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## The Constitutionality of Anti-Drug Paraphernalia Laws—The Smoke Clears

In recent years, states and communities have realized that their efforts to curb illicit drug use have been inadequate. Most states and many communities have chosen to supplement traditional anti-drug laws with statutes and ordinances aimed at restricting or eliminating a wellspring and symbol of the drug culture—the “headshop.” The new laws represent an attempt to remove the glaring incongruity presented by the existence of shops which sell drug paraphernalia in a society which purports to be waging war on drug abuse.

This note examines the constitutionality of anti-drug paraphernalia laws in light of the Supreme Court’s decision in *Hoffman Estates v. Flipside, Hoffman Estates*.<sup>1</sup> Part I analyzes the constitutional battleground on which these laws are challenged; Part II traces the history of drug paraphernalia laws up to the advent of the Drug Enforcement Administration’s Model Drug Paraphernalia Act<sup>2</sup> (MDPA); Part III discusses the impact the MDPA has had as the prototype of a “constitutional” drug paraphernalia law; and Parts IV and V focus on *Flipside* and the circuit court decisions rendered after it,<sup>3</sup> in order

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1 455 U.S. 489 (1982), *reh’g denied*, 102 S.Ct. 2023 (1982). In *Flipside*, the Court rejected a headshop owner’s pre-enforcement facial challenge to a village ordinance requiring a business to obtain a license to sell any items that were “designed or marketed for use with illegal cannabis or drugs.” 455 U.S. at 491. A pre-enforcement facial challenge is basically an assertion by the plaintiff, prior to any attempt by police to enforce the enactment, that the law is “invalid in toto and therefore incapable of any valid application.” *Id.* at 494 n.5 (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)). The Court in *Flipside* noted that when evaluating a facial challenge, a court must consider any limiting construction that a state court or enforcement agency has proffered. 455 U.S. at 494 n.5 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). The plaintiff contended that the ordinance was unconstitutionally overbroad and vague. The Court employed a two-pronged test in upholding the validity of the ordinance. The test virtually assures that a carefully drawn anti-drug paraphernalia law will withstand any pre-enforcement facial challenge to its constitutional validity:

(1) Overbreadth—Whether the enactment reaches a substantial amount of constitutionally protected conduct?

(2) Vagueness—Whether the enactment is impermissibly vague in all its applications?

455 U.S. at 494-95.

2 MODEL DRUG PARAPHERNALIA ACT, Drug Enforcement Administration (1979) [hereinafter cited as MDPA]. The MDPA is reprinted in Appendix B. The ordinance at issue in *Flipside* was not based on the MDPA. That ordinance is reprinted in Appendix A.

3 Thirteen United States Courts of Appeals cases have dealt with challenges to anti-drug paraphernalia laws since the *Flipside* opinion. See note 52 *infra*.

to answer the question: are anti-drug paraphernalia laws constitutional?

## I. The Constitutional Battleground

Although plaintiffs have advanced several theories challenging the constitutionality of drug paraphernalia laws,<sup>4</sup> courts have given serious consideration to only two—vagueness and overbreadth. Vagueness is a fourteenth amendment due process doctrine. In *Grayned v. City of Rockford*,<sup>5</sup> the Supreme Court held that in order for a law to withstand a vagueness challenge, it must (1) provide fair warning to those whose conduct is subject to the law's prohibitions, and (2) set out explicit standards for those who apply the law, in order to avoid arbitrary or discriminatory enforcement.<sup>6</sup> The Supreme Court has established that a person whose conduct clearly falls within a statute's prohibitions cannot challenge that statute on vagueness grounds.<sup>7</sup>

Drug paraphernalia laws have also been attacked as unconstitutionally overbroad. Overbreadth is technically a standing doctrine.<sup>8</sup> It permits a party in a case involving a first amendment challenge to

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4 In addition to fourteenth amendment due process vagueness and first amendment overbreadth, plaintiffs have argued that drug paraphernalia laws violate the eighth amendment, the right to privacy, the fourth amendment, the takings clause, the commerce clause, and equal protection. Courts have paid little attention to these arguments. See, e.g., *Lady Ann's Oddities, Inc. v. Macy*, 519 F.Supp. 1140 (W.D. Okla. 1981), where the court upheld the constitutionality of Oklahoma's drug paraphernalia act—a modified version of the MDPA—against a barrage of constitutional arguments, after severing certain provisions from the act. Some plaintiffs have even alleged that a state has no legitimate interest to protect in this area or that the statute used bore no rational relationship to achieving the furtherance of that interest. These arguments have been summarily rejected. See note 31 *infra*.

5 408 U.S. 104 (1972).

6 *Id.* at 108-09. The *Grayned* Court stated:

First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

*Id.* Accord *Smith v. Goguen*, 415 U.S. 566 (1974); See generally Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Note, *Anti-Drug Paraphernalia Laws: Void for Vagueness?*, 61 B.U.L. REV. 453 (1981) [hereinafter cited as *Paraphernalia Laws*].

7 *Parker v. Levy*, 417 U.S. 733, 756 (1974). A vague statute can be cured by subsequent narrowing of the statute by courts. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

8 *Hoffman Estates v. Flipside*, *Hoffman Estates*, 455 U.S. at 508 (White, J., concurring) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973)).

government restrictions on noncommercial speech to assert that a law is invalid because it infringes on the first amendment rights of others not before the court.<sup>9</sup> The party asserting the overbreadth challenge to the statute need not actually be engaged in constitutionally protected conduct; it is enough that the statute's very existence may cause others not before the court to refrain from exercising their constitutional right to speak or express themselves.<sup>10</sup> Thus, in an overbreadth challenge a party may have standing to challenge a statute if it infringes on another's first amendment rights, despite the fact that his own rights of free expression are not implicated.<sup>11</sup>

A drug paraphernalia statute that is drafted precisely enough to avoid vagueness and overbreadth will withstand constitutional scrutiny. However, avoiding these two pitfalls has not proven to be an easy task for lawmakers.

## II. Anti-Drug Paraphernalia Statutes—From "Needle Laws" to the Model Drug Paraphernalia Act

Most states enacted some type of paraphernalia control statute over a decade ago.<sup>12</sup> These early statutes were aimed at regulating the sale and use of hypodermic needles, quinine, and other accessories of heroin addiction.<sup>13</sup> By 1976, five states had moved beyond "needle laws" and had criminalized the possession of a pipe or similar object that the possessor intended to use to smoke a controlled substance.<sup>14</sup> Legislators enacted these "pipe laws" largely because

9 *Id.*

10 *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The rationale behind allowing a party, whose first amendment rights are not implicated, to challenge a law as unconstitutionally overbroad, is that courts want to prevent the "chilling" effect an overbroad statute has or may have on protected speech. The *Broadrick* Court stated:

In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. *Id.* at 612. The *Broadrick* Court, however, was hardly willing to let the overbreadth doctrine run too far. The Court noted that facial overbreadth adjudication is an exception to the traditional rules of practice. *Id.* at 615. The Court went on to state:

To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. *Id.*

11 The overbreadth doctrine is truly "manifestly, strong medicine". Overbreadth, like vagueness, can be cured by subsequent narrowing by courts. *Id.* at 613.

12 As of 1973, 35 states had enacted heroin paraphernalia laws. See Christianson, *Heroin Paraphernalia: Breakdown of a Fix*, 10 CRIM. L. BULL. 493 (1974).

13 *Id.*

14 These states were Alabama, California, Florida, Indiana, and Mississippi. See Note,

many courts had held that "needle laws" did not prohibit the possession of non-hypodermic paraphernalia.<sup>15</sup>

Although the new "pipe laws" cured many coverage problems, they encountered a serious constitutional obstacle—vagueness. Pipes, in and of themselves, have innocent uses, and this characteristic tends to make a pipe less susceptible to regulation than a hypodermic needle.<sup>16</sup> Moreover, legislators in drafting "pipe laws" inevitably sought to include the wide variety of objects that the non-hypodermic drug user may employ.<sup>17</sup> The lawmakers thus sacrificed precision for effective coverage, thereby enacting pipe laws which were inherently vague and subject to challenge for failing to meet the due process requirements of *Grayned v. City of Rockford*.<sup>18</sup>

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*Paraphernalia for Marijuana and Hashish Use: Possession Statutes and Indiana's Pipe Dream*, 10 VAL. L. REV. 353, 354 (1976) [hereinafter cited as *Indiana's Pipe Dream*].

15 See *Kraft v. State*, 18 Md. App. 169, 305 A.2d 489 (1973) (Maryland needle law held not to prohibit the possession of a marijuana pipe); *People v. Berger*, 61 Misc. 2d 475, 305 N.Y.S.2d 789 (Albany County Ct. 1969) (New York statute prohibiting possession of hypodermic needles, syringes, or "any instrument or implement adapted for the administration of narcotic drugs," held not to prohibit the possession of ordinary pipes despite the presence of marijuana residue on the pipe in question); see also *Williams v. United States*, 304 A.2d 287 (D.C. 1973) (District of Columbia's statute prohibiting possession of any "instrument, tool, or other implement . . . usually employed . . . in the commission of any crime" held not to prohibit the possession of a small wooden pipe containing marijuana residue). To eliminate any doubt that the New York needle law was not meant to prohibit the possession of pipes, the legislature subsequently amended the statute to limit its application to paraphernalia accompanying the use of drugs by hypodermic injection. N.Y. PUB. HEALTH LAW § 3381 (McKinney supp. 1976), as amended, Laws of New York, 1972, ch. 878 § 2, amending Laws of New York, 1952, Ch. 91 § 1.

16 Although hypodermic needles and syringes also have a variety of lawful uses, ample allowance for such lawful use can be made by requiring prescriptions or licenses for the possession and use of hypodermic needles because few people actually need hypodermic needles or syringes for legitimate purposes. On the other hand, a great many people can or do engage in lawful activities with a pipe. The difficulties of requiring a license or prescription for pipe possession and use are obvious.

17 California's law was typical; it prohibited the possession of "any device, contrivance, instrument, or paraphernalia used for unlawfully injecting or smoking controlled substances." CAL. HEALTH & SAFETY CODE § 11,364 (West 1980). Pipes suitable for smoking controlled substances come in all shapes and sizes ranging from typical corn cob pipes to elaborate water pipes or "bongs." In addition, other objects are employed in non-hypodermic drug use, including cigarette or "rolling" papers and alligator or "roach" clips. All of these items are (or arguably may be) inherently innocent. See *World Imports, Inc. v. Woodbridge Township*, 493 F.Supp. 428, 430 (D.N.J. 1980) (legitimate uses of alligator clips and water pipes); *Bambu Sales, Inc. v. Gibson*, 474 F.Supp. 1297, 1299 (D.N.J. 1979) (rolling papers commonly used for forming tobacco cigarettes).

18 408 U.S. 104 (1972). See notes 5-7 *supra* and accompanying text. For example, Indiana's law was declared unconstitutionally vague in *Indiana Chapter Norml v. Sendak*, No. 75-142, slip op. (S.D. Ind. Feb. 4, 1980) (3 judge district court). The Seventh Circuit subsequently vacated the case as moot at the time of appeal. 631 F.2d 734 (7th Cir. 1980). The case was vacated because the Indiana legislature had repealed the first statute and had en-

The early anti-drug paraphernalia statutes focused on prohibiting the possession of paraphernalia used with a controlled substance.<sup>19</sup> Realizing that the paraphernalia industry was big business,<sup>20</sup> states and communities began to shift the focus of paraphernalia laws to the retailer or manufacturer of the paraphernalia.<sup>21</sup> While these laws varied widely in their form and sanctions, retailers and manufacturers uniformly objected and proceeded to sue.

The litigation spawned by challenges to early drug paraphernalia laws found the courts quick to strike down the vast majority of the enactments as unconstitutionally vague.<sup>22</sup> Headshop owners and paraphernalia manufacturers attacked the laws as being vague for failing to provide them with fair warning of what conduct was pro-

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acted in its place a law, *see* note 44 *infra*, based on the MDPA. *See* note 2 *supra* and notes 33-44 *infra* and accompanying text. The new statute was declared constitutional in its entirety in *Nova Records, Inc. v. Sendak*, No. 81-1107 (7th Cir. April 15, 1983).

19 One commentator has called these statutes "possession and use" statutes. Note, *The Constitutionality of Drug Paraphernalia Laws*, 81 COLUM. L. REV. 581, 582 (1981). The part of Florida's statute which outlawed possession of paraphernalia *prior* to its actual use with controlled substances was declared unconstitutionally vague in *Florida Businessmen v. Florida*, 499 F.Supp. 346 (N.D. Fla. 1980), *aff'd sub nom.*, *Florida Businessmen v. City of Hollywood*, 673 F.2d 1213 (11th Cir. 1982).

20 Estimates on the nationwide sales volume of drug paraphernalia range from \$50 million to \$3 billion a year. U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, COMMUNITY AND LEGAL RESPONSES TO DRUG PARAPHERNALIA 5 (1980); *see also Drug Paraphernalia: Hearings Before the House Select Comm. on Narcotics Abuse and Control*, 96th Cong., 1st Sess. 87 (1979) (statement of Peter Bensinger, Administrator of the Drug Enforcement Administration) (increasing concern that the availability of drug paraphernalia facilitates and glamorizes drug use).

21 All states listed in note 14 *supra* subsequently amended their laws to outlaw the sale of paraphernalia as well as its possession. *See* note 44 *infra*. California prohibits the sale of paraphernalia to minors. *Id.* By 1980 these five states had been joined by several other states and communities that enacted a variety of anti-drug paraphernalia laws. *See* notes 22 & 44 *infra*.

22 *Magnani v. City of Ames*, 493 F.Supp. 1003 (S.D. Iowa 1980); *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390 (E.D. Mich. 1980); *Knoedler v. Roxbury Township*, 485 F.Supp. 990 (D.N.J. 1980); *Record Museum v. Lawrence Township*, 481 F.Supp. 768 (D.N.J. 1979); *Housworth v. Glisson*, 485 F.Supp. 29 (N.D. Ga. 1978), *aff'd per curiam*, 615 F.2d 1295 (5th Cir. 1980); *Riddle v. Clack*, No. 77-0025, slip op. (N.D. Tex. Aug. 25, 1977). One circuit court dealt with the question in *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980) and struck the ordinance down as vague. *See also* note 18 *supra*. In *Bambu Sales, Inc. v. Gibson*, 474 F.Supp. 1297 (D.N.J. 1979) the court found the law in question sufficiently precise to avoid vagueness but unconstitutionally overbroad as the items proscribed were frequently used lawfully. The court, however, appeared to confuse vagueness and overbreadth. *See* 455 U.S. at 497 n.9. (where the Supreme Court, in *Flipside*, characterized the headshop owner's argument that the ordinance was overbroad because it could extend to innocent and lawful uses of the items, as an argument that the ordinance was vague).

Cases upholding the constitutionality of these early anti-drug paraphernalia laws are few. *See, e.g.*, *Gasser v. Morgan*, 498 F.Supp. 1154 (N.D. Ala. 1980); *Tobacco Road v. City of Novi*, 490 F.Supp. 537 (E.D. Mich. 1979).

hibited and for failing to provide explicit standards for police and courts to follow when enforcing the law.<sup>23</sup> The courts struck down the statutes and ordinances as unconstitutionally vague because legislators had attempted to define "drug paraphernalia" in objective terms, to distinguish items that inherently constituted "drug paraphernalia" from those that did not.<sup>24</sup> Considering that most items that could be termed "drug paraphernalia" have both lawful and unlawful uses, this task was doomed from the outset.<sup>25</sup>

An Eighth Circuit case, *Geiger v. City of Egan*,<sup>26</sup> illustrates the futility of legislative efforts to define "drug paraphernalia" objectively. Egan, Minnesota, had enacted an ordinance prohibiting the "possession, sale, transfer or display for sale or transfer" of a "drug related device."<sup>27</sup> In holding that the definition of "drug related device" was not sufficiently clear to meet *Grayned's* two-pronged test, the court determined that the common understanding of the words "any pipe or other object suitable to be used for smoking" was that they described tobacco smoking accessories and not drug paraphernalia.<sup>28</sup> Relying solely on the language of the ordinance to determine what constituted a prohibited "drug related device," the court found that whether an "object" was suitable to be used for smoking a

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23 This is an allegation that the laws failed to meet the two-pronged test set out in *Grayned*. 408 U.S. at 108-09. See notes 5-7 *supra* and accompanying text.

24 *Paraphernalia Laws*, *supra* note 6, at 456.

25 See note 17 *supra*.

26 618 F.2d 26 (8th Cir. 1980).

27 *Id.* at 27.

28 *Id.* at 29. The precise issue facing the court was whether the definition of "drug related device" was sufficiently clear to meet the two-pronged requirements of *Grayned*. 408 U.S. at 108-09. See notes 5-7 *supra* and accompanying text. The ordinance in *Geiger* defined "drug related device" as "any pipe or other object suitable to be used for smoking" with one of the following characteristics:

1. Contains a visible fine wire mesh screen or;
2. Contains a bowl with the interior surface made of metal, glass, acrylic, plexiglass or plastic; or
3. Contains a bowl with an inside diameter of one-half inch or less at the halfway point between the top and the bottom of the bowl; or
4. Contains a chamber; or
5. Contains a flexible tube or tubes.

"Chamber", "bowl", and "pipe stem" are further defined in the ordinance: "Chamber" means an enclosed area suitable for the collection or movement of smoke, other than a bowl, pipe stem, flexible tube, or a tube suitable for holding cigarettes or cigars.

"Bowl" means a concave-shaped object suitable for holding a smoking material to be lighted.

"Pipe stem" means a non-flexible tube with one end entering directly into a bowl.

618 F.2d at 28-29.

controlled substance depended primarily upon the ingenuity and practices of drug users.<sup>29</sup> The court further stated that the characteristics enumerated in the ordinance, intended to aid in determining what constituted a drug related device, were themselves vague.<sup>30</sup>

Although the ordinance in *Geiger* was void for vagueness, the *Geiger* court entertained no doubt that Eagan "clearly" had the power to enact a properly drawn drug paraphernalia law.<sup>31</sup> As an

29 618 F.2d at 29.

30 *Id.* As such, the ordinance failed to meet the first prong of the *Grayned* test because it failed to give fair warning. See notes 5-7 *supra* and accompanying text. The *Geiger* court went on to hold that the ordinance failed the second prong of the test as well, because it did not establish explicit standards for enforcement. 618 F.2d at 29. See notes 5-7 *supra* and accompanying text. The court in *Geiger* was concerned that an arrest for a violation of the paraphernalia ordinance would be used to justify a search incident to the arrest that would in turn be directed at finding the controlled substance itself. This is undeniably a problem, for the reasonable policeman no doubt knows or believes that where there is paraphernalia, the illegal substance is likely close at hand. Where there is smoke (paraphernalia), there is fire (dope). For interesting commentary on the fourth amendment implications of paraphernalia laws see *Indiana's Pipe Dream*, *supra* note 14, at 367-73. Subsequent to the *Geiger* decision, however, courts—when dealing with legislation based on the MDPA—have refused to give fourth amendment attacks on paraphernalia laws much consideration. See, e.g., *Mid-Atlantic Accessories Trade Ass'n v. Maryland*, 500 F.Supp. 834 (D. Md. 1980). There, the court dismissed the plaintiff's contention that Maryland's drug paraphernalia law violated the fourth amendment's prohibition on unreasonable searches and seizures as lacking in merit. The plaintiffs argued that possession of an item that might arguably be drug paraphernalia was not enough to constitute probable cause for a drug search. The plaintiff's point was that by making possession of drug paraphernalia a crime, Maryland's statute permitted arrest for the possession of paraphernalia and a search incident to that arrest aimed at seizing drugs. The law, according to the plaintiffs, authorized searches not based on probable cause. The court made it quite clear that it was not persuaded by this argument. It determined that if a state may validly make possession of drug paraphernalia a crime, the fourth amendment permits a search incident to that arrest. See *United States v. Robinson*, 414 U.S. 218 (1973). As the district court found the law in question constitutional, plaintiff's fourth amendment argument failed.

31 618 F.2d at 28. The *Geiger* court is not alone in this finding. Every court that has been called upon to determine the constitutionality of a drug paraphernalia law has recognized that states and communities have the power to regulate or ban drug paraphernalia. A state need only show that a law bears a rational relation to a legitimate state interest and that the legislation is a reasonable means of achieving a legitimate state goal. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). A state has a legitimate interest in curbing drug abuse. While it may be less clear that regulating or banning drug paraphernalia bears a rational relationship to curbing drug abuse, most courts have so held. As the Fifth Circuit recently stated:

One need not squint in the dark to perceive a link between the illegal use of drugs, particularly by youngsters, and items used to facilitate drug use. The Louisiana legislature is within its constitutional authority when it addresses in this manner, the problems involved in drug abuse. Whether the measure is wise, prudent or likely to succeed is a decision for the legislature. The courtroom is not the forum for that debate.

*Tobacco Accessories v. Treen*, 681 F.2d 378, 386 (5th Cir. 1982) (upholding Louisiana's drug paraphernalia act, an act modeled on the MDPA, see note 2 *supra* and notes 33-44 *infra* and

example of such a law, the court referred to the recently drafted Model Drug Paraphernalia Act (MDPA).<sup>32</sup>

### III. The Model Drug Paraphernalia Act—The Prototype of a Constitutional Drug Paraphernalia Law?

#### A. *The Statutory Scheme*

In August, 1979, the Drug Enforcement Administration (DEA) of the Justice Department drafted the Model Drug Paraphernalia Act (MDPA). The DEA designed the MDPA as an amendment to the Uniform Controlled Substances Act<sup>33</sup> in response to the setbacks earlier paraphernalia laws had suffered at the hands of the courts.<sup>34</sup> The MDPA is the DEA's attempt to write a statute broad enough to deal with the problem of drug paraphernalia, narrow enough to avoid impinging on constitutionally protected conduct, and precise enough to be understood by both the law's enforcers and its targets.<sup>35</sup>

The statutory scheme of the MDPA is straightforward. There are four articles. Article I defines "drug paraphernalia" and lists certain items that are to be considered drug paraphernalia.<sup>36</sup> Article I also lists certain factors that a court or other authority should consider to determine whether an object is drug paraphernalia.<sup>37</sup> The list of factors is not meant to be mandatory or exhaustive, but rather the factors should be considered in addition to other logically relevant factors.<sup>38</sup> Article II, the offenses and penalties section, is divided into four parts. The parts respectively criminalize the possession, the

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accompanying text). In any event, it is well established that a state has only a modest burden when it attempts to meet the rational relationship test. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Any doubt that a state or community has the power to regulate or ban drug paraphernalia was erased by the Supreme Court in *Flipside*. The Court stated: "Many American communities have recently enacted laws regulating or prohibiting the sale of drug paraphernalia. Whether these laws are wise or effective is not, of course, the province of this court." 455 U.S. at 504-05.

32 618 F.2d at 28 n.4.

33 The Uniform Controlled Substances Act has been adopted by 46 states. UNIF. CONTROLLED SUBSTANCES ACT 9 U.L.A. 78 (Supp. 1983) (table of adopting jurisdictions).

34 For a history of the MDPA see Note, *The Model Drug Paraphernalia Act: Can We Outlaw Head Shops—And Should We?* 16 GA. L. REV. 137 (1981). An excellent analysis of the MDPA and a review of the DEA's comments to the MDPA is contained in *Paraphernalia Laws*, *supra* note 6, at 463-76. See also MDPA comments at 6-8 where the DEA asserts that the MDPA should withstand attacks on grounds of vagueness.

35 See *Levas & Levas v. Village of Antioch, Ill.*, 684 F.2d 446, 449 (7th Cir. 1982).

36 MDPA Art. I. The MDPA defines drug paraphernalia as "all equipment, products and materials of any kind which are used, intended for use, or designed for use, in . . . introducing into the body a controlled substance. . . ."

37 *Id.*

38 *Id.*

manufacture or delivery, the delivery to a minor, and the advertisement of drug paraphernalia.<sup>39</sup> Article III provides for civil seizure and forfeiture of drug paraphernalia.<sup>40</sup> Article IV permits severability in the event some provision or provisions of the Act are found unconstitutional.<sup>41</sup>

Two features distinguish the MDPA from earlier anti-drug paraphernalia statutes. First, the Act attempts to give a precise definition of drug paraphernalia by listing examples and factors for a court or other authority to consider when determining whether a given object is drug paraphernalia.<sup>42</sup> Second, and more importantly, the MDPA contains an intent requirement to mitigate any definitional ambiguity or uncertainty.<sup>43</sup> The MDPA has now been adopted in its

39 MDPA Art. II.

40 MDPA Art. III.

41 MDPA Art. IV.

42 See *Levas & Levas v. Village of Antioch*, Ill. 684 F.2d 446, 449. See also MDPA comments at 6-7.

43 *Id.* The MDPA is designed to satisfy the two-pronged *Grayned* test. See notes 5-7 *supra* and accompanying text. The MDPA attempts to give fair warning to those whose conduct is subject to its prohibitions by combining a precise definition of drug paraphernalia with a specific intent requirement. The MDPA incorporates the specific intent requirement in two places. First, in MDPA Art. I, drug paraphernalia is defined as "equipment, products [or] materials of any kind which are used, intended for use, or designed for use, . . . [with] a controlled substance." Second, in Article II the substantive offenses are also defined in terms of specific intent. The acts prohibited are 1) "us[ing], or . . . possess[ing] with intent to use, drug paraphernalia . . . [with] a controlled substance." 2) "deliver[ing], possess[ing] with intent to deliver, or manufactur[ing] with intent to deliver, any drug paraphernalia, knowing or under circumstances where one reasonably should know, that it will be used . . . [with] a controlled substance." 3) "plac[ing] . . . [an] advertisement, knowing or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia."

To have a violation of the MDPA two actions done with specific intent are needed. Without the first, nothing is drug paraphernalia. Without the second, no act committed by a person and involving drug paraphernalia is prohibited. See *Mid-Atlantic Accessories Trade Ass'n v. Maryland*, 500 F.Supp. 834, 844 (D. Md. 1980). In other words, to violate the MDPA, one must have paraphernalia and do something with it.

In *Screws v. United States*, 325 U.S. 91 (1945) the Supreme Court recognized that requiring specific intent as an element of a criminal offense can cure an otherwise vague statute. See also *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952). This principle, though well established, has not gone without criticism. See W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 11, 86-87 (1972). LaFave and Scott note that a scienter requirement is not a guarantee that an accused has any notice of the law, but only conditions punishment on a finding that had the accused been aware of the statutory prohibition he would have known his conduct was illegal. According to LaFave and Scott, because it is the knowledge of the consequences of one's actions and not the knowledge of the existence or meaning of the law which is relevant, uncertain language in a statute is not clarified by a scienter requirement.

The MDPA also attempts to satisfy the second prong of the *Grayned* test, see notes 5-7 *supra* and accompanying text, by providing standards for judges and police to follow so that the danger of arbitrary enforcement is minimal. The Act does this by listing certain factors

entirety or in a modified version by a majority of the states and by many communities.<sup>44</sup> Although some of its provisions have been sub-

that a court or other authority should consider in determining whether a given object is drug paraphernalia. MDPA Art. I.

While the scienter requirement is the heart of the MDPA, the DEA made two other arguments to support the statute's scheme in its comments. First, a legislature can employ broad terms when the subject of the statute does not lend itself to precise definition. The DEA asserted that it is far better to regulate drug paraphernalia imprecisely than to fail to regulate it at all. *See* *United States v. Petrillo*, 332 U.S. 1 (1947). Second, some of the terms used in the statute, while imprecise at one time, have been rendered more specific by trade usage. *See* *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925). *See generally* MDPA comments 6-8.

