

“CIVILIZING” DRUG PARAPHERNALIA POLICY: PRESERVING OUR FREE SPEECH AND DUE PROCESS RIGHTS WHILE PROTECTING CHILDREN

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*“I like to collect glass and [I] have some pipes and tubes in my collection. Just because crackheads use them that doesn’t mean everyone who has a pipe smokes crack. If the U.S. is all about freedom then why are you infringing on my rights.”*¹

INTRODUCTION

In October 2001, police raided the Smoke Signals Pipe and Tobacco Shop in Dover, New Hampshire and seized various items they considered to be drug paraphernalia.² Susan Hargrove, the store’s manager, pled guilty to one count of selling drug paraphernalia, resulting in a suspended \$1,000 fine.³ As part of the plea agreement, the government returned most of the seized items, assuring Hargrove that it was legal to sell them.⁴ These included “small glass pipes, so-called carburetor pipes, several so-called bubblers, small glass pipes that contain a water chamber filter, and a number of smaller items referred to as ‘one hitters.’”⁵ Less than two months after Hargrove’s plea, the same police department raided the store again and seized many of the items that the government had just given back.⁶ Hargrove was acquitted in a bench trial when the judge concluded that she couldn’t have *knowingly* sold illegal items if the prosecutors had told her she could sell them.⁷

But when the shop tried to get its seized items back, the judge refused because he had concluded that they *were* drug paraphernalia.⁸ His decision was based largely on the testimony of a detective who admitted he wasn’t an expert on drug paraphernalia and who couldn’t explain the criteria he used to identify paraphernalia.⁹ Ultimately, the New Hampshire Supreme Court ordered that the merchandise should be returned, based on Hargrove’s acquittal and the government’s as-

1. RasMan2001, Comment #5 to *Drug Paraphernalia or Tobacco Pipes?*, CANNABIS NEWS (Oct. 20, 2001, 18:02 PT), <http://cannabisnews.com/news/9/thread9304.shtml>.

2. Jacob Sullum, *Bongs Away! How the Crusade Against Drug Paraphernalia Punishes Controversial Speech*, REASON, Feb. 2009, at 35, available at <http://www.reason.com/news/show/130844.html>.

3. *Id.*

4. *Id.*

5. State v. Smoke Signals Pipe & Tobacco Shop, L.L.C., 922 A.2d 634, 635 (N.H. 2007). “One hitters” are “wooden boxes which typically contain enough marijuana for a single use and an accompanying smoking apparatus.” State v. Chubb, No. M2005-01214-CCA-R3-CD, 2007 WL 258429, at *7 (Tenn. Crim. App. Jan. 29, 2007).

6. Sullum, *supra* note 2.

7. *Id.*

8. *Id.*

9. *Id.*

surances that the items were legal.¹⁰ Welcome to the Alice-in-Wonderland¹¹ guessing-game known as “identifying drug paraphernalia.”

And, speaking of *Alice in Wonderland*, Mike Mahaney of Englewood, Colorado hired some artists to paint a huge mural depicting scenes from the Lewis Carroll tale on one outside wall of his store as a way of stopping graffiti artists from desecrating the store.¹² Although discouraging graffiti—often a predictor of gang activity¹³—might seem like a good thing, local officials prosecuted Mahaney for the mural.¹⁴ A neighboring business had complained about a “drug theme” in the mural—remember the hookah-smoking caterpillar sitting on a mushroom in the *Alice in Wonderland* story?¹⁵ In addition, Mahaney’s store sells pipes and papers that could be adapted to serve as drug paraphernalia, and the shop posts a sign praising a legalized marijuana initiative in Denver.¹⁶ Wait a minute. Hookahs? Mushrooms? Pipes? Rolling papers? “Legalize Marijuana” signs? Mahaney’s store must be a “head shop,” i.e., a store that sells drug paraphernalia.¹⁷ Mahaney’s wares are legal, yet local officials arguably distorted their own laws (which protect murals as “art” but require licenses for “signs”) to cite Mahaney for not seeking a permit for his “sign.”¹⁸ Thus, a painting depicting a beloved children’s classic, which might have been uncontroversial on the outside wall of a day-care center, incurred the wrath of local authorities. Mahaney’s case is an example of how free speech rights may be compromised in the presence of the sale of perceived drug paraphernalia. Mahaney eventu-

10. *Smoke Signals*, 922 A.2d at 642–43.

11. See LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* (Signet Classic 1960) (1865), available at <http://etext.lib.virginia.edu/etcbin/toccer-new2?id=CarAlic.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all>.

12. Jim Spencer, *In Englewood, Bureaucrats Try to Define Art, Free Speech*, COLO. INDEP. (Aug. 3, 2007, 2:21 PM), <http://coloradoindependent.com/2437/in-englewood-bureaucrats-try-to-define-art-free-speech>.

13. See generally James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC, Mar. 1982, at 29, 33, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/> (arguing that the presence of graffiti sends a message that the environment is uncontrolled and open to mischief).

14. Spencer, *supra* note 12.

15. *Id.*; CARROLL, *supra* note 11, at 59–60. A “hookah” is “an oriental tobacco pipe with a long, flexible tube that draws the smoke through water contained in a bowl.” NEW OXFORD AM. DICTIONARY 813 (Erin McKean ed., 2d ed. 2005).

16. Spencer, *supra* note 12.

17. A “head,” in this context, is a “habitual user of an illicit drug.” NEW OXFORD AM. DICTIONARY, *supra* note 15, at 777.

18. Spencer, *supra* note 12.

ally won his case in the Colorado Court of Appeals, but only because the court found that the city ordinance lacked procedural safeguards.¹⁹

The inherent police powers of the states, which authorize them to legislate on behalf of the health, safety, and welfare of their citizens,²⁰ allow states to prohibit the sale and use of drugs that are considered harmful. The prohibition of drug paraphernalia, however, is a murkier legal issue because of the constitutional difficulties in defining drug paraphernalia so that citizens and law enforcement have fair notice of exactly which items are prohibited and so that innocent items are not implicated by an overly broad definition. Additionally, because statements made by the manufacturer, seller, or buyer are often considered as circumstantial evidence in determining whether an item is drug paraphernalia, a defendant's free speech rights may be at issue in drug paraphernalia cases.

Part I of this article will discuss the due process difficulties in defining drug paraphernalia while avoiding vagueness and overbreadth. It will analyze (1) the Drug Enforcement Administration's Model Drug Paraphernalia Act, which was devised to overcome the constitutional issues noted above, and (2) the Supreme Court's seminal opinion in *Village of Hoffman Estates v. Flipside*, in which the Court grappled with the vagueness and overbreadth issues raised by drug paraphernalia laws.

Part II will consider free speech issues related to drug paraphernalia in (1) *Morse v. Frederick*, the "BONG HiTS 4 JESUS" case, in which a high school student's apparently pro-drug-paraphernalia banner earned him a suspension from school, and (2) actor Tommy Chong's prosecution for producing drug paraphernalia, wherein a federal court was asked to consider the pro-drug message conveyed by the actor's movies as a sentencing factor.

Part III considers the reasons why a government would pursue a war on drug paraphernalia and offers suggestions for a truce. I argue that government at various levels—state, local, and national—is mainly concerned with the "flaunt factor," i.e., the "glamorization" of drug paraphernalia and its effect on children's attitudes toward drugs.²¹ This concern leads courts to tolerate criminal statutes written with a greater inexactitude than those defining most other crimes.

19. *Mahaney v. City of Englewood*, 226 P.3d 1214, 1219–20 (Colo. App. 2009).

20. See *United Haulers Ass'n, Inc. v. Oneida Herkimer Solid Waste Auth. Mgmt.*, 550 U.S. 330, 342–43 (2007).

21. To "flaunt" is to "display (something) ostentatiously, esp. in order to provoke envy or admiration or to show defiance." NEW OXFORD AM. DICTIONARY, *supra* note 15, at 641.

Civil regulation, such as prohibiting sales to minors and regulating advertising to reduce minors' exposure, might address the problem better than the blunt instrument of the criminal law. Drug paraphernalia sellers should realize that they would be less likely to subject themselves to the ire of local legislators and law enforcement if they would treat their wares with greater discretion when children are concerned.

I.

DRUG PARAPHERNALIA AND DUE PROCESS

It is fairly easy to draft legislation banning a particular drug because the drug can always be defined by its chemical composition if ordinary words (e.g., "cannabis," "heroin") are not sufficient. Defining "drug paraphernalia," however, is a different matter. There is no simple definition of drug paraphernalia because an item becomes paraphernalia based on its use or intended use. Before one defines an object by its "intended" use, one must determine whose intent is at issue—the manufacturer's, the seller's, or the buyer's. What if none of these three intend an item to be used with illegal drugs, but it would still be possible to use it with them—is it still drug paraphernalia?²² What if three people buy identical glass pipes—one uses his to smoke cannabis, the second uses his to smoke tobacco, the third uses his as a decoration on his coffee table? It is easy for the law to say that the cannabis user possessed drug paraphernalia. Actual use of an object with drugs or the finding of drug residue on the object provides objective criteria by which to define drug paraphernalia. But what about the other two buyers of glass pipes, who never used their pipes to ingest drugs and never intended to? Are their pipes still illegal paraphernalia? What if the manufacturer intended that the pipes be used for drugs, but the buyers didn't? In that case, are the pipes still illegal?

How much do the circumstances of the sale of the item affect its classification as paraphernalia? If rolling papers for cigarettes are sold at a Walgreen's store, they are more likely to be considered within the law than identical papers sold at a so-called "head shop."²³ If the store sells magazines such as *High Times*, which encourages use of illegal drugs, this may be taken as a sign that the seller intends, or reasonably should know, that the items in the store will be used as drug paraphernalia. Even more problematic is the proximity of a "Legalize Mari-

22. For the purposes of this article, and for the sake of brevity, I will use "drugs" to refer to "illegal drugs," such as marijuana, heroin, cocaine, and ecstasy, unless otherwise stated, and "paraphernalia" to refer to "illegal drug paraphernalia."

23. This implicates equal protection issues as well. In practice, the giant corporation can, without penalty, sell products that a Mom and Pop store can't sell.

juana” sign. Such a sign is a political statement and should receive greater First Amendment protection²⁴ than a “Smoke Marijuana” sign, which is arguably an incitement to crime.²⁵

Why is there a problem with defining drug paraphernalia? The dictionary defines “paraphernalia” as “the equipment needed for a particular activity,”²⁶ so wouldn’t illegal drug paraphernalia be equipment needed for ingesting illegal drugs? When one tries to prohibit a class of objects based on how they *might* be used, rather than their actual use or intrinsic characteristics, there will likely be difficulties in arriving at clear definitions. Makers of the objects will usually be able to point to other (legitimate) uses for such items. It is especially difficult when one is drafting a criminal statute, which requires greater clarity than civil regulations.²⁷

Suppose legislators had to define “coffee cup” for purposes of the law, such as, import-export law. “Coffee” is “a drink made from the roasted and ground beanlike seeds of a tropical shrub.”²⁸ A “cup” is defined as “a small, bowl-shaped container for drinking from, typically having a handle and used with a matching saucer for hot drinks.”²⁹ A “coffee cup” would then be a small, bowl-shaped container for drinking from, typically having a handle and used with a matching saucer for drinking coffee.

But suppose that the legislature has, for some reason, found it necessary to ban coffee. Just to ensure that people don’t drink coffee, the legislature also bans coffee cups. Now, this may sound a little ridiculous. If coffee itself is the evil to be combated, why target an innocent cup that might be used for other purposes besides drinking coffee? And why target coffee cups when all kinds of other containers could be used for drinking the illicit substance? Yet this is precisely what has happened with drugs and drug paraphernalia. In order to discourage the use of drugs, governments have banned various types of drug implements and containers.³⁰

24. See *Virginia v. Black*, 538 U.S. 343, 365 (2003) (finding political speech “at the core of what the First Amendment is designed to protect”).

25. See *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (holding that legislatures may protect the people from abuse of speech or press that incites to crime or violence).

26. NEW OXFORD AM. DICTIONARY, *supra* note 15, at 1234.

27. See *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976).

28. NEW OXFORD AM. DICTIONARY, *supra* note 15, at 329.

29. *Id.* at 413.

30. Paraphernalia prohibitionists might argue, however, that certain types of drug paraphernalia have little use *except* with illegal drugs.

What happens to retailers who have thousands of coffee cups in stock? They will likely begin to sell them as "teacups." As the old merchandise is sold off, manufacturers will begin to alter the style of cups so that they no longer resemble the now-verboten coffee cups. One day the police will raid a Crate & Barrel store for stocking illegal coffee cups. The store manager will insist that the items in question are actually teacups and will argue that, while some people may buy this item for the now-illicit purpose of drinking coffee, the store cannot be responsible for all the after-sale uses of its product. Besides, it would be unfair to prevent people from using the objects for the beneficial, and still legal, practice of drinking tea.

Now, we have a problem. If we are trying to write a criminal statute prohibiting coffee cups, we have to be more precise about what we mean by "coffee cups." Otherwise, people will not be able to tell whether they are buying an illegal object, and police will not be sure whom they may arrest. Because violation of a criminal law can subject a person to loss of liberty, ambiguous criminal laws must be construed narrowly, in favor of the accused.³¹ Defining "coffee cup" by its objective features becomes quite difficult because a teacup looks very much like a coffee cup, but it *really can be used* for drinking tea. How do we decide whether this object is illegal? And if we decide it is illegal, exactly what about it *makes* it illegal?

Of course, if someone is caught using a teacup to drink coffee, then she has arguably used the object as a coffee cup and has thereby violated the law. At the very least, she has violated the law against drinking coffee, if not the law against using coffee cups. But what about someone who simply owns a teacup and doesn't use it for coffee? Even though she has not violated the law, she cannot necessarily assume that she won't be prosecuted. Perhaps so many people use teacups for drinking coffee that police and courts begin to assume that anyone who has a teacup is violating the law. The innocent owner may well be dragged into court and required to convince a jury that she never used or intended to use her cup for illegal purposes. Thus the presumption of innocence is lost. "Sentence first—verdict afterwards," as the Queen declared in *Alice in Wonderland*.³² These are the same sorts of problems we run into when we try to define drug paraphernalia for the purposes of prohibiting it.

31. See *United States v. Lanier*, 520 U.S. 259, 266 (1997) (the "rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered").

32. CARROLL, *supra* note 11, at 172.

These problems arise because precise definitions are more important in the context of criminal law. Normally, we would not waste much time arguing about whether a certain item is a coffee cup or a teacup. But if coffee cups are illegal and teacups are not, then we have raised the stakes. We may get into the most hairsplitting “teacup versus coffee cup” arguments. Losing the argument may mean going directly to jail, so the loser has a right to demand a crystal clear definition of “coffee cup.”

Drug paraphernalia, unlike the drugs themselves, are intrinsically harmless. Similarly, many objects with scores of innocent uses might be used in illicit ways. A butcher knife may be used to chop vegetables or to stab one’s neighbor. A roll of duct tape may be used to stop a leaky pipe or to tie up a hostage. A crowbar may be used to replace a flat tire or to burglarize an apartment. Usually, we don’t prohibit the object itself; we prohibit the illicit act. When we do prohibit possession of certain objects, the object is usually easily definable (e.g., uranium, nuclear weapons, drugs). We don’t ban knives and duct tape, but we do have laws against stabbing and kidnapping. Even laws against “burglary tools” usually require that there be evidence that the tools were used or intended to be used in a burglary,³³ not merely that they *could* be used.

A plastic vial, for example, could be a cocaine vial or a perfume vial. If it is empty and has no drug residue in it, how does one tell if it is a cocaine vial? A laboratory can tell us whether a quantity of powder contains cocaine, but if a vial contains no trace of cocaine, how can one be sure it is a “cocaine vial”? In 1995, Sam Zhadonov, a sixty-eight-year-old Russian immigrant, a plastic molder and inventor who had never been in trouble with the law, went to federal prison and lost his assets for making plastic vials.³⁴ Zhadonov thought he was making perfume vials.³⁵ But because the vials could be used to contain crack, the government successfully prosecuted him for, among other things, conspiracy to aid and abet the distribution of crack cocaine.³⁶ Yet there was no evidence that Zhadonov himself ever saw, sold, or knew about any drugs.³⁷

33. See, e.g., ALA. CODE § 13A-7-8 (LexisNexis 2009); CAL. PENAL CODE § 466 (West 2010); FLA. STAT. ANN. § 810.06 (West 2010); N.Y. PENAL LAW § 140.35 (McKinney 2010).

34. Jacob Sullum, *A Vial Crime*, REASON, May 1995, at 31, available at <http://reason.com/archives/1995/05/01/a-vial-crime/>.

35. *Id.*

36. *Id.*

37. *Id.* at 32.

A. *Attempting to Define "Drug Paraphernalia" Without Violating Due Process: The Model Drug Paraphernalia Act*

1. *Early Court Challenges*

The difficulties with defining paraphernalia led several federal courts to invalidate anti-paraphernalia statutes and ordinances in the late 1970s and early 1980s.³⁸ For example, the Eastern District of Michigan, remarking on a provision banning any pipe with a bowl "so small that the primary use for which it is reasonably adapted or designed is the smoking of marijuana or hashish," found that "[n]o objective standard of reference for the term 'so small' is offered by the Ordinance"³⁹

Meanwhile, the Southern District of Iowa sided with the owners of Sid's Head Shop, finding a city ordinance unconstitutionally vague. The ordinance defined a cocaine spoon as one with a bowl "so small" that its "primary use is for . . . cocaine," and a marijuana or hashish pipe as a pipe characterized by a bowl that is "so small" that its "primary use . . . is the smoking of marijuana or hashish."⁴⁰ No one involved was able to answer the question of "How small is 'so small'?"⁴¹

The Eighth Circuit ordered a preliminary injunction in favor of a head shop where a local ordinance banned "drug-related devices," which the ordinance vaguely defined as "any pipe or other object suitable to be used for smoking" (which would, of course, include ordinary tobacco pipes).⁴² "Indeed," the court commented, "which objects are 'suitable' to be used for smoking controlled substances may depend upon the ingenuity and current practices of drug users."⁴³

The District Court of New Jersey used an overbreadth rationale, not vagueness, to invalidate an ordinance that banned rolling papers, reasoning that the ordinance covered "articles whose major uses are overwhelmingly lawful."⁴⁴ As one commentator put it, "Outlawing rolling papers solely because they can be used to make marijuana cigarettes is like banning sugar merely because it can be used to make illegal liquor."⁴⁵

38. See Gregory R. Veal, Note, *The Model Drug Paraphernalia Act: Can We Outlaw Head Shops—And Should We?*, 16 GA. L. REV. 137, 144–48 (1981).

39. *Music Stop, Inc. v. City of Ferndale*, 488 F. Supp. 390, 393 (E.D. Mich. 1980).

40. *Magnani v. City of Ames*, 493 F. Supp. 1003, 1003–04, 1006 (S.D. Iowa 1980).

41. See *id.* at 1006.

42. *Geiger v. City of Eagan*, 618 F.2d 26, 28–30 (8th Cir. 1980).

43. *Id.* at 29.

44. *Bambu Sales, Inc. v. Gibson*, 474 F. Supp. 1297, 1305 (D.N.J. 1979).

45. Veal, *supra* note 38, at 147.

The same court also struck down a statute that required the seller to determine “what the customer intends to do with the items of purchase.”⁴⁶ The court was especially troubled by the statute’s requirement that the seller consider such factors as the purchaser’s appearance, age, sex, mannerisms, and friends.⁴⁷ The focus on the buyer’s “friends” raised concerns regarding the law’s infringement of individuals’ rights to freedom of association.

2. *The Model Drug Paraphernalia Act*

But help for wayward paraphernalia laws was already on the way. By 1979, at the request of the Drug Policy Office of the President’s Domestic Policy Council, the Drug Enforcement Administration (DEA) had prepared the Model Drug Paraphernalia Act (Model Act) as an amendment to the Uniform Controlled Substances Act. In a prefatory note, the DEA revealed one of the motives that prompted the targeting of drug paraphernalia—tolerance of such objects sent a message to children that drugs were acceptable, even exciting:

[T]he availability of Drug Paraphernalia has reached epidemic levels. An entire industry has developed which *promotes, even glamorizes, the illegal use of drugs by adults and children alike*. Sales of Drug Paraphernalia are reported as high as three billion dollars a year. What was a small phenomenon at the time the Uniform [Controlled Substances] Act was drafted has now mushroomed into an industry so well-entrenched that it has its own trade magazines and associations.⁴⁸

It was the Justice Department’s view that the law enforcement campaign against drug paraphernalia should be conducted mainly at the state and local levels.⁴⁹ The Model Act was intended to avoid or minimize the constitutional problems of previous anti-paraphernalia laws, while effectively curbing the sale of drug paraphernalia.⁵⁰ To-

46. *Knoedler v. Roxbury Township*, 485 F. Supp. 990, 993–94 (D.N.J. 1980).

47. *Id.* at 993.

48. MODEL DRUG PARAPHERNALIA ACT § Prefatory Note (Drug Enforcement Admin. of the U.S. Dep’t of Justice 1979) [hereinafter MDPA], reprinted in Steven E. Gersten, *Drug Paraphernalia: Illustrative of the Need for Federal-State Cooperation in Law Enforcement in an Era of New Federalism*, 26 SW. U. L. REV. 1067, 1109–14 (1997). The complete text of the MDPA’s provisions appears as an Appendix to this article.

49. *Drug Paraphernalia: Hearing Before the H. Select Comm. on Narcotics Abuse and Control*, 96th Cong. 32–33 (1979) (testimony of Irvin B. Nathan, Deputy Assistant Att’y Gen., Criminal Div., U.S. Dep’t of Justice) [hereinafter Nathan Testimony]. See *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 919 (6th Cir. 1980), *vacated on other grounds*, 456 U.S. 968 (1982) (citing Nathan testimony extensively).

50. Nathan Testimony, *supra* note 49, at 32.

day, forty-nine states and the federal government have criminal laws against drug paraphernalia, many of them based on the Model Act; West Virginia is the only state that merely requires licensing.⁵¹

In a statement to the House Select Committee on Narcotics Abuse and Control, Deputy Assistant Attorney General Irvin B. Nathan recommended that states and cities enact the Model Act partly as a symbolic act against the scandal of paraphernalia sales:

The positive features of such a bill are apparent. Outlawing the *open* advertisement and sale of drug paraphernalia will send a clear message to *impressionable adolescents* and others that society does not condone the use of drugs. Governmental authority will present a more consistent and reasoned face to the community by refusing to let the paraphernalia industry *mock the law* by thriving off the wide spread use of illegal drugs. *Communities will no longer be offended by the presence of open symbols of illegal activity in their midst.*⁵²

Again, the significant emphasis is on the symbolism of drug paraphernalia and its effect on children. “Open” advertisement and “open” symbols of illegality will not be tolerated because they offend communities and “mock the law.” Implicit in the message is that communities would be less offended by more discreet or covert symbols of illegality. Also implicit in the message is what may be called the “flaunt factor,” i.e., the more high-profile a business is about its drug paraphernalia, the more likely it is to be targeted by authorities. The “flaunt factor” may explain the eagerness of the bureaucrats in Englewood, Colorado to restrict Mike Mahaney’s *Alice in Wonderland* mural.⁵³ The officials may have thought Mahaney was mocking them by communicating a pro-drug message through a seemingly innocent children’s story.

Deputy Assistant Attorney General Nathan went on to acknowledge in his statement to the House committee that “enforcement of [the Model Act] by state and local authorities may prove difficult and may divert scarce resources from more pressing drug concerns.”⁵⁴ He further cautioned that:

Even if there were resources to permit vigorous enforcement, there is a significant potential for *mistakes and abuse* by local authori-

51. 21 U.S.C. § 863 (2006); Sullum, *supra* note 2, at 33–34.

52. *Drug Paraphernalia: Hearing Before the H. Select Comm. on Narcotics Abuse and Control*, 96th Cong. 97 (1979) (prepared statement of Irvin B. Nathan, Deputy Assistant Att’y Gen., Criminal Div., U.S. Dep’t of Justice) [hereinafter Nathan Statement] (emphasis added).

53. See Spencer, *supra* note 12.

54. Nathan Statement, *supra* note 52, at 97.

ties. There may be additional *invasions of privacy* if law enforcement personnel need see only an implement such as a pipe, rather than any actual evidence of the drug itself, in order to make an arrest and conduct a search. Moreover, the prevalence of drug paraphernalia may leave law enforcement personnel in the difficult position of *having to engage in selective enforcement*, with the potential for disparate treatment of similarly situated individuals.⁵⁵

These statements show that the Department of Justice was aware of most of the drawbacks of criminalizing drug paraphernalia—selective enforcement, invasions of privacy, and mistakes due to a lack of clarity in the law, not to mention the apprehension that law enforcement should be concentrating its resources on the drugs themselves, not the paraphernalia used to ingest them. Mr. Nathan even questioned the potential effectiveness of drug paraphernalia statutes and listed several civil law alternatives to the Model Act, such as licensing, zoning, forbidding sales to minors, and regulating the form of advertising.⁵⁶ In retrospect, it is unfortunate that the powers-that-be decided to resort to criminal law before trying out some of the milder regulatory strategies that Mr. Nathan suggested.

The first article of the Model Act painstakingly defines “drug paraphernalia” in three different ways: (1) in abstract terms, (2) with specific illustrative but non-exhaustive examples, and (3) by circumstantial factors.⁵⁷

First, drug paraphernalia is defined in abstract terms as any “equipment, products and materials of any kind” which are “[a] used, [b] intended for use, or [c] designed for use” in producing, or introducing into the human body, controlled substances.⁵⁸

Second, several specific examples are listed, such as kits, scales, balances, hypodermic needles, isomerization devices, separation gins, sifters, blenders, bowls, containers, spoons, and mixing devices—each qualified by the phrase “used, intended for use, or designed for use” with illegal drugs.⁵⁹ The list concludes with the catch-all category, “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.”⁶⁰ This is followed by another list of exam-

55. *Id.* (emphasis added).

56. *Id.* at 98.

57. See MDPA, *supra* note 48, art. I. The MDPA does not refer to the three parts of the definition by these numbers. I use them for the sake of convenience.

58. *Id.*

59. *Id.*

60. *Id.*

ples, "such as" water pipes, carburetor pipes, electric pipes, air-driven pipes, roach clips, chillums, and bongs.⁶¹

The third leg of the exhaustive definition of "drug paraphernalia" lists fourteen factors that a "court or other authority should consider, in addition to all other logically relevant factors," in "determining whether an object is Drug Paraphernalia . . ." ⁶² These factors include the statements by an owner about the item's use, prior drug convictions of the owner, the proximity of the items to any controlled substances, national or local advertising, and the existence of lawful uses for the item.⁶³

In any statute that follows the Model Act, the first part, i.e., objects "used, intended for use, or designed for use" with illegal drugs, will be the operative definition because it is the only part that is sufficiently abstract to be useful as a statutory definition. The examples in the second part merely help to illustrate the basic definition by giving examples of objects that could be "used, intended for use, or designed for use" with illegal drugs. And the circumstantial factors in the third part are merely clues in determining "intent" or "design," which are essential elements of the basic definition, given in the first part.⁶⁴ Thus, drug paraphernalia are simply objects that are [a] used with illegal drugs, [b] intended for use with illegal drugs, or [c] designed for use with illegal drugs. After the first article of the Model Act defines

61. *Id.* Roach clips are "objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand." *Id.* A chillum is "a hookah or other water pipe adapted for smoking marijuana, that can be passed in ritual fashion among a group of participants . . ." *Chillum*, DICTIONARY.COM, <http://dictionary.reference.com/browse/chillum> (last visited May 8, 2010). A "bong" is a "water pipe that consists of a bottle or a vertical tube partially filled with liquid and a smaller tube ending in a bowl, used often in smoking narcotic substances." *Definition of Bong*, YOURDICTIONARY.COM, <http://yourdictionary.com/bong> (last visited Aug. 31, 2010).

62. MDPA, *supra* note 48, art. I.

63. *Id.*

64. If we were to write a definition of another crime, say, first degree murder, using the same pattern as the Model Act definition of drug paraphernalia, the first part might say that murder is "the premeditated killing of a human being." The second part might give examples of methods by which this could be done, e.g., shooting, stabbing, strangling, drowning, provided that they result in the victim's death. The third part might list factors to consider in deciding whether the killing was indeed premeditated, e.g., whether the killer owned the murder weapon for some time before the incident or bought it just before going to meet the victim, whether the killer lay in wait for the victim, whether the killer made statements about his hatred for the victim, whether the killer had anything to gain by the victim's death.

drug paraphernalia, the second article criminalizes the possession, manufacturing, or delivery of drug paraphernalia.⁶⁵

To sum up the operative portions of the Model Act's first two articles as succinctly as possible, one could say, "It is a crime to possess, use, or distribute *any object* that has been used, or is intended to be used, or has been designed for use, in connection with illegal drugs." Underneath the verbiage, this is all the Model Act really says.⁶⁶ Thus, the Model Act's excessive emphasis on different types of objects, such as chillums and bongos (pipes that may be used with tobacco, as well as illegal drugs), camouflages the fact that *any object* can be paraphernalia under the Act if it is used with the requisite intent regarding illegal drugs.⁶⁷ If you buy a soda with the intention of using the empty can to smoke illegal drugs,⁶⁸ you have just purchased drug paraphernalia.

The paradox of paraphernalia laws is that a court must try to determine an *individual's* intent so that it can tell if an *object* is or is not drug paraphernalia. At least, that appears to be the thrust of the Model Act.⁶⁹ Under the Model Act, a glass pipe might be drug paraphernalia in one situation and not-drug-paraphernalia in another situation, depending on the intent of the individuals involved. Suppose that a vendor sells ordinary tobacco papers to a customer with no intent that they be used with illegal drugs. The customer, however, plans to use them to roll marijuana joints. Now the rolling papers are *both* not-drug-paraphernalia (to the vendor) and drug paraphernalia (to the customer) *at the same time!*

To many people, this incongruity goes against their logical sense of how to define physical objects. While a coffee cup may be used for drinking tea, we still might reasonably refer to it as a coffee cup, even

65. MDPA, *supra* note 48, art. II. Article II also criminalizes the placing of any advertisement in the print media promoting the sale of such objects and makes it a special offense to deliver drug paraphernalia to a minor. *Id.* Article III provides for the civil forfeiture of all drug paraphernalia. *Id.* at art. III.

66. But see the Model Act for yourself in the Appendix at the end of this article.

67. See *Record Revolution No. 6*, 638 F.2d at 931 (describing testimony of pipe expert who stated that "the size of a pipe, the presence of a screen or chamber in a pipe, the material from which pipe is made, or the use of ice, water or air in a pipe," does not indicate that the pipe was designed for use with unlawful substances and that such pipes had been used lawfully for centuries).

68. Apparently, this can be done. See, e.g., *Casbah, Inc. v. Thone*, 512 F. Supp. 474, 481 n.10 (D. Neb. 1980) (describing apple and soft drink can "carved in such a manner that [they] could [each] be used as a smoking device"); Brian DeMarzo, Letter to REASON, May 2009, at 8 (describing using a Coke can to smoke drugs).

69. "The term 'Drug Paraphernalia' means all *equipment, products and materials of any kind* which are used, intended for use, or designed for use, [with controlled substances]." MDPA, *supra* note 48, art. I (emphasis added).

as we sip tea from it. No one claims that cocaine may or may not be cocaine, depending on one’s intent towards it. But under the Model Act’s scheme, drug paraphernalia can become not-drug-paraphernalia based on how someone thinks about it. This regime seems a rather mystical way to approach the criminal law. It is no wonder that paraphernalia cases often remind us of *Alice in Wonderland*.

The reason for this outcome, I argue, is that drug paraphernalia laws are less about objects or substances (which is what laws against the drugs themselves are, for the most part) and more about behavior.⁷⁰ And the behavior that is being targeted is not so much the use of paraphernalia, but the promotion and “glamorization” of illegal drugs. It’s the “flaunt factor.” That is why selling a book called *A Child’s Garden of Grass*⁷¹ near a glass pipe is likely to attract police attention—not because the book is illegal (it isn’t), but because it encourages people to use illegal drugs.

3. *Due Process Issues—Vagueness and Overbreadth*

A state or local statute based on the Model Act may implicate the Due Process Clause of the Fourteenth Amendment and its doctrines of void-for-vagueness and overbreadth.⁷² These doctrines have distinct meanings and purposes, though they often overlap; a statute that is vague might be overbroad as well.⁷³ The void-for-vagueness doctrine requires statutes to give persons of common intelligence fair notice of the persons covered and the conduct prohibited.⁷⁴ The overbreadth doctrine prohibits statutes that criminalize innocent or constitutionally protected conduct.⁷⁵ While the Supreme Court recognizes the overbreadth doctrine only in First Amendment cases,⁷⁶ some courts have

70. To be sure, drug prohibition laws ultimately target behavior; such laws probably would not exist if no one ever used substances like cocaine and marijuana. But since marijuana is conclusively identifiable in a laboratory, it is as easy to ban possession of marijuana itself as to ban “taking marijuana.” An object such as a rolling paper, however, is not conclusively identifiable as drug paraphernalia until certain behaviors (such as using it to roll a joint) render it drug paraphernalia.

71. JACK S. MARGOLIS & RICHARD CLORFENE, *A CHILD’S GARDEN OF GRASS (THE OFFICIAL HANDBOOK FOR MARIJUANA USERS)* (rev. ed. 1974).

72. See *Record Revolution No. 6*, 638 F.2d at 927; *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (“[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines.”).

73. See *Record Revolution No. 6*, 638 F.2d at 927; *Kolender*, 461 U.S. at 358 n.8.

74. *Colautti v. Franklin*, 439 U.S. 379, 390–91 (1979).

75. *Broadrick v. Oklahoma*, 413 U.S. 601, 612–13 (1973); *Coates v. City of Cincinnati*, 402 U.S. 611, 614–16 (1971) (striking down ordinance as “unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct”).

76. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”).

applied it to non-speech issues where the challenged statute or state action either sweeps so broadly that it far exceeds the state's legitimate police powers or criminalizes a "significant amount of constitutionally protected activity."⁷⁷ I will apply an overbreadth analysis to the Model Act's non-speech, as well as speech, provisions because I believe that overbreadth analysis has value in regard to paraphernalia laws.

a. Void-for-Vagueness

A statute based on the Model Act may logically be challenged on vagueness grounds because it is often difficult for individuals to tell if they are violating a drug paraphernalia law, and law enforcement may apply the law arbitrarily. The vagueness doctrine holds that fundamental fairness requires that persons not be required to guess, at their own peril, the meaning and application of a statute or ordinance.⁷⁸ Standards of guilt must be clear in order to protect against arbitrary, erratic, and discriminatory arrests, prosecutions, and convictions.⁷⁹ If a statute does not lay down sufficiently precise standards, basic policy decisions are impermissibly left to the personal whims of police, pros-

But see Hill v. Colorado, 530 U.S. 703, 764 (2000) (Scalia, J., dissenting) ("*Stenberg* applies overbreadth analysis to an antiabortion law that has nothing to do with speech, even though until eight years ago overbreadth was unquestionably the exclusive preserve of the First Amendment."). Despite Justice Scalia's observation, a Supreme Court majority has never explicitly rejected the idea that overbreadth applies only to the First Amendment.

77. Commonwealth v. Duda, 923 A.2d 1138, 1150 (Pa. 2007); *see also* Commonwealth v. Ickes, 873 A.2d 698, 700–03 (Pa. 2005) (holding statute, which allowed Game Officers to demand identification without reasonable suspicion of a violation, was overbroad and violated Fourth Amendment); Commonwealth v. Barud, 681 A.2d 162, 166 (Pa. 1996) (holding DUI statute, which criminalized blood alcohol content over 0.10% three hours after driving, unconstitutionally overbroad because defendant might have had lower blood alcohol *while* driving); People v. Gutierrez, 657 N.E.2d 491, 491 (N.Y. 1995) (finding closure of trial to public unconstitutionally overbroad where defendant's family was excluded although testifying officers had expressed no fear of family); People v. Reed, 559 N.E.2d 1169, 1170–72 (Ill. App. Ct. 1990) (finding search warrant, which authorized search of all persons in a bar, "so facially overbroad that [police] could not reasonably believe it was valid"); State v. Mercherson, 438 N.W.2d 707, 708–10 (Minn. Ct. App. 1989) (holding city ordinance, which prohibited all people from living in, working at, or visiting a building where illegal activity occurred, unconstitutionally overbroad).

78. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

79. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (striking down vagrancy ordinance "because it encourages arbitrary and erratic arrests and convictions").

ecutors, and juries.⁸⁰ A greater degree of precision is required when a statute defines criminal offenses or affects activities protected by the First Amendment.⁸¹

The Model Act defines “drug paraphernalia” as items that are “[a] used, [b] intended for use, or [c] designed for use” in various drug-related activities.⁸² The first category is not impermissibly vague. Whether an item has *actually* been used for drug-related purposes is a factual question that can be proved by testimony (e.g., “I saw defendant put hashish in the pipe and smoke it.”) or physical evidence (e.g., drug residue in the pipe). Drug residue on an item and actual “use” are standards for identifying drug paraphernalia in some states.⁸³ Furthermore, it would be difficult for a defendant to argue that he didn’t understand a statute that told him, basically, “It is against the law to use objects with illegal drugs, such as cocaine, heroin, marijuana.” Police would know that they should investigate alleged instances of *actual use* of an item with illicit drugs.

The “intended for use” category is more difficult. Courts addressing the question of “Whose intent are we talking about?” have logically concluded that it must necessarily be the intent of the person charged with the violation.⁸⁴ In other words, a manufacturer would violate the Act if he made an item with the intent that it be used with illegal drugs. A seller would violate it if he sold with the intent that the item be used with illegal drugs. And so forth. But a seller, for example, would not violate the law if he sold an item (e.g., rolling papers) with no intent that it be used for illicit purposes, even though some of his customers may well be buying with illicit purposes in mind. And in the case of the manufacturer or seller, it could be argued that his

80. *Grayned*, 408 U.S. at 108–09.

81. *E.g.*, *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 620 (1976) (“The general test of vagueness applies with particular force in review of laws dealing with speech.”); *Winters v. New York*, 333 U.S. 507, 515 (1948) (“The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.”).

82. MDPA, *supra* note 48, art. I.

83. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3415(E)(5) (2010) (identifying the “existence of any residue of drugs on the object” as a factor in determining whether an object is drug paraphernalia); COLO. REV. STAT. § 18-18-427(1)(c) (2010) (identifying the “existence of any residue of controlled substances on the object” as a factor in determining whether an object is drug paraphernalia).

84. *E.g.*, *Record Revolution No. 6*, 638 F.2d at 928–29; *New England Accessories Trade Ass’n, Inc. v. Tierney*, 691 F.2d 35, 36 (1st Cir. 1982) (“[T]he intent referred to is that of the person alleged to have violated the statute.”).

only intent is to make a profit selling his products, regardless of how they are used.⁸⁵

Still, it may be difficult to tell if an item is *intended for use* with illegal drugs merely by examining the item itself. One would have to infer intent from circumstances surrounding the manufacture or sale of an item. The third part of the definitional section of the Model Act attempts to solve this difficulty. It gives illustrative factors to be taken into consideration in determining whether an item is paraphernalia, including statements by an owner or by anyone in control of the object concerning its use; prior convictions, if any, of an owner, or of anyone in control of the object, under state or federal drug laws; the proximity of the object to controlled substances; instructions, oral or written, provided with the object concerning its use; national and local advertising concerning its use; the manner in which the object is displayed for sale; 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; direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise; and the existence and scope of legitimate uses for the object in the community.⁸⁶

Despite the Model Act's attempt to solve the difficulty of determining when an item is *intended for use* with illegal drugs, the illustrative factors themselves are problematic. As for written instructions accompanying the object, it seems unlikely that sellers of drug paraphernalia will be foolish enough to include instructions advising the user how to ingest illegal drugs with their wares. And what does the Model Act mean by the "manner" in which the object is displayed for sale? If one is selling items that could conceivably be considered drug paraphernalia, one must carefully consider this provision. But the Model Act does not say which "manners of sale" will lead to an inference of illegal drug intent and which will not. How close is "close" when it comes to evaluating the "*proximity* of the object to controlled substances"? A person previously convicted of a drug offense would have to think twice about selling or buying meerschaum pipes because his criminal record may be taken into account in determining intent.

85. See Kenneth E. Johnson, Note, *The Constitutionality of Drug Paraphernalia Laws*, 81 COLUM. L. REV. 581, 610 (1981) ("[I]t is extremely difficult to demonstrate that a merchant intended an article to be used with drugs . . . the 'intent' of even the most disreputable merchants is simply to make a profit, regardless of a customer's subsequent activities.").

86. MDPA, *supra* note 48, art. I.

Perhaps most disturbing is that the Model Act creates a seemingly arbitrary distinction between different sellers of the same object. "Legitimate suppliers," such as licensed distributors or dealers of tobacco products, are less likely to be targeted than "head shops," which sell mostly or only drug paraphernalia. The difficulty is that the definition then becomes circular. How do we know it's paraphernalia? Because it's sold in a head shop. And how do we know it's a head shop? Because it sells paraphernalia. Or to state it another way, we know it's drug paraphernalia because it's placed near other drug paraphernalia. Police have testified that they would arrest a retailer operating a "head shop" if it sold alligator clips or cigarette papers, but not a drug store owner selling the same items.⁸⁷ Such testimony has led to the invalidation, on vagueness grounds, of a city ordinance based on the Model Act.⁸⁸ As the Sixth Circuit said, "This testimony suggests that the ordinances would be enforced only against 'head shops,' as designated by the local law enforcement officials. No guidelines have been written to prevent such selective discriminatory enforcement [T]he ordinances would permit at least the arrest and prosecution of persons by police and prosecutors who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance" ⁸⁹

The "designed for use" category has similar problems to the "intended for use" designation. The trouble with defining drug paraphernalia in terms of the "design" of an item is the lack of any design characteristics that distinguish lawful purposes from unlawful purposes. The type of object that can become, or be used as, drug paraphernalia is limited only by the imagination of the user and on the current practices of a clandestine society of illegal drug users.⁹⁰ As one drug user wrote, in a post on the *Cannabis News* website:

It has always amazed me just how ingenious pot smokers are. It seems like we can fashion a pipe out of just about anything . . . toilet paper roll, tin foil, plumbing parts, cans, bottles, duct tape (the list is endless). I once made a bong from PVC pipe, an antique

87. See *Record Revolution No. 6*, 638 F.2d at 931.

88. *Id.* at 931–32.

89. *Id.* at 931.

90. See *Geiger v. City of Eagan*, 618 F.2d 26, 29 (8th Cir. 1980) ("Indeed, which objects are 'suitable' to be used for smoking controlled substances may depend upon the ingenuity and current practices of drug users."); *Music Stop, Inc. v. City of Ferndale*, 488 F. Supp. 390, 393 (E.D. Mich. 1980).

telephone pole glass insulator, copper pipe and an old dipstick and dipstick tube.⁹¹

Aluminum foil, apples, brass plumber's pipes, plastic bottles, buckets, and garden hoses can be used to create one's own paraphernalia.⁹² Herbert J. Bessai, an expert on pipes, testified in an Ohio case that the size of a pipe, the presence of a screen or chamber, the material from which the pipe is made, or the use of ice, water, or air in a pipe do not indicate that the pipe was designed for use with unlawful substances.⁹³ According to Bessai, the various pipe designs seized as paraphernalia in that case had been used lawfully for centuries.⁹⁴

Again, police would have to infer "design" from the long list of factors in the Model Act. This list has many possible pitfalls. Citizens who intend to sell items that might be used with drugs, as well as police, prosecutors, and judges who have to enforce the law, must apply a cumbersome "totality of the circumstances" test in order to tell if an object is illegal drug paraphernalia. The Model Act gives no clue as to how much weight must be given to the many factors listed. Consequently, different persons might reasonably come to different conclusions as to the legality of a particular item. What if the store owner had one marijuana possession conviction twelve years ago, and his store sells mostly glass pipes? Are the glass pipes drug paraphernalia? What if the store owner was convicted of selling heroin five years ago, and the store is a typical pharmacy, but with a few glass pipes for sale in a corner? Are these glass pipes drug paraphernalia? The *Smoke Signals* case, described at the beginning of this article, demonstrates the confusion that may occur in determining whether some "small glass pipes" are drug paraphernalia. The average police officer may have better luck determining if he has "probable cause" for a search or seizure⁹⁵ than in knowing whether he has correctly identified drug paraphernalia.

91. Imprint, Comment to *Winning War On Terror—One Roach Clip At a Time*, CANNABIS NEWS (Feb. 26, 2003, 1:27 PT), <http://cannabisnews.com/news/15/thread15562.shtml>.

92. Jacob Sullum, *You Can Put Your Weed in There: What to do after the last head shop closes*, REASON, Feb. 2009, at 34–35.

93. *Record Revolution No. 6*, 638 F.2d at 931.

94. *Id.*

95. See, e.g., Gregory D. Totten et al., *The Exclusionary Rule: Fix It, But Fix It Right, A Critique of If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 26 PEPP. L. REV. 887, 901 (1999) ("Confusion over Fourth Amendment law is not limited to police officers. Judges and lawyers also have difficulty interpreting and applying the law in this difficult area.").

b. Overbreadth

In the case of the Model Act, its overbreadth significantly overlaps its vagueness, as often happens with these two doctrines. Because it is so difficult to define exactly which items are drug paraphernalia, the Act is likely to sweep within its ambit a wide array of innocent items that the law never intended to condemn: ordinary tobacco pipes, rolling papers, alligator clips, and paper clips⁹⁶ might easily become “drug paraphernalia” by being sold in the wrong store, or by the wrong person, or in the wrong “manner.” The Act could therefore be considered “overbroad”—that is, arbitrary and capricious because it results in the imposition of punishment bearing little relation to any legitimate governmental interest.⁹⁷ While the Supreme Court may disdain to apply the overbreadth doctrine outside of the First Amendment context, there would seem to be a place for such a doctrine when an alligator clip, a commonplace electrical connector frequently used in dental offices and physics labs,⁹⁸ can become contraband. The Model Act thus arguably violates both the void-for-vagueness and overbreadth aspects of constitutional due process.

But the early paraphernalia laws that were invalidated by courts were not based on, and were less sophisticated than, the Model Act. Although the Sixth Circuit invalidated a Model Act-based ordinance,⁹⁹ paraphernalia laws based on the Model Act tended to have better luck in the courts, largely because courts found that the “intent” requirement gave the laws sufficient clarity.¹⁰⁰

And despite the imprecisions in the Model Act identified here, it is clear in retrospect that it would have easily passed Supreme Court muster. When a paraphernalia case finally reached the U.S. Supreme Court, it involved a much less sophisticated ordinance than the Model Act. Yet the Court upheld it with little soul-searching. After the Supreme Court’s 1982 decision in *Village of Hoffman Estates v. Flipside*,¹⁰¹ most paraphernalia laws are not likely to be struck down.

96. Alligator clips and paper clips could be used as “roach clips,” devices used to hold the last fragment of a marijuana joint. See *infra* Part II.B.

97. See *Commonwealth v. Duda*, 923 A.2d 1138, 1150 (Pa. 2007) (offering one definition of overbroad as leading to the “imposition of punishment bearing little relation to any legitimate governmental interest”); *Commonwealth v. Ickes*, 873 A.2d 698, 700–03 (Pa. 2005) (finding statute overbroad, where it applied to any person and not just those suspected of violating the law, thereby allowing arbitrary enforcement).

98. *Crocodile clip*, WIKIPEDIA, http://en.wikipedia.org/wiki/Alligator_clips (last visited Apr. 17, 2010).

99. *Record Revolution No. 6*, 638 F.2d at 931–32, *vacated*, 456 U.S. 968 (1982).

100. See *Veal*, *supra* note 38, at 148–58.

101. 455 U.S. 489 (1982).

B. *Drug Paraphernalia: The Supreme Court Knows It When It Sees It in Village of Hoffman Estates v. Flipside*

The local ordinance at issue in *Flipside* was not based on the Model Act, as the ordinance was, in fact, written the year before the Model Act was issued.¹⁰² The ordinance was not even a criminal statute, but a civil licensing regulation.¹⁰³ The Village of Hoffman Estates (the Village) had concluded that drug paraphernalia were legal retail items whose sale could not be banned.¹⁰⁴ The Village therefore decided to regulate these items by requiring paraphernalia sellers to be licensed; that all paraphernalia sales be recorded, including the name, address, and signature of the buyer; and that the police be able to inspect these records at any time during business hours.¹⁰⁵ The businesses also had to submit affidavits affirming that the licensee and its employees had not been convicted of any drug-related offenses.¹⁰⁶ Violations of the ordinance would be penalized by fines between \$10 and \$500.¹⁰⁷ The ordinance did not define drug paraphernalia in any comprehensive way, as the Model Act did, but simply required licensing for the sale of “any items, effect, paraphernalia, accessory or thing which is *designed or marketed* for use with illegal cannabis or drugs”¹⁰⁸

But the oral argument in the United States Supreme Court suggested that the Village was administratively using guidelines similar to those in the Model Act in determining which items were drug paraphernalia and which were not.¹⁰⁹ The attorney for the Village listed a number of items that have legal uses but may also be used to ingest illegal drugs: tobacco papers, scales, water pipes, and alligator clips.¹¹⁰ The Village worked on what it called the “common denominator” theory: the common denominator of these items is that they can be used with illicit drugs.¹¹¹ Therefore, if these items are all being sold together in the same store, and, especially if they are all on the same shelf, the presumption is that they are more likely than not being sold

102. Oral Argument at 8:53, *Vill. of Hoffman Estates v. Flipside*, Hoffman Estates, Inc., 455 U.S. 489 (No. 80-1681), available at http://www.oyez.org/cases/1980-1989/1981/1981_80_1681 [hereinafter *Flipside* Oral Argument].

103. *Id.* at 1:53.

104. *Flipside*, 455 U.S. at 505 (Appendix to Opinion of the Court).

105. *Id.* at 506.

106. *Id.*

107. *Id.* at 507.

108. *Id.* at 506 (emphasis added).

109. See *Flipside* Oral Argument, *supra* note 102, at 20:50.

110. *Id.* at 17:19.

111. *Id.*

for use with illegal drugs.¹¹² The Village argued that judges should be able to take judicial notice that this is the purpose of selling these items when they are sold together.¹¹³

During oral argument, one justice addressed the "manner of display" issue by asking, "Would you say it would have some impact on your case if along with all this paraphernalia they had a sign reading generally, forget your troubles, escape from your anxieties, et cetera?"¹¹⁴ The Village responded, "It depends on where it is displayed. They sell records, and you can escape [by] listening to their records. But if they put it with the paraphernalia . . . [i]t would be one piece that we would add to the total display."¹¹⁵ Thus, in actual practice, the Village appears to have been applying a totality of the circumstances test to the task of gleaning intent, in much the way that the Model Act recommends.

The Village also issued "licensing guidelines" to assist merchants in determining whether their wares fell under the ordinance. The guidelines advised that rolling papers did not come under the ordinance if they were white, but did if they were "of colorful design."¹¹⁶ This guideline, of course, sent a clear message to consumers: roll your joints with white papers. Additionally, pipes and paraphernalia were covered by the ordinance if displayed near literature that encouraged illegal drug use.¹¹⁷

Flipside, the store that challenged the ordinance, had for over three years sold phonograph records, smoking accessories, novelty devices, and jewelry.¹¹⁸ The Village advised the store that a large number of its items came under the ordinance.¹¹⁹ Flipside responded by filing a lawsuit in the U.S. District Court for the Northern District of Illinois, seeking declaratory judgment that the ordinance was unconstitutionally vague and overbroad.¹²⁰ Flipside lost its case in the District Court¹²¹ but won in the Seventh Circuit, which found the ordinance vague in certain applications, such as when applied to ordinary pipes,

112. *Id.*

113. *Id.*

114. *Id.* at 1:00:32.

115. *Id.*

116. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 492 n.3 (1982).

117. *Id.*

118. *Id.* at 491.

119. *Id.* at 493.

120. *Id.*

121. *See Flipside, Hoffman Estates, Inc. v. Vill. of Hoffman Estates*, 485 F. Supp. 400, 410 (N.D. Ill. 1980).

or “paper clips sold next to *Rolling Stone* magazine.”¹²² The Seventh Circuit also suggested that the subjective nature of the “marketing” test might open up the possibility of discriminatory enforcement against people with “lifestyles and views different from those of the majority culture.”¹²³

1. *Overbreadth*

The Supreme Court, in an 8–0 decision¹²⁴ written by Justice Thurgood Marshall, did not tarry long with the overbreadth argument. Flipside claimed that the ordinance inhibited free speech rights of third parties because treating the proximity of drug-related literature, signs, or slogans as an indicator that paraphernalia were marketed for use with illegal drugs infringed the display of such protected speech.¹²⁵ The Court responded that there was no prohibition of literature or signs per se, only regulation of drug paraphernalia.¹²⁶ Besides, state and local governments had a right to regulate or entirely ban commercial speech that encouraged illegal activities.¹²⁷ And, finally, the Court stated that the overbreadth doctrine did not apply to commercial speech.¹²⁸ The Court did not analyze the overbreadth issue in regard to non-speech issues because, as noted above, the Court has held that overbreadth doctrine does not apply outside of First Amendment issues.¹²⁹

As far as its speech-related overbreadth analysis goes, the Court assumed that all drug-related literature located near paraphernalia encouraged the use of illegal drugs. But what about literature that merely advocates legalization of a currently illegal drug? Wouldn't that be protected political speech? It is not clear from the Court's analysis that this type of literature would be safe from regulation. Political literature itself could not be prohibited, but merchants would be discouraged from displaying it for fear that the tobacco pipes and papers that they were also selling would suddenly become drug paraphernalia. This result is the kind of “chilling” effect that the overbreadth doctrine is

122. Flipside, *Hoffman Estates, Inc. v. Vill. of Hoffman Estates*, 639 F.2d 373, 382–83 (7th Cir. 1981).

123. *Id.* at 384.

124. Justice Stevens took no part in the consideration or decision of the case. *Flipside*, 455 U.S. at 505.

125. *Id.* at 495–96.

126. *Id.* at 496.

127. *Id.*

128. *Id.* at 497.

129. *See Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) (“[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad.”).

designed to remedy,¹³⁰ but, unfortunately, Flipside never raised the political speech issue,¹³¹ so the Court did not address it.

2. *Vagueness*

The Court began its vagueness analysis by reciting the standard it had formulated in *Grayned v. City of Rockford*, namely, that a law must provide (1) fair warning to citizens and (2) explicit standards to courts and law enforcement.¹³² The Court noted, however, that the standard would be somewhat relaxed for two reasons: (1) this was an economic regulation, and businesses are expected to make inquiries as to whether their practices are legal and plan accordingly; and (2) this was a civil ordinance, meaning that, in case of any ambiguity, it would *not* have to be construed narrowly.¹³³ Still, since the Village considered the ordinance “quasi-criminal” because of its possible stigmatic effect, the Court said the case might deserve a relatively strict test.¹³⁴ Under its quasi-strict test, the Court found that merely banning “paraphernalia” would be too vague¹³⁵ and examined the ordinance’s “designed for use” language.¹³⁶

The Court found that the “designed for use” standard referred to items that were principally used with illegal drugs by virtue of objective features that were designed by the manufacturer.¹³⁷ “Designed for use” could refer only to the manufacturer’s intent, not the retailer’s or customer’s.¹³⁸ But what “objective features” may clue one in to the manufacturer’s intent? The Court did not say. The Court also found it clear that items “principally used” for nondrug purposes, such as ordinary tobacco pipes, were not “designed for use” with illegal drugs.¹³⁹ In other words, consumer use of an object determines what the manufacturer intended for the object when he designed it.

130. See *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (explaining that “persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression”).

131. See Brief for Appellees at 22–28, *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) (No. 80-1681), 1981 WL 390120 at *22–*28 (raising First Amendment issues and invoking commercial speech rights while never expressly raising issue of political speech).

132. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

133. *Flipside*, 455 U.S. at 498–99.

134. *Id.* at 499.

135. *Id.* at 500 n.17.

136. *Id.* at 500–01.

137. *Id.* at 501.

138. *Id.*

139. *Id.*

The store owners in *Flipside* argued that even if the Court were to infer a scienter requirement,¹⁴⁰ such as a provision that one violated the ordinance only if one *intentionally* sold drug paraphernalia, that would not save the ordinance from vagueness.¹⁴¹ After all, if an ordinance regulated the “knowing, willful, and intentional” sale of “thin-gamajigs,” one could not know if he were violating the law unless “thingamajigs” were clearly defined.¹⁴² As discussed above,¹⁴³ however, it is the *intention* to sell an item *for use with illegal drugs* that makes the selling illegal under drug paraphernalia laws. Thus, it doesn’t matter what the object is, only the purpose for which it is sold.

But any abstract arguments about vagueness fell apart in the wake of the facts of the case, which the Court examined as part of its analysis of the “marketed for use” standard of the ordinance. Flipside displayed pipes and colored rolling papers near copies of *High Times* magazine and books with titles such as *Marijuana Grower’s Guide*, *Children’s Garden of Grass*, and *The Pleasures of Cocaine*.¹⁴⁴ Flipside also admitted that it sold “roach clips,”¹⁴⁵ an expressly prohibited item under the licensing guidelines (although neither the ordinance nor the guidelines were able to define what a “roach clip” was).¹⁴⁶ And, as if that weren’t enough, the store had a sign saying, “You must be 18 or older to purchase any head supplies.”¹⁴⁷ Flipside had clearly failed the “flaunt factor.”

In the face of such facts, the Court seemed too weary of hypothetical arguments about whether an ordinary paper clip placed next to *Rolling Stone* magazine would be covered by the ordinance.¹⁴⁸ The

140. “Scienter” is a “degree of knowledge that makes a person legally responsible” for an act. BLACK’S LAW DICTIONARY 1463 (9th ed. 2009).

141. *Flipside* Oral Argument, *supra* note 102, at 55:30 (“As I said in . . . the *Cohn Grocery* case, where it says [that it would be] unlawful to do anything detrimental to the public interest. Would intent add anything to that? It shall be unlawful to willfully, intentionally, knowingly, and any other mens [rea] that we can hypothecate, to do anything which is not in the public interest. And you kick a cat. Some people think it is wrong, some people don’t think it is wrong. But what is the standard for compliance?”).

142. *Cf.* *Screws v. United States*, 325 U.S. 91, 154 (1945) (Roberts, Frankfurter, and Jackson, JJ., dissenting) (“‘Willfully’ doing something that is forbidden, when that something is not sufficiently defined . . . is not rendered sufficiently definite by that unknowable having been done ‘willfully’.”).

143. See *supra* notes 66–68 and accompanying text.

144. *Flipside*, 455 U.S. at 502.

145. *Id.*

146. *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d 373, 381 (7th Cir. 1981).

147. *Flipside*, 455 U.S. at 502–03. “Head” is a slang term for a frequent user of drugs. *Id.* at 503 n.20.

148. See *id.* at 503 n.21.

Court noted that the Seventh Circuit’s concern about the ordinance being used to harass people with alternative lifestyles was not an issue, at least not yet, because the ordinance was not being challenged “as applied,” but rather for facial vagueness.¹⁴⁹ The Court admitted that there was some danger of arbitrary enforcement, as testimony of the Village attorney who drafted the measure, the Village president, and the chief of police indicated confusion about exactly what was covered by the ordinance.¹⁵⁰ The Court wrote off this confusion, saying it was not prepared to hold that this risk jeopardized the entire ordinance, and, besides, the Village would probably take steps to minimize the dangers of arbitrary enforcement.¹⁵¹

The danger of arbitrary enforcement, however, is one of the key evils of vague legislation.¹⁵² The Seventh Circuit had scoffed at the Village’s argument that it might someday adopt guidelines closer to the Model Drug Paraphernalia Act to clarify the ordinance: “[T]he mere possibility that the vagueness in this ordinance might later be corrected by additional guidelines certainly cannot be a sound basis for holding it constitutional.”¹⁵³ But the Supreme Court, aware of the danger of arbitrary enforcement (and implicitly, of the law’s vagueness), left the details to the bumbling good faith of the Village officials who had devised the ordinance but still couldn’t figure out what it meant.

Yet, when it came to vagrancy laws, the Supreme Court was not so tame as to leave an elastically written ordinance in the hot hands of law enforcement. In *Papachristou v. City of Jacksonville*, the Court famously struck down a city ordinance that read:

Rogues and vagabonds, or dissolute persons who go about begging . . . lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons . . . shall be deemed vagrants¹⁵⁴

While the drafters of the Jacksonville ordinance may have thought they knew whom they meant by “[r]ogues and vagabonds . . . wanton and lascivious persons . . . habitual loafers, disorderly persons,” how was an individual to know if he or she came under those

149. *Id.* at 503.

150. *Id.* at 503–04.

151. *Id.*

152. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

153. *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d 373, 385–86 (7th Cir. 1981).

154. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972).

rubrics? All the ordinance did was to give police unfettered discretion to harass people of whom they did not approve. Jacksonville's ordinance received no mercy from the Supreme Court, while the sketchy ordinance in *Flipside* received tender indulgence.

In short, the Supreme Court in *Flipside* would have none of this hairsplitting about whether one could adequately define drug paraphernalia—not if it would prevent American communities from combating the scourge of drugs. We know it when we see it, the Court seemed to say. When we say, “roach clip,” we mean “roach clip,” and when we say “head shop,” we mean “head shop.” The ordinance doesn't regulate “thingamajigs,” it regulates bong, and everyone knows what a bong is. If you are making, selling, or buying drug paraphernalia (and you know who you are), local governments have a right to regulate you.

This line of reasoning parallels how a drug paraphernalia case plays out in court today, as summarized by Robert Vaughn, a Nashville defense attorney who specializes in drug paraphernalia cases:

Did you intend to sell those items? Well, obviously [you did]. OK, we've got that intent to sell out of the way. “Now, ladies and gentlemen of the jury, look at these items we're setting in front of you, and you decide whether or not they're drug paraphernalia. And oh, by the way, how many of you remember your grandfather sitting on the porch rocker smoking from one of these four-foot-tall acrylic things?”¹⁵⁵

This scenario is part of a disturbing pattern by the Court of applying less rigorous analyses to government actions when they involve drugs. For example, in the Fourth Amendment context,¹⁵⁶ the Court in *Payton v. New York* came down hard on New York police officers who, without a warrant, entered a suspected murderer's home in order to arrest him.¹⁵⁷ But the Court, in a 5–4 decision, upheld police officers' warrantless entry into the home of a suspected marijuana dealer in *Ker v. California*, even though the evidence for exigent circumstances was ambiguous.¹⁵⁸ The Court found Ker's arrest lawful based

155. Sullum, *supra* note 2, at 33–34.

156. See generally Thomas Regnier, *The “Loyal Foot Soldier”: Can the Fourth Amendment Survive the Supreme Court's War on Drugs?*, 72 *UMKC L. REV.* 631, 649–62 (2004) (criticizing Supreme Court jurisprudence in drug cases for weakening Fourth Amendment protections).

157. *Payton v. New York*, 445 U.S. 573, 589–90 (1980).

158. *Ker v. California*, 374 U.S. 23, 39 (1963). Police thought Ker knew he was a suspect because he had made a U-turn when police were following him. *Id.* at 27. The dissent challenged the officers' no-knock entry and the legality of the arrest on the basis that “ambiguous conduct cannot form the basis for a belief of the officers that an escape or the destruction of evidence is being attempted.” *Id.* at 57, 60–62 (Brennan,

on *Draper v. United States*, where the Court held that information from a reliable informer, corroborated by observed details, could establish probable cause for a warrantless arrest.¹⁵⁹ But *Draper* was arrested in a train station, a public place; *Ker* was arrested in his home.¹⁶⁰ The *Ker* majority did not discuss the heightened sanctity of the home, as compared to public places.¹⁶¹ Justice Stevens, in dissent, has disparagingly called the Court a "loyal foot-soldier" in the war on drugs,¹⁶² and the label is no less true in the war on drug paraphernalia.

The *Flipside* decision made obsolete overnight most of the lower court decisions that had found infirmities in paraphernalia laws and consigned numerous law review notes on the unconstitutionality of the Model Act to the dustbin.¹⁶³ After all, if the sparse language in the Village ordinance passed constitutional muster, it was difficult to argue that the more detailed Model Act language was vague or overbroad. As a civil act, the Village ordinance was not subject to as strict a vagueness test as a criminal statute would be¹⁶⁴ (and most drug paraphernalia laws are criminal statutes or ordinances). Theoretically, a criminal drug paraphernalia statute would be more difficult for the Court to uphold. But the Village ordinance passed so easily that it signaled doom to challenges to criminal statutes banning drug paraphernalia. The Court's reasoning could be used to uphold criminal statutes as easily as civil ones. Constitutional challenges to drug paraphernalia laws have been rare to nonexistent since *Flipside*.¹⁶⁵

J., dissenting) (citing *Wong Sun v. United States*, 371 U.S. 471, 483–84 (1963); *Miller v. United States*, 357 U.S. 301, 311 (1958)). Since possible escape and destruction of evidence were among the "exigent circumstances" that the majority used to excuse the warrantless entry, *id.* at 40–41, the criticism applies to the warrantless aspect of the case as well.

159. *Id.* at 36 (citing *Draper v. United States*, 358 U.S. 307, 312–14 (1959)).

160. *Draper*, 358 U.S. at 313; *Ker*, 374 U.S. at 28.

161. See *Payton*, 445 U.S. at 586–87 ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable.").

162. *California v. Acevedo*, 500 U.S. 565, 601–02 (1991) (Stevens, J., dissenting).

163. E.g., Michael D. Guinan, Note, *The Constitutionality of Anti-Drug Paraphernalia Laws—The Smoke Clears*, 58 NOTRE DAME L. REV. 833 (1983); Johnson, *supra* note 85; Veal, *supra* note 38.

164. See *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."); *Winters v. New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.").

165. Although the Court did have occasion to clarify the scienter requirement in the federal anti-paraphernalia laws. *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 517–22 (1994).

It has been said that “courts’ construction of criminal statutes is typically ad hoc, sacrificing broader legal principles for the sake of a desired result in the particular case.”¹⁶⁶ One commentator concludes an exhaustive treatise on vagueness and overbreadth by saying that

[W]ords and phrases in American criminal law . . . mean whatever the courts say they mean. Sometimes the statutory language is seen as precise and clear and, at other times, the words being examined are said to be vague, ambiguous, or uncertain [T]here are never totally clear statutory definitions . . . but . . . these are a smorgasbord of general principles and guidelines, interpretative sources, and rules of thumb that appear in the caselaw from which courts can pick and choose to uphold or strike down criminal law legislation as they see fit.¹⁶⁷

It is unfortunate that the Supreme Court saw fit to uphold such a poorly written piece of legislation as the Village ordinance. As argued here, even criminal drug paraphernalia laws based on the more-precise Model Act, while not so vague as to be unworkable, are less exact than most criminal laws. Although a court may find theoretical justifications for upholding paraphernalia laws, these laws in actual practice create real concerns regarding such matters as: uncertainty about what is covered by the law, as in the *Smoke Signals* case described at the beginning of this article;¹⁶⁸ chilling effects on free speech, as in the case of Mike Mahaney’s *Alice in Wonderland* mural;¹⁶⁹ and selective enforcement, as in the Tommy Chong case described later in this article. For these reasons, drug paraphernalia is a more appropriate subject for civil regulation than criminal prosecution.

II.

FREE SPEECH AND DRUG PARAPHERNALIA

First Amendment free speech issues usually get short shrift when courts analyze the constitutionality of drug paraphernalia laws. This is because these laws do not prohibit pro-drug speech in and of itself, but instead use it as a factor in gauging the legality of the items for sale. But speech about drugs or drug paraphernalia has led to punishments that more directly involve First Amendment free speech rights. This

166. Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL’Y & L. 1, 39 (1997).

167. John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 343 (2002) (emphasis added) (citation omitted).

168. *State v. Smoke Signals Pipe & Tobacco Shop, LLC*, 922 A.2d 634, 642–43 (N.H. 2007).

169. *Mahaney v. City of Englewood*, 226 P.3d 1214 (Colo. App. 2009).

part of the article will examine the *Morse v. Frederick* case, in which a student was suspended from school for displaying a banner with a reference to drug paraphernalia, and the Tommy Chong case, wherein an actor's appearance in pro-marijuana movies may have been considered in his sentencing for selling drug paraphernalia.

A. *Leaving the First Amendment Outside the Schoolhouse Door: Morse v. Frederick and "BONG HiTS 4 JESUS"*

Morse v. Frederick,¹⁷⁰ or the "BONG HiTS 4 JESUS" case, has received a great deal of attention, probably because it sends a muddled message as far as free speech and drug paraphernalia are concerned. Its ambiguity may be attributable to two factors: (1) the plaintiff was a minor in the charge of a public school and therefore did not have the full constitutional rights that an adult would have had; and (2) the content of his message was so ambiguous that the Court's opinion has limited precedential value for future cases. This section of the article contains a brief summary of the facts of the case and attempts to gauge its significance.

Joseph Frederick, the plaintiff in the original case, was a student at a high school in Juneau, Alaska.¹⁷¹ On January 24, 2002, the Olympic torch was scheduled to pass through the city, and Frederick's high school had arranged for students to observe the torch passing through as part of a school-sponsored "field trip."¹⁷² As the torch passed by, Frederick and his friends displayed a fourteen-foot banner that read, "BONG HiTS 4 JESUS."¹⁷³ Deborah Morse, the school principal, deeming that the banner encouraged illegal drug use, confiscated the banner and later suspended Frederick for ten days for violating a School Board policy that prohibited "any assembly or public expression that . . . advocates the use of substances that are illegal to minors."¹⁷⁴ In other words, the school had an official policy against the "flaunt factor."

Frederick sued Morse under 42 U.S.C. § 1983 for violating his First Amendment rights.¹⁷⁵ The District Court granted summary judgment for the principal, finding that she had the authority to prevent such messages at school-sanctioned activities.¹⁷⁶ The Ninth Circuit re-

170. 551 U.S. 393 (2007).

171. *Id.* at 397.

172. *Id.*

173. *Id.*

174. *Id.* at 398.

175. *Id.* at 399.

176. *Id.*; *Frederick v. Morse*, No. J 02-008 CV, 2003 WL 25274689, at *4-*6 (D. Alaska May 27, 2003).

versed, holding that Morse had not demonstrated that Frederick's banner gave rise to a risk of "substantial disruption."¹⁷⁷ The Supreme Court held, however, in an opinion written by Chief Justice Roberts, that schools, in their efforts to curtail illegal drug use by students, could prohibit communications at school-sponsored activities that reasonably appeared to promote such use.¹⁷⁸ As "bongs" are a type of drug paraphernalia usually associated with marijuana, the message, though admittedly ambiguous, was taken to have something to do with advocating marijuana use.¹⁷⁹

The decision was by a 5–4 vote.¹⁸⁰ Justice Alito wrote a concurring opinion, joined by Justice Kennedy, which effectively narrows the holding.¹⁸¹ Alito said that he joined the majority opinion with the understanding that (1) it does no more than allow a public school to restrict student speech that a reasonable observer would interpret as advocating illegal drug use, and (2) it does not allow for restrictions on comments about political or social issues, such as legalizing drugs.¹⁸² Because the Alito concurrence represents the narrowest holding that coincides with a majority of the justices' opinions, it is, for practical purposes, the holding of the Court.¹⁸³ If Frederick's sign had made a political statement, such as, "Legalize Marijuana," Justices Alito and Kennedy would in all likelihood not have joined Chief Justice Roberts' opinion.¹⁸⁴

The *Morse* opinion, however, has a number of saving graces, as far as free speech advocates are concerned. First, it restricts its holding to messages that encourage illegal drug use; other types of messages, even political statements about drug policy, are not implicated. It should be noted that such diverse groups as gay advocacy groups and conservative Christian organizations filed amicus briefs on behalf of

177. *Id.* (citing *Frederick v. Morse*, 439 F.3d 1114, 1118, 1121–23 (9th Cir. 2006)).

178. *Id.* at 408–10.

179. *See id.* at 401.

180. *Id.* at 395.

181. *Id.* at 422–25 (Alito, J., concurring).

182. *Id.* at 422 (Alito, J., concurring).

183. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .") (internal quotation marks omitted).

184. Justices Roberts and Scalia (in the majority) might not have reached the conclusion that they did if Frederick's sign had had a political message. Justice Thomas would have reached the same conclusion either way, as he opined that public school students do not have First Amendment rights. *Morse*, 551 U.S. at 419 (Thomas, J., concurring).

Frederick.¹⁸⁵ These groups feared that a decision against Frederick might allow public schools to restrict a variety of viewpoints, such as gay rights advocacy and pro-religious sentiments.¹⁸⁶ These groups were relieved to find that the decision appeared to be so narrowly limited.¹⁸⁷

Furthermore, Alito's opinion was seen to have upheld the principle of *Tinker v. Des Moines Independent Community School District* that students do not shed their constitutional rights as they enter the schoolhouse gates.¹⁸⁸ *Tinker*, a seminal case regarding public school students' free speech rights, had upheld students' right to wear armbands protesting the Vietnam War.¹⁸⁹ *Morse* seemingly adheres to the basic principle of *Tinker*, while merely creating a narrow exception to it.

Finally, *Morse* rejects the idea that public school officials act *in loco parentis* and may discipline students in any way that the parents would be justified in disciplining them. School officials are state actors and are bound by constitutional restrictions.¹⁹⁰ The Court did not affirm the school's contention that it could censor any speech that interfered with its "educational mission."¹⁹¹

But a weakness of the opinion, as far as free speech advocates are concerned, is that the Court did not require any showing that Frederick's banner was "disruptive" of school activities. Such a showing had been a key element of the *Tinker* decision, where the Court held that the school could not ban antiwar armbands where there was no evidence that they would have disrupted school activities.¹⁹²

Even more disturbing about *Morse* is that it allows a school to prohibit certain speech because of its viewpoint. This result is more alarming than restricting speech based on its content. To understand the difference between content-based and viewpoint-based restrictions, consider a hypothetical situation in which a municipality decides to prohibit distribution of handbills in a public park in order to reduce litter.¹⁹³ Since the ordinance applies to all handbills regardless

185. David Schimmel, *Morse v. Frederick: Did the Supreme Court Weaken or Strengthen Student Freedom of Expression?*, 226 ED. LAW REP. 557, 559–60 (2008).

186. *Id.*

187. *Id.* at 567.

188. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

189. *Id.* at 514.

190. *See* Schimmel, *supra* note 185, at 569.

191. *Id.*

192. *Tinker*, 393 U.S. at 509.

193. The hypothetical is one that John Hart Ely used in a constitutional law class I attended at the University of Miami School of Law.

of content or viewpoint, it has a good chance of being held constitutional as a reasonable time, place, and manner restriction intended to decrease littering in the park. Suppose, however, that the ordinance forbids only “political” handbills. Now, it has a “content” restriction and is more suspect, constitutionally. After all, if the city’s purpose is to cut down on litter, wouldn’t commercial, non-political handbills be potential litter threats just as much as political handbills? Finally, suppose the ordinance says that only handbills supporting the “Proposition X” ballot initiative are banned. Now, it forbids a particular “viewpoint” and becomes most suspicious of all. Such a restriction would likely be struck down as unconstitutional.

After Principal Morse suspended Frederick, the school superintendent upheld the suspension, saying that the reason for the discipline was not that the principal disagreed with Frederick’s message, but that his message appeared to advocate use of illegal drugs.¹⁹⁴ No one, however, can explain exactly what the message means—not even Frederick, who called “BONG HiTS 4 JESUS” a meaningless message intended solely to get the attention of the TV cameras.¹⁹⁵ But let us assume, as the superintendent did, that the message advocates use of illegal drugs.¹⁹⁶ In that case, it seems likely that Morse confiscated the banner, not merely for its content, but for its viewpoint. After all, if Frederick had unfurled a banner with the message, “Say No to Illegal Drugs,” the school would most likely have allowed it, as its rationale for suspending Frederick was the school board’s policy that prohibited public expression advocating use of substances that are illegal for minors.¹⁹⁷

Comparing this case to the handbill hypothetical, if the school had said that no student could display banners of any kind in classes while they were in session, this policy would have been a reasonable time, place and manner restriction. If the school had said “no” to banners regarding either side of the drug issue, this policy would at least have been content-based. But allowing anti-drug speech while prohibiting pro-drug speech is a viewpoint-based restriction. Erwin Chemerinsky has argued that this goes against clearly established First Amendment principles.¹⁹⁸ The superintendent was not persuasive when he argued that the school’s disagreement with Frederick’s mes-

194. *Morse v. Frederick*, 551 U.S. 393, 401 (2007).

195. *Id.* at 402.

196. *Id.* at 401.

197. *Id.* at 398.

198. See Erwin Chemerinsky, *How Will Morse v. Frederick Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 19 (2008).

sage was not a factor in his suspension. The school’s stated rationale for suspension implies that the banner would not have been banned if it had an anti-drug message.

Morse does not explicitly hold that schools may ban speech promoting alcohol use, violence, reckless driving, or promiscuous sex (How would a “CONDOMS 4 JESUS” banner be received by school officials?), but there is nothing in *Morse*’s reasoning (or in that of the Alito concurrence) that would prevent the Court from extending its holding to such areas. It may be an exaggeration to say, as one commentator has, that the Supreme Court has now given school officials similar power over students’ speech to that given to prison officials over convicts’ speech.¹⁹⁹ Still, one wonders how much further the Court might go in future cases in restricting students’ advocacy of activities that school policy disfavors.

Morse is thus another example of the Supreme Court’s predilection to make “drug exceptions” to basic rights. It also illustrates the recurring theme in this article that anti-paraphernalia laws are concerned with shielding children from a “glamorized” idea of drug use. Its harm is limited by the narrowness of the holding, in that it is restricted to public school students and to advocacy of illegal drug use. An adult’s right to carry a sign or wear a shirt or button saying, “BONG HiTS 4 JESUS” in a public place would likely be upheld.²⁰⁰ Nevertheless, it would not be advisable for a retailer of glass pipes or tobacco rolling papers to post a “BONG HiTS 4 JESUS” sign in his store.

*B. Movie Career as Sentencing Factor: Chong Bong,
Nice Dreams, Up in Smoke*

Tommy Chong, along with his partner Cheech Marin, became famous in the 1970s for playing perpetually stoned stooges in movies such as *Up in Smoke* and *Still Smokin*’.²⁰¹ Chong later sold glass water pipes, which he called “Chong Bong” through his company, Nice Dreams.²⁰² In 2003, the federal government’s “Operation Pipe Dreams,” a national investigation of drug paraphernalia distributors, arrested fifty-five people and shut down head shops and distributors

199. See Jennifer Giuttari, *Morse v. Frederick: Locking the “Schoolhouse Gate” on the First Amendment*, 69 MONT. L. REV. 447, 460 (2008).

200. See *Cohen v. California*, 403 U.S. 15, 15, 26 (1971) (upholding right to wear jacket in courthouse bearing inscription, “Fuