drug rings thrive due to the absence of identification requirements).

314. See Joe Oprosko, *Fake IDs Have Improved Dramatically. Has Your Screening Process?*, FORBES (Aug. 20, 2021, 7:45 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/08/20/fake-ids-have-improved-dramatically-has-your-screening-process/?sh=4b0555dc6d6b> [<https://perma.cc/5TZC-T4LQ>] (advocating for organizations to implement "layered" identification checks to detect fake identifica-

Mandatory identification laws are also necessary to cure some of the known issues with discretionary identification laws, namely that individuals might become friendly with the pharmacy staff in an attempt to circumvent dispensing requirements.<sup>315</sup> Insisting that the pharmacy staff verify the identity of the person picking up the controlled substance prescription, regardless of whether they are known to the pharmacy staff, would remedy this situation.<sup>316</sup> Requiring that the staff document the reason for not inspecting an identification card and increasing oversight over this documentation by local health departments or law enforcement offices would serve as additional misuse deterrents.<sup>317</sup>

## V. CONCLUSION

The CPHCS misuse that began in Texas in the 1960s is still prevalent to this day across the United States as a result of its glamorization in pop culture and on social media.<sup>318</sup> Despite this misuse, CPHCS is still widely available today.<sup>319</sup> Medical research has long illuminated the harmful effects that accompany CPHCS misuse, ranging from brain damage, decreased respiratory rate, increased somnolence, and even death.<sup>320</sup> Keeping the health risks associated with this medical product in mind, addressing this public health emergency should be a federal priority to protect the public from the harm caused by pharming the medication.<sup>321</sup>

The solution to this problem is simple: require a prescription and photo identification prior to dispensing this medication.<sup>322</sup> This solution is feasible because the majority of states already do not permit the sale

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tion cards by comparing the printed information from the front of the card with the machine-readable data from the barcode and ensuring that the fields align, and to utilize secure identification readers to confirm the presence of security features).

315. See, e.g., Administrative Complaint at 5, *In re Universal Pharmacy of Saginaw*, File No. 53-17-147135 (Nov. 6, 2017), [https://www.michigan.gov/-/media/Project/Websites/lara/bpl/Folder22/Universal\\_AC.PDF?rev=cdde0430e9d64943b7d1a80b6e407bb](https://www.michigan.gov/-/media/Project/Websites/lara/bpl/Folder22/Universal_AC.PDF?rev=cdde0430e9d64943b7d1a80b6e407bb) [<https://perma.cc/8R6K-6Y6E>] (alleging that a doctor often sent controlled substance prescriptions to a particular pharmacy because the pharmacist who worked there was the only one in the area who would fill the prescriptions that he wrote).

316. See, e.g., *Opioid Dispensing Rate Maps*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/rxrate-maps/opioid.html> [<https://perma.cc/N8CS-UA4T>] (Oct. 31, 2023) (reporting that Massachusetts, one of two states that mandates universal identification requirements, had the sixth-lowest opioid dispensing rate per 100 persons in the nation in 2020).

317. See Burke, *supra* note 313.

318. See *supra* Part II.B–C.

319. See *supra* Part II.D.

320. See *supra* notes 55-62 and accompanying text.

321. See *supra* Part IV.A.

322. See *supra* Part IV.

of CPHCS without a prescription<sup>323</sup> and do require that photo identification be presented prior to dispensing controlled substance prescriptions.<sup>324</sup> Moreover, it is well within the federal government's authority to enact these amendments to the CSA and Title 21 of the CFR because the impetus behind these acts was to protect the public from the adverse effects of medications, including controlled substances.<sup>325</sup>

France, Australia, and New Zealand have restricted codeine-containing medicines from OTC to prescription-only in the last few years.<sup>326</sup> Wisconsin, too, has similarly restricted access to codeine-containing cough syrups.<sup>327</sup> It is beyond time for the United States government to follow suit and strengthen and harmonize its controlled substance dispensing requirements to protect public health.<sup>328</sup>

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323. *See supra* Part III.B.1.

324. *See supra* Part III.B.2.

325. *See supra* notes 288-90 and accompanying text.

326. *See supra* notes 283-87 and accompanying text.

327. *See supra* note 278 and accompanying text.

328. *See supra* Part IV.

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