44 In *Stoianoff v. State of Montana*, 695 F.2d 1214, (9th Cir. 1983), the court noted that twenty-five states had adopted MDPA-based legislation. They are:

Arkansas: ARK. STAT. ANN. §§ 82-2601(Y), 82-2644 to 82-2650 (Supp. 1981); Colorado: COLO. REV. STAT. §§ 12-22-501 to 12-22-506 (Supp. 1982); Connecticut: CONN. GEN. STAT. ANN. §§ 19-443(20)(A), 19-472(A), 19-474(A), 19-474(B) (West Supp. 1982); Delaware: DEL. CODE ANN. tit. 16, §§ 4701(13), 4771 to 4775 (Supp. 1982); Florida: FLA. STAT. ANN. §§ 893.12, 893.145 to 893.147 (West Supp. 1983); Georgia: GA. CODE ANN. §§ 16-13-32 to 16-13-32.2, 16-13-49 (1982); Idaho: IDAHO CODE §§ 37-2701(BB), 37-2734A, 37-2734B, 37-2744(A)(7) (Supp. 1982); Kansas: KAN. STAT. ANN. §§ 65-4150 to 65-4157 (Supp. 1982); Louisiana: LA. REV. STAT. ANN. §§ 40:1031 to 40:1036 (West Supp. 1983); Maine: ME. REV. STAT. ANN. tit. 17-A, § 1111-A (1983); Maryland: MD. ANN. CODE, art. 27, §§ 287A, 297 (1982); Massachusetts: MASS. ANN. LAWS ch. 94C, §§ 1, 32I, 47(A)(6) (Michie Law Co-op Supp. 1982); Montana: MONT. CODE ANN. §§ 45-10-101 to 45-10-107 (1981); Nebraska: NEB. REV. STAT. §§ 28-439 to 28-444, 28-431 (Supp. 1982); Nevada: 1981 NEV. STATS. 216; New Hampshire: N.H. REV. STAT. ANN. §§ 318-B:1(X-A), 318-B:2, 318-B:26 (Supp. 1981); New Jersey: N.J. STAT. ANN. §§ 24.21-46 to 24.21-53 (West Supp. 1982-83); New Mexico: N.M. STAT. ANN. §§ 30-31-2(W), 30-31-25.1, 30-31-34 (Supp. 1982); North Dakota: N.D. CENT. CODE §§ 12.1-31.1-01 to 12.1-31.1-06 (Supp. 1981); Oklahoma: OKLA. STAT. ANN. tit. 63, §§ 2-101(32), 2-101.1, 2-405, 2-503 (West Supp. 1982-83); Pennsylvania: PA. STAT. ANN. tit. 35, §§ 780-102(B), 780-113(A)(32-34), 780-113(I), 780-128(A)(1) (Purdon Supp. 1982-83); Texas: TEX. REV. CIV. STAT. ANN. art. 4476-15, §§ 1.02(29), 4.07, 5.03(7), 5.15 (Vernon Supp. 1982-83); Utah: UTAH CODE ANN. §§ 58-37A-1 to 58-37A-6 (Supp. 1981); Virginia: VA. CODE §§ 18.2-265.1 to 18.2-265.4 (1982); Washington: WASH. REV. CODE ANN. §§ 69.50.102, 69.50.412, 69.50.505 (Supp. 1982).

*Id.* at 1217 n.3.

Eighteen other states have adopted paraphernalia legislation. Some of the statutes are based on the MDPA, others take various approaches ranging from licensing requirements to prohibiting the sale of smoking accessories to minors:

Alabama: ALA. CODE § 20-2-75 (Supp. 1982); Arizona: ARIZ. REV. STAT. ANN. § 13-3411 (Supp. 1982-83); California: CAL. HEALTH & SAFETY CODE §§ 11364.5, 11472 (West Supp. 1982); Illinois: ILL. ANN. STAT. ch. 23, §§ 2358-1 to 2358-5 (Smith-Hurd Supp. 1982-83); Indiana: IND. CODE ANN. §§ 35-48-4-8.1 to 35-48-4-8.3, 16-6-8-5.1 (Burns Supp. 1982); Kentucky: KY. REV. STAT. ANN. §§ 218A.500, 218A.510, 218A.990(14) (Baldwin 1982); Minnesota: MINN. STAT. ANN. §§ 152.01(18), 152.092 to 152.095, 152.19 (West Supp. 1983); Mississippi: MISS. CODE ANN. §§ 41-29-105(v), 41-29-139, 41-29-153, 41-29-154, 41-29-177, 41-29-179, 41-29-181 (Supp. 1983); Missouri: MO. ANN. STAT. §§ 195.010(11),

jected to constitutional attack, recent trends indicate that it will survive to become the prototype of a constitutionally sound drug paraphernalia law.

### B. *Five Problem Areas in the MDPA*

The MDPA has been subjected to a wide variety of constitutional attacks;<sup>45</sup> however, vagueness and overbreadth represent the most serious challenges to the Act's validity. Five specific areas have drawn the brunt of the attacks: (1) the language "intended for use, or designed for use" used in article I to define drug paraphernalia; (2) the list of items in article I that are to be included as drug paraphernalia; (3) the factors listed in article I that a court or other authority should consider when determining whether an object is drug paraphernalia; (4) the language "under circumstances where one reasonably should know"—the constructive knowledge standard—that is used in articles I and II; and (5) article II's prohibition on placing an advertisement to promote in whole or in part the sale of drug paraphernalia.

The first four areas have been attacked as vague while the fifth has been attacked as overbroad. Prior to the Supreme Court's decision in *Flipside*, numerous district and circuit courts ruled on the constitutionality of statutes and ordinances based on the MDPA. The courts focused on these five areas and reached mixed results. Some upheld the legislation in its entirety,<sup>46</sup> others struck it down,<sup>47</sup> still

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195.020, 195.135, 195.140, 195.200 (Vernon Supp. 1983); New York: N.Y. GEN. BUS. LAW §§ 850 to 853 (McKinney Supp. 1982-83); North Carolina: N.C. GEN. STAT. §§ 90-113.20 to 90-113.24 (Supp. 1981); Ohio: OHIO REV. CODE ANN. § 2925.14 (Page 1982); Oregon: ORE. REV. STAT. §§ 163.575, 163.580 (1981); Rhode Island: R.I. GEN. LAWS §§ 21-28.5-1 to 21-28.5-4 (Supp. 1982); South Carolina: S.C. CODE §§ 44-53-110, 44-53-391 (Supp. 1982); Tennessee: TENN. CODE ANN. §§ 39-4-411 to 39-4-418 (1982); West Virginia: W. VA. CODE §§ 47-19-1 to 47-19-8 (Supp. 1982); Wyoming: WYO. STAT. ANN. §§ 35-7-1002, 35-7-1049, 35-7-1056, 35-7-1057 (Supp. 1982).

The remaining seven states and the District of Columbia have no laws specifically aimed at prohibiting drug paraphernalia. Several municipalities and counties do have such laws.

45 See note 4 *supra*.

46 *Casbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982), *reh'g denied*, 102 S. Ct. 2023 (1982) (upholding the constitutionality of Nebraska's drug paraphernalia act); *Virginia Tobacco Accessories Trade Ass'n v. Commonwealth*, Nos. 81-0610-A, 81-0611-A, 81-0632-A slip op. (E.D. Va. July 22, 1981) (mem.) (upholding constitutionality of Virginia's drug paraphernalia law); *Atkins v. Clements*, 529 F. Supp. 735 (N.D. Tex. 1981) (upholding the constitutionality of Texas's drug paraphernalia act.); *Nova Records, Inc. v. Sendak*, 504 F.Supp. 938 (S.D. Ind. 1980) (upholding the constitutionality of Indiana's drug paraphernalia act); *Mid-Atlantic Accessories Trade Ass'n v. Maryland*, 500 F.Supp. 834 (D.Md. 1980) (upholding the constitutionality of Maryland's drug paraphernalia act); Dela-

others upheld laws after severing objectionable provisions.<sup>48</sup> The various conclusions led one commentator to lament that the failure of a suitable case to reach the Supreme Court had postponed a resolution to the conflict.<sup>49</sup>

#### IV. The *Flipside* Decision—the “Suitable” Case?

Although *Flipside*’s “suitability” to resolve the conflicts in this area is debatable,<sup>50</sup> the Supreme Court used the case as a vehicle for

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ware Accessories Trade Ass’n v. Gebelein, 497 F.Supp. 289 (D. Del. 1980) (upholding the constitutionality of Delaware’s drug paraphernalia act); World Imports, Inc. v. Woodbridge Township, 493 F.Supp. 428 (D.N.J. 1980). See *Brache v. County of Westchester*, 658 F.2d 47 (2d Cir. 1981), cert. denied, 455 U.S. 1005 (1982). The *Brache* decision represents the best judicial treatment accorded the difficult standing issues involved in pre-enforcement challenges to drug paraphernalia laws. The court held that plaintiff-headshop owners, having lost their challenge to Westchester County’s drug paraphernalia ordinance as applied to their sale of single use items, had no standing to secure a broader ruling concerning multi-use items, especially since their claims involved no first amendment concerns that might trigger an overbreadth challenge. Noting that *United States v. Raines* teaches that a party to whom a statute may constitutionally be applied lacks standing to challenge the statute on the ground that it would be unconstitutional as applied to “other persons” or “other situations”, 658 F.2d at 52 n.7 (citing *United States v. Raines*, 362 U.S. 17, 21 (1960)), the Second Circuit determined that since the plaintiffs admitted that at least some of the items they were selling (“free-base cocaine kits,” “marijuana test kits,” “coke kits”) could only be used in ways clearly violative of the ordinance, the plaintiffs could not attack the ordinance as it might be applied to other items which could be used in other ways. In many ways, the *Brache* decision foreshadowed the Supreme Court’s decision in *Hoffman Estates v. Flipside*, *Hoffman Estates*, 455 U.S. 489 (1982).

47 *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916 (6th Cir. 1980), vacated and remanded, 451 U.S. 1013 (1981), vacated and remanded, 102 S.Ct. 2227 (1982) (striking down Parma, Ohio’s Drug Paraphernalia Ordinance. The *Record Revolution* opinion has twice been vacated by the Supreme Court, once because of a change in Ohio law, and recently to be reconsidered in light of *Flipside*); *Information Management Servs., Inc. v. Borough of Pleasant Hills*, 512 F.Supp. 1066 (W.D. Pa. 1981); *Franza v. Carey*, 518 F.Supp. 324 (S.D.N.Y. 1981) (striking down New York State’s drug paraphernalia law); *Back Door Records v. City of Jacksonville*, 515 F.Supp. 857 (E.D. Ark. 1981).

48 *Lady Ann’s Oddities, Inc. v. Macy*, 519 F.Supp. 1140 (W.D. Okla. 1981) (upholding Oklahoma’s drug paraphernalia act after severing objectionable provisions); *New England Accessories Trade Ass’n v. Browne*, 502 F. Supp. 1245, (D. Conn. 1980), vacated and remanded, 679 F.2d 873 (1981) (upholding Connecticut’s drug paraphernalia law after severing the portion relating to possession of drug-related objects). See also *Hejira Corp. v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981) (Colorado’s drug paraphernalia act, not directly based on the MDPA, was upheld after excising objectionable provisions).

49 Note, *The Model Drug Paraphernalia Act: Can We Outlaw Headshops—And Should We?* 16 GA. L. REV. 137, 139 (1981).

50 *Hoffman Estates*’ ordinance was *not* based on the MDPA. See Appendix A *infra*. The thrust of the ordinance was to require a business to obtain a license before it could sell items “designed or marketed for use with illegal cannabis or drugs.” The ordinance required the business to file affidavits that the licensee and its employees had not been convicted of a drug-related offense. The ordinance made it unlawful to sell or give such items to minors. Moreover, the ordinance required the licensee to keep a record of the items sold, and this

setting forth the proper analysis to be applied by lower courts confronted with a pre-enforcement facial challenge to the constitutionality of a drug paraphernalia law.<sup>51</sup> The Supreme Court's analysis virtually assures that an anti-drug paraphernalia law will withstand a pre-enforcement facial challenge to its constitutionality. *Flipside* has had a pronounced effect on the circuits — in the thirteen cases dealing with drug paraphernalia laws decided subsequent to *Flipside*, only one held an ordinance unconstitutional.<sup>52</sup>

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record had to contain the name and address of the purchaser. This record was to be open to police inspection. The penalty for violating the ordinance was a civil fine, but the ordinance was "civil" only in form. See note 72 *infra*.

51 See note 1 *supra*.

52 *Record Head Corp. v. Sachen*, 682 F.2d 672 (7th Cir. 1982). The Seventh Circuit held a West Allis, Wisconsin drug paraphernalia ordinance—not patterned after the MDPA—unconstitutionally vague. The ordinance was a criminal law banning sales, offers to sell, dispensing, gifts and displays of drug-related "instruments." The ordinance absolutely banned the above activities anywhere within 1,000 feet of a school; otherwise drug paraphernalia could be sold only in parts of premises not open to minors or to which minors were not allowed unless accompanied by a parent or guardian. The court held that several imprecise factors, enumerated by the ordinance to be considered in deciding what is an "instrument," exacerbated the ordinance's vagueness and resulted in a serious risk of arbitrary enforcement.

In twelve other cases, courts of appeals have upheld the constitutionality of a variety of drug paraphernalia laws. *Nova Records, Inc. v. Sendak*, No. 81-1107 (7th Cir. April 15, 1983) (upholding Indiana's drug paraphernalia statute, which differed slightly from the MDPA); *Camille Corp. v. Phares*, No. 82-1410 (7th Cir. April 13, 1983) (upholding East Moline, Illinois' drug paraphernalia ordinance, which was based on the MDPA but did not contain a severability clause); *Stoianoff v. State of Montana*, 695 F.2d 1214 (9th Cir. 1983) (upholding Montana's drug paraphernalia act, which was patterned after the MDPA); *Levas & Levas v. Village of Antioch, Ill.*, 684 F.2d 446 (7th Cir. 1982) (upholding Antioch's drug paraphernalia ordinance, which was based on the MDPA); *General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982) (upholding New Mexico's drug paraphernalia act, which was patterned after the MDPA); *Weiler v. Carpenter*, 695 F.2d 1348 (10th Cir. 1982) (upholding Clovis, New Mexico's drug paraphernalia ordinance—which was based on the MDPA—but only after severing the portion of the ordinance providing for the forfeiture of paraphernalia without a hearing); *Kansas Retail Trade Co-Op v. Stephan*, 695 F.2d 1343 (10th Cir. 1982) (upholding Kansas' drug paraphernalia act which was nearly identical to the MDPA); *New England Accessories Trade Ass'n v. City of Nashua*, 679 F.2d 1 (1st Cir. 1982) (upholding New Hampshire's drug paraphernalia statute and Nashua, New Hampshire's drug paraphernalia ordinance. Both the statute and the ordinance were closely patterned after the MDPA); *Florida Businessmen v. City of Hollywood*, 673 F.2d 1213 (11th Cir. 1982) (upholding Florida's state "head shop" law and Hollywood, Florida's drug paraphernalia ordinance. Both the state law and ordinance were modeled after the MDPA. The circuit court did, however, affirm the district court's severance of the portion of the statute that prohibited the mere possession of drug paraphernalia as unconstitutionally vague. Florida's law excluded the "with intent to use" language of the MDPA; thus, the words needed to create the scienter requirement were omitted. As such, Florida's ban on mere possession of paraphernalia was unconstitutional); *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225 (11th Cir. 1982) (upholding Georgia's 1978 and 1980 "head shop" laws, which were not patterned after the MDPA); *New England Accessories Trade Ass'n v. Tierney*, 691 F.2d 35 (1st Cir. 1982) (upholding the constitutionality of Maine's drug paraphernalia act—which was patterned after the MDPA);

### A. *The Background*

The *Flipside* opinion illustrates the old truism about prisms—where one goes in determines where one comes out. That is, the analysis applied to the statute determines whether it will pass constitutional muster. Flipside had done business (selling records, smoking accessories etc.) for about three years prior to May 1, 1978, the date that Hoffman Estates' drug paraphernalia ordinance was to become effective.<sup>53</sup> After an administrative inquiry, the village determined that Flipside and another shop appeared to be violating the ordinance.<sup>54</sup> The village attorney notified Flipside of the violation and made available to Flipside copies of the ordinance and a series of licensing guidelines.<sup>55</sup>

Flipside's owner asked the village attorney's advice concerning what items the store could not sell if it failed to obtain a license, and thereafter removed the objectionable items.<sup>56</sup> Flipside's owners decided not to comply with the licensing requirements and proceeded to sue the village alleging that the ordinance was unconstitutionally vague and overbroad.<sup>57</sup> Flipside asked for injunctive and declaratory relief and for damages.<sup>58</sup> The district court upheld the constitutionality of the ordinance; however, the Seventh Circuit reversed, finding the ordinance unconstitutionally vague on its face.<sup>59</sup>

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Tobacco Accessories v. Treen, 681 F.2d 378 (5th Cir. 1982) (upholding Louisiana's MDPA-based drug paraphernalia act).

Subsequent to the *Flipside* decision the Supreme Court denied certiorari in two cases that expressly held MDPA-based statutes constitutional in their entirety. *Casbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982), *reh'g denied*, 102 S.Ct. 2023, (1982); *Florida Businessmen for Free Enterprise v. City of Homestead, Fla.*, 679 F.2d 252 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 763 (1983) (affirming without opinion the district court's summary judgment upholding the constitutionality of the city's MDPA-based ordinance). The Court's denial of certiorari in these two cases may give some indication that the Court would rule against a pre-enforcement facial challenge to a statute or ordinance patterned after the MDPA. This is especially true in light of *Flipside*, 455 U.S. 489 (1982).

53 455 U.S. at 491-92.

54 *Id.* at 493.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Flipside, Hoffman Estates v. Village of Hoffman Estates*, 639 F.2d 373 (7th Cir. 1981). The Seventh Circuit, in holding the ordinance void for vagueness, felt that neither prong of the *Grayned* test had been satisfied. *See* notes 5-7 *supra* and accompanying text. First, there was no fair warning because "drug paraphernalia" was not defined in the ordinance. The court reasoned this would require a store owner to obtain a license if he displayed almost any item in the proximity of "literature encouraging illegal use of . . . drugs." Even displaying a paperclip might require a storeowner to obtain a license! *Id.* at 382-83. Second, the court noted that there was a "genuine danger that enforcement of [the] ordinance [would] be used

## B. *The Supreme Court's Analysis*

### 1. Overbreadth<sup>60</sup>

The Supreme Court reversed the Seventh Circuit, stating that "under a proper analysis . . . the ordinance [was] not facially invalid."<sup>61</sup> The Supreme Court's "proper" analysis consisted of a two-phase inquiry: (1) overbreadth and (2) vagueness.<sup>62</sup> The Supreme Court held that a statute would be unconstitutionally overbroad only if the enactment reached a substantial amount of constitutionally protected conduct.<sup>63</sup> Constitutionally protected conduct in the context of an overbreadth challenge entailed the first amendment rights of Flipside or other parties.<sup>64</sup>

Flipside argued that (1) the ordinance imposed a prior restraint on speech,<sup>65</sup> and (2) the ordinance infringed on protected symbolic speech.<sup>66</sup> The Court quickly disposed of these contentions by finding that the ordinance only implicated commercial speech that proposed an illegal transaction; therefore, a government could regulate or ban the speech entirely.<sup>67</sup> The Court further held that any possible effect

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to harass individuals choosing [different] lifestyles." The court felt that this danger of discriminatory enforcement stemmed from the subjective nature of the design and marketing tests. *Id.* at 384. The court went on to state that the availability of administrative review or of guidelines could not cure the ordinance's vagueness. *Id.* at 385-86.

60 See notes 8-11 *supra* and accompanying text.

61 455 U.S. at 495.

62 See note 1 *supra*.

63 455 U.S. at 494. The Court pointed out that when determining whether a law reached a substantial amount of constitutionally protected conduct, a court should evaluate both the ambiguous and unambiguous scope of the enactment. The Court deemed this necessary because ambiguous meanings tend to cause citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked." *Id.* at 494 n.6 (citations omitted). Thus, the Court recognized that the vagueness of a law will affect a court's overbreadth analysis. *Id.*

Justice White thought it unnecessary for the Court to engage in any discussion of overbreadth because the Seventh Circuit had based its decision solely on vagueness grounds. *Id.* at 507 (White, J., concurring). He felt it was sufficient to reverse simply because the circuit court had erred in its analysis of the vagueness problem presented by the village's ordinance. *Id.* Nevertheless, Justice White went on to discuss overbreadth, and stated that Flipside's argument was "tenuous at best." *Id.* at 508. See notes 8-11 *supra* and accompanying text.

64 *Id.* at 495.

65 Flipside argued that the ordinance was a prior restraint on speech because the guidelines to the ordinance treated the proximity of drug related literature as an indication that paraphernalia was "marketed for use with illegal cannabis or drugs." *Id.* at 495-96.

66 Flipside argued that the ordinance infringed on protected symbolic speech because the presence of drug related designs, logos, or slogans on paraphernalia could lead to enforcement of the ordinance. *Id.* at 496.

67 *Id.* at 496. The Court determined that the ordinance did not infringe on the noncommercial speech of Flipside or other parties because it merely regulated the sale of items displayed "with" or "within proximity of" literature encouraging illegal use of cannabis or

the ordinance might have on the first amendment rights of individuals other than Flipside was irrelevant, because the overbreadth doctrine did not apply to commercial speech.<sup>68</sup>

## 2. Vagueness and Fair Warning<sup>69</sup>

The Court then proceeded to the second phase of its analysis and addressed Flipside's vagueness challenge. The crucial question was whether, assuming the enactment implicates no constitutionally protected conduct, was it impermissibly vague in all of its applications?<sup>70</sup> Using *Grayned*<sup>71</sup> as its framework, the Court analyzed (1) whether certain language in the ordinance failed to provide fair warning, and (2) whether the risk of arbitrary or discriminatory enforcement existed. The village's ordinance required Flipside to obtain a license to sell "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes."<sup>72</sup> Flipside at-

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illegal drugs. *Id.* As such, the ordinance did not regulate in any manner the sale of the literature itself. *Id.* Concerning the allegation that the ordinance infringed on protected symbolic speech, the Court stated that although certain items with logos or designs may be subject to regulation, the ordinance did not restrict speech, but rather regulated the commercial marketing of items whose labels reveal that they may be used for illicit purposes. *Id.*

It is well established that a government can regulate or ban any commercial speech that proposes an illegal transaction. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973).

68 *Id.* at 496-97. (citing 447 U.S. at 565 n.8.). Flipside also contended that the village ordinance was "overbroad" because it could be extended to "innocent" and "lawful" uses of items as well as uses with illegal drugs. Some courts have incorrectly ruled paraphernalia laws unconstitutional for that reason. *See, e.g., Bambu Sales, Inc. v. Gibson*, 474 F.Supp. 1297 (D.N.J. 1979). But as the Supreme Court stated in *Flipside* "this argument seems to confuse vagueness and overbreadth." 455 U.S. at 497 n.9. The Court noted that if the Flipside was actually objecting because it could not determine whether the ordinance regulates items with some lawful uses then it was complaining of vagueness. *Id.* If Flipside was objecting because the ordinance would inhibit innocent uses of items covered by the ordinance, then it was complaining of denial of substantive due process. *Id.* The Court found Flipside's possible substantive due process challenge lacking in merit, noting that a retailer's right to sell and a purchaser's right to buy smoking accessories were entitled to only minimum due process protection. As such, the village would have little trouble showing that regulating the items was a rational means of discouraging drug use. *Id.* (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978)). *See* note 31 *supra*.

69 *See* notes 5-7 *supra* and accompanying text.

70 455 U.S. at 497.

71 *Grayned v. City of Rockford*, 408 U.S. 104 (1972). *See* notes 5-7 *supra* and accompanying text.

72 455 U.S. at 500. Prior to engaging in its analysis, the Supreme Court made some important observations. First, the Constitution tolerates vagueness in varying degrees depending in part on the nature of the enactment. *Id.* at 498. Thus, a criminal ordinance warrants a stricter test than one imposing civil penalties. *Id.* at 498-99. Second, the Court

tacked both the "designed for use" standard and the "marketed for use" standard as unconstitutionally vague. The Supreme Court rejected both contentions.

The Court held that the "designed for use" standard was sufficiently clear to cover at least some items Flipside sold, and therefore was not void for vagueness.<sup>73</sup> The Court noted that the business person of ordinary intelligence would know that the term "designed for use" referred to the design of the manufacturer, not the intent of the retailer or customer.<sup>74</sup> Because the Court found that items principally used for non-drug uses were clearly not "designed for use" with illegal drugs, and because Flipside had conceded the phrase referred to the structural characteristics of an item, the Supreme Court held that the fair warning requirement of *Grayned* was satisfied.<sup>75</sup> The

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expressly recognized that a scienter requirement can mitigate a law's vagueness, especially with respect to the fair warning requirement of the *Grayned* test. *Id.* at 499. *See* note 43 *supra*. Finally, the Court stated that the most important factor affecting whether the Constitution will tolerate an allegedly vague law is whether the law tended to inhibit constitutionally protected rights. *Id.* The Court then went on to subject Hoffman Estates's "quasi-criminal" ordinance to a strict test. The Court recognized the "stigmatizing" effects the ordinance would have. *Id.* Even if a shop did obtain the license, who would buy the items with the condition that they give their name and address, and that their name and address would be put in a record available to police inspection? That the Court subjected the Hoffman Estates ordinance to a strict test is important. The ordinance imposed only civil penalties. Had the Court chosen to subject it to a less rigorous analysis, the decision in *Flipside* would have relatively slight precedential value in subsequent cases where MDPA-type laws, with their criminal sanctions, were being attacked as unconstitutionally vague. In the one circuit court case striking down a drug paraphernalia law subsequent to *Flipside*, the Seventh Circuit relied heavily upon the fact that the ordinance at issue, unlike the ordinance involved in *Flipside*, imposed criminal penalties. *Record Head Corp. v. Sachen*, 682 F.2d 672, 676 (7th Cir. 1982). As the dissenting judge noted, this distinction might well have been unjustified. *Id.* at 682. (Pell, J. dissenting).

73 455 U.S. at 502. Flipside had argued that the "designed for use" standard was ambiguous in several respects. Flipside claimed that it did not say (1) whether the retailer's intent or manner of display is relevant, (2) whether the intent of a third party (the manufacturer) was critical since the third party was the "designer," or (3) whether items must be inherently suited only for a single purpose—drug use. *Id.* at 500.

74 *Id.* at 501. An interesting question is whether the Court was using the term design as a synonym for intent. The definition the Court gave to design, "to fashion according to a plan," *Id.*, seems to suggest that the answer could be yes. *See* note 75 *infra*.

75 455 U.S. at 501. The Court did not expressly state that the "designed for use" standard incorporated a scienter requirement that tended to mitigate any possible vagueness. *See* note 43 *supra*. But a close reading of the *Flipside* opinion suggests that this was a factor in the Court's decision. The Court quoted the Flipside's brief in support of its conclusion that there was no issue of fair warning present as Flipside conceded that the phrase "designed for use" referred to structural characteristics of an item. *Id.* In that quote, the following language appeared: "if any intentional conduct is implicated by the phrase, it is the intent of the designer (i.e. patent holder or manufacturer) whose intent for an item or 'design' is absorbed into the physical attributes, or structural 'design' of the finished product." *Id.* at 501 n.19 (quoting Brief for Appellee at 42-43). Therefore, the Court may well have read the "designed

Court read the "marketed for use" language as incorporating a scienter requirement, for a "retailer could scarcely 'market' items for a particular use without intending that use."<sup>76</sup> The Court held that the scienter requirement rendered the "marketed for use" standard "transparently clear,"<sup>77</sup> and that since some of *Flipside's* display techniques obviously violated ordinance guidelines, *Flipside* had fair warning that its marketing activities required a license.<sup>78</sup>

### 3. Vagueness and Discriminatory Enforcement<sup>79</sup>

Turning to the second prong of the *Grayned* test, the Court asked whether the Village's ordinance presented the danger of discriminatory enforcement. Although the Court acknowledged that the threat of such enforcement existed,<sup>80</sup> it stated it was improper to adjudicate the issue in a pre-enforcement facial challenge.<sup>81</sup> The Court stated that this challenge could not be made until the possibility of discriminatory enforcement "ripens into a prosecution."<sup>82</sup> The *Flipside* opinion is carefully tailored to apply only to pre-enforcement facial challenges to drug paraphernalia laws. But the decision's impact is deceptively broad because these challenges inevitably arise in the pre-enforcement context.<sup>83</sup> No headshop owner of sound mind is willing to undergo voluntary prosecution under a criminal statute in order that he may litigate the merits of his vagueness—discriminatory enforcement claim.

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for use" language as incorporating a scienter requirement, one referring to the intent of the manufacturer or designer of the item; an intent evidenced by the structural characteristics of the item itself. This is important because the "designed for use" language is contained in the MDPA, and has been subjected to attack on the grounds that it is unconstitutionally vague. See notes 90 & 94-95 *infra* and accompanying text.

76 455 U.S. at 502.

77 *Id.* See notes 43 & 72 *supra* (scienter requirement can cure an otherwise vague statute).

78 455 U.S. at 502.

79 See notes 5-7 *supra* and accompanying text.

80 The Court stated: "We do not suggest that the risk of discriminatory enforcement is insignificant here." 455 U.S. at 503.

81 *Id.*

82 455 U.S. at 503-04 n.21. The Supreme Court also gave weight to the possibility that the village could take further steps to minimize the danger of arbitrary enforcement. *Id.* at 504.

83 The *Flipside* decision effectively precludes a headshop owner from challenging any drug paraphernalia law for vagueness (because of discriminatory enforcement) in a pre-enforcement setting. It is quite possible, therefore, that a drug paraphernalia law will accomplish its purpose—shut down headshops—without ever being subjected to attack on grounds of vagueness for arbitrary enforcement. The Supreme Court in *Flipside* intimated that such an attack might be successful. See note 80 *supra*.

## V. The Smoke Clears

The Supreme Court has never passed on the constitutionality of the Model Drug Paraphernalia Act.<sup>84</sup> Nevertheless, the *Flipside* decision has eliminated three of the five problem areas<sup>85</sup> that once plagued the MDPA.<sup>86</sup> Moreover, *Flipside*, read in conjunction with several subsequent circuit court cases, indicates that the MDPA is either constitutional in its entirety or constitutional after severing some objectionable language.

Headshop owners attacking the MDPA language "intended for use or designed for use" invariably claim that "intended for use" is unconstitutionally vague because it fails to give fair notice to one whose conduct may be subject to the law's prohibitions.<sup>87</sup> This attack is directed at the heart of the MDPA, the scienter requirement, which is meant to mitigate any vagueness problems.<sup>88</sup> The claim is that the scienter requirement is ineffective in curing vagueness because the statute does not say whose intent is relevant. Thus, the plaintiffs contend that the "intended for use" language permits the prosecution of one person on the basis of the unknown intent of another.<sup>89</sup> This "transferred intent" argument was rejected in *Flipside*<sup>90</sup> and has been explicitly rejected by the courts of appeals, that have ruled on the issue subsequent to *Flipside*.<sup>91</sup> A fair reading of the stat-

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84 But the Court did deny certiorari in two cases where the Act was upheld in its entirety. See note 52 *supra*.

85 See text accompanying notes 45-49 *supra*.

86 See notes 47-48 *supra*.

87 See notes 5-7 *supra* and accompanying text.

88 See note 43 *supra* and accompanying text.

89 See, e.g., *New England Accessories Trade Ass'n v. City of Nashua*, 679 F.2d 1, 5 (1st Cir. 1982).

90 455 U.S. at 501. The Court stated that "a business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer." See notes 73-75 *supra* and accompanying text. See also notes 94-95 *infra* and accompanying text.

91 *Stoianoff v. State of Montana*, 695 F.2d 1214, 1220 (9th Cir. 1983); *New England Accessories Trade Ass'n v. City of Nashua*, 679 F.2d 1, 5-6 (1st Cir. 1982); *New England Accessories Trade Ass'n v. Tierney*, 691 F.2d 35, 35-36 (1st Cir. 1982); *Florida Businessmen v. City of Hollywood*, 673 F.2d 1213, 1219 (11th Cir. 1982); *Tobacco Accessories v. Treen*, 681 F.2d 378, 383 (5th Cir. 1982); *Kansas Retail Trade Co-Op v. Stephan*, 695 F.2d 1343, 1346 (10th Cir. 1982); *General Stores, Inc. v. Bingaman*, 695 F.2d 502, 503-04 (10th Cir. 1982); *Weiler v. Carpenter*, 695 F.2d 1348, 1349-50 (10th Cir. 1982); *Levas & Levas v. Village of Antioch, Ill.*, 684 F.2d 446, 452 (7th Cir. 1982). Accord *Hejira Corp. v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981) (a pre-*Flipside* decision involving Colorado's non-MDPA statute); *Casbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982), *reh'g denied*, 102 S.Ct. 2023 (1982) (a pre-*Flipside* decision involving Nebraska's MDPA-based act). *Contra Record Head Corp. v. Sachin*, 682 F.2d 672, 673 (7th Cir. 1982). *Record Head* involved a non-MDPA ordinance; the court struck down the "intended for use" language as vague. A strong

ute as a whole, including the portions defining the substantive offenses which focus on the mental state of the accused, indicates that the intent referred to by the language "intended for use" is that of the person alleged to have violated the statute.<sup>92</sup> Therefore, the language presents no vagueness for lack of fair warning problem.<sup>93</sup>

Plaintiffs attacking the "designed for use" language likewise assert the "transferred intent" argument.<sup>94</sup> *Flipside*, as well as the recent circuit court cases, have rejected the argument. They hold that since the language clearly refers to structural features of objects deemed fashioned for drug use, the intent implicated is that of the designer or manufacturer of the drug paraphernalia; thus the language is not unconstitutionally vague.<sup>95</sup>

The circuit courts have found no vagueness problem with article I's list of items that are to be included as drug paraphernalia.<sup>96</sup> The courts have uniformly held that because the statute defines "drug paraphernalia" in terms of specific intent, no item will be considered drug paraphernalia unless the requisite intent to use it with controlled substances exists.<sup>97</sup> The presence of the specific intent re-

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dissent failed to comprehend the majority's distinction between the "intended for use" language at issue and the "marketed for use" language that the *Flipside* court had held to be constitutional. *Id.* at 683. (Pell, J., dissenting).

92 New England Accessories Trade Ass'n v. City of Nashua, 679 F.2d 1, 6 (1st Cir. 1982). In *Stoianoff v. State of Montana*, 695 F.2d 1214 (9th Cir. 1983), the court recognized that the MDPA's definition of drug paraphernalia was an inartful but legitimate attempt to assign the appropriate scienter requirement to the appropriate offender. "Use" is assigned to the user. "Designed for use" is assigned to the manufacturer. "Intended for use" is assigned to the retailer or distributor. *Id.* at 1220.

93 See notes 5-7 *supra* and accompanying text.

94 See, e.g., *Florida Businessmen v. City of Hollywood*, 673 F.2d 1213, 1218 (11th Cir. 1982).

95 455 U.S. at 500-02. See notes 73-75 *supra* and accompanying text. See, e.g., *Stoianoff v. State of Montana*, 695 F.2d 1214, 1219-20 (9th Cir. 1983); *Florida Businessmen v. City of Hollywood*, 673 F.2d 1213, 1218-19 (11th Cir. 1982) (the court noted that the designer's intent is reflected by the physical characteristics of the finished product); *Tobacco Accessories v. Treen*, 681 F.2d 378, 384-85 (5th Cir. 1982); *Contra Record Head Corp. v. Sachse*, 682 F.2d 672, 677 (7th Cir. 1982) (non-MDPA-based ordinance).

96 *Kansas Retail Trade Co-Op. v. Stephan*, 695 F.2d 1343, 1347 (10th Cir. 1982); *New England Accessories Trade Ass'n v. Tierney*, 691 F.2d 35, 38 (1st Cir. 1982). *Accord Casbah, Inc. v. Thone*, 651 F.2d 551, 560 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982), *reh'g denied*, 102 S. Ct. 2023 (1982); *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 932 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 1013 (1981), *vacated and remanded*, 102 S. Ct. 2227 (1982).

97 *Id.* In *Levas & Levas v. Village of Antioch, Ill.*, 684 F.2d 446, 455-56 (7th Cir. 1982), the court noted that a legislature might constitutionally make certain items of drug paraphernalia (coke spoons and marijuana or hash pipes) per se illegal without any intent requirement—strict liability. But the court refused to rule on the matter in a pre-enforcement facial challenge.

quirement precludes a plaintiff from prevailing on a contention that this list is unconstitutionally vague.<sup>98</sup>

Plaintiffs attacking the factors listed in article I that a court or other authority should consider when determining whether an object is drug paraphernalia argue that the list is vague because it fails to establish explicit enforcement standards.<sup>99</sup> *Flipside* unequivocally held that although a law may present the danger of arbitrary enforcement, that theoretical possibility does not render the law vague in a pre-enforcement challenge.<sup>100</sup> Therefore, *Flipside* effectively prohibits a headshop owner from raising a challenge to this list of factors in a pre-enforcement suit. The argument can be made only when the possibility actually ripens into a prosecution.<sup>101</sup>

*Flipside* did not address the constructive knowledge standard used in articles I and II. The circuit courts that have addressed the issue have held, with few exceptions,<sup>102</sup> that this language does not void a paraphernalia law for vagueness.<sup>103</sup> Plaintiffs attacking the MDPA's constructive knowledge standard contend that the language permits conviction under the law on a mere negligence standard.<sup>104</sup>

98 See notes 43 & 72 *supra*. See also notes 5-7 *supra* and accompanying text.

99 See, e.g., *Tobacco Accessories v. Treen*, 681 F.2d 378, 384 (5th Cir. 1982); *New England Accessories Trade Ass'n v. City of Nashua*, 679 F.2d 1, 6-7 (1st Cir. 1982); *Florida Businessmen v. City of Hollywood*, 673 F.2d 1213, 1219-20 (11th Cir. 1982); *Levas & Levas v. Village of Antioch, Ill.*, 684 F.2d 446, 454 (7th Cir. 1982).

100 455 U.S. at 503-04. See notes 79-83 *supra* and accompanying text.

101 455 U.S. at 503-04. *Contra* *Record Head Corp. v. Sachen*, 682 F.2d 672, 677-78 (7th Cir. 1982). The court in *Record Head* characterized the non-MDPA ordinance at issue as criminal. As such, the court felt the ordinance presented a more serious possibility of arbitrary enforcement than did the "business regulation" involved in the *Flipside* case. Therefore, the Seventh Circuit found the ordinance constitutionally infirm for satisfying neither the fair notice nor the consistent enforcement branches of the *Grayned* test. 682 F.2d at 678. In light of *Flipside*, the holding in *Record Head* concerning the possibility of arbitrary enforcement would appear to be improper. See notes 79-83 *supra* and accompanying text. This is especially apparent because the Supreme Court in *Flipside* treated the Hoffman Estates' ordinance as "quasi-criminal" and subjected it to a strict test. See note 72 *supra*.

102 *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 935-36 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 1013 (1981), *vacated and remanded*, 102 S. Ct. 2227 (1982) (holding the "reasonably should know" language unconstitutionally vague).

103 *Stoianoff v. State of Montana* 695 F.2d 1213, 1220-22 (9th Cir. 1982); *Florida Businessmen v. City of Hollywood*, 673 F.2d 1213, 1219 (11th Cir. 1982) (noting that the fact a defendant reasonably should have known something is established in substantially the same manner as actual knowledge); *New England Accessories Trade Ass'n v. Tierney*, 691 F.2d 35, 36-37 (1st Cir. 1982); *Kansas Retail Trade Co-op v. Stephan*, 695 F.2d 1343, 1346 (10th Cir. 1982); *Casbah, Inc. v. Thone*, 651 F.2d 551, 561 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982), *reh'g denied*, 102 S. Ct. 2023 (1982). See *Delaware Accessories Trade Ass'n v. Gebelien*, 497 F. Supp. 289, 294 (D. Del. 1980).

104 See, e.g., *New England Accessories Trade Ass'n v. Tierney*, 691 F.2d 35, 36-37 (1st Cir. 1982).

However, the courts have found that argument unpersuasive because the MDPA's definitional section classifies an item as drug paraphernalia only if it is used, intended to be used or is designed for use with illicit, controlled substances.<sup>105</sup> Thus, to prove a violation of an MDPA-based paraphernalia law, the government must show (1) that the defendant intended that an item would be used for the production or consumption of controlled substances and (2) that the defendant knew, or that he acted under circumstances from which the reasonable person would know, that the buyer of the item would thereafter use the item with illicit controlled substances.<sup>106</sup> Therefore, the constructive knowledge standard has significance only if the defendant is selling or delivering items that he intends from the outset to be used to produce or consume controlled substances.<sup>107</sup> Plaintiffs have also argued that the constructive knowledge standard is unconstitutionally vague because it provides no guidance to defendants, prosecutors, or judges.<sup>108</sup> *Flipside* undermines this contention by its holding that objections to the possibility of discriminatory enforcement can only be raised in post-enforcement proceedings.<sup>109</sup>

Because the "speech" involved in advertising drug paraphernalia is commercial speech, *Flipside* disposes of any first amendment attack on the MDPA's provision prohibiting the advertisement of drug paraphernalia.<sup>110</sup> Also, any "speech" implicated by MDPA article II constitutes speech proposing an illegal transaction; thus a government can regulate or ban the speech altogether.<sup>111</sup> Regarding any overbreadth problems, *Flipside* unequivocally held that the overbreadth doctrine does not apply to commercial speech.<sup>112</sup> The language "in part" contained in the MDPA's advertising prohibition,

105 MDPA Art. I.

106 *New England Accessories Trade Ass'n v. Tierney*, 691 F.2d 35, 37 (1st Cir. 1982) (quoting *Delaware Accessories Trade Ass'n, v. Gebelien*, 497 F. Supp. 289, 294 (D. Del. 1980)). See also note 103 *supra*. In *Gebelien*, the court noted that a seller is safe so long as he does not actually know the buyer's purpose and as long as the objective facts that are there for him to observe do not give fair notice that illegal use will ensue. 497 F. Supp. at 294.

107 *Id.* In *Florida Businessmen v. City of Hollywood*, 673 F.2d 1213, 1219 (11th Cir. 1982) the court noted that the "reasonably should know" standard did not punish innocent or inadvertent conduct. Rather it establishes a scienter requirement that the defendant acted in bad faith, with intent or knowledge that the recipient will use the paraphernalia with controlled substances.

108 See, e.g., *New England Accessories Trade Ass'n v. Tierney*, 691 F.2d 35, 37 (1st Cir. 1982).

109 See notes 79-83 *supra* and accompanying text. See also notes 99-101 *supra* and accompanying text.

110 455 U.S. at 496. See notes 60-68 *supra* and accompanying text.

111 455 U.S. at 496.

112 *Id.* at 497.

however, may be unconstitutionally overbroad. This language could arguably refer to some speech which, unlike that advocating the sale of drug paraphernalia, is completely lawful and thus protected.<sup>113</sup> Careful lawmakers should determine whether prudence dictates excising the "in part" language from a particular anti-drug paraphernalia law.

## VI. Conclusion—Swan Song for the Bong?

A government may regulate or ban drug paraphernalia entirely. Banning drug paraphernalia bears a rational relationship to the furtherance of a legitimate government goal — curbing the proliferation of illicit drug use. But the law, the vehicle through which the government seeks to reach that goal, must be drawn with sufficient clarity so as not to offend the due process requirements of the Constitution. The history of drug paraphernalia laws is one in which lawmakers have sought to strike the careful balance between effectiveness and constitutional validity. Effective laws were often struck down as unconstitutionally vague, while laws that may have passed constitutional muster would by their very nature have been unable to deal with the complex and pervasive problem of drug abuse.

The Model Drug Paraphernalia Act was drafted to strike the balance. The Act's breadth of coverage—extending to users, manufacturers, and sellers of drug paraphernalia—combined with its criminal penalties effectively bans drug paraphernalia. Moreover, the Act's precise definitions and its scienter requirement mitigate constitutional vagueness problems. *Flipside* and the recent circuit court decisions make it clear that the Act is constitutional.

Now a government has the power and the means to ban drug paraphernalia. The only question that remains is whether it should. This is a question that lawmakers are competent to decide. They, and not the courts, should now determine whether it is time to play the swan song for the bong.

*Michael D. Guinan*

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113 See *New England Accessories Trade Ass'n v. City of Nashua*, 679 F.2d 1, 4 (1st Cir. 1982). (citing *Record Revolution No. 6 Inc. v. City of Parma*, 638 F.2d 916, 937 (6th Cir. 1980)). In *Record Revolution* the Sixth Circuit expressed the concern that the use of the words "in part" could result in the suppression of speech urging the reform of drug laws. The purpose of the overbreadth doctrine is to prevent speech of that type from being muted or "chilled." See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

## APPENDIX A

## Village of Hoffman Estates Ordinance No. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF  
THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING  
FOR REGULATION OF ITEMS DESIGNED OR MAR-  
KETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

*Section 1:* That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16—ITEMS DESIGNED OR MARKETING FOR USE  
WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such license shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-

16A in any form to any male or female child under eighteen years of age.

**D. Records:**

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

**E. Regulations:**

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

*Section 2:* That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs  
\$150.00

*Section 3:* Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

*Section 4:* That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

*Section 5:* That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.

APPENDIX B  
MODEL DRUG PARAPHERNALIA ACT

ARTICLE I

(Definitions)

SECTION (insert designation of definitional section) of the Controlled Substances Act of this State is amended by adding the following after paragraph (insert designation of last definition in section):

“( ) The term ‘Drug Paraphernalia’ means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Act (meaning the Controlled Substances Act of this State). It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species or plant which is a controlled substance or from which a controlled substance can be derived;

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana;

(8) Blenders, bowls, containers, spoons and mixing devices used,

intended for use, or designed for use in compounding controlled substances;

(9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs;

(m) Ice pipes or chillers;

In determining whether an object is Drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this Act;

- (4) The proximity of the object to controlled substances;
- (5) The existence of any residue of controlled substance on the object;
- (6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia;
- (7) Instructions, oral or written, provided with the object concerning its use;
- (8) Descriptive materials accompanying the object which explain or depict its use;
- (9) National and local advertising concerning its use;
- (10) The manner in which the object is displayed for sale;
- (11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
- (12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;
- (13) The existence and scope of legitimate uses for the object in the community;
- (14) Expert testimony concerning its use."

## ARTICLE II

### (Offenses and Penalties)

SECTION (designation of offenses and penalties section) of the Controlled Substances Act of this State is amended by adding the following after (designation of last substantive offense):

#### "SECTION (A) (Possession of Drug Paraphernalia)

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

“SECTION (B) (Manufacture or Delivery of Drug Paraphernalia)

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both.”

“SECTION (C) (Delivery of Drug Paraphernalia to a Minor)

Any person 18 years of age or over who violates Section (B) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both.”

“SECTION (D) (Advertisement of Drug Paraphernalia)

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both.”

### ARTICLE III

#### (Civil Forfeiture)

SECTION (insert designation of civil forfeiture section) of the Controlled Substances Act of this States is amended to provide for the civil seizure and forfeiture of drug paraphernalia by adding the following after paragraph (insert designation of last category of forfeitable property):

“( ) all drug paraphernalia as defined by Section ( ) of this Act.”

## ARTICLE IV

## (Severability)

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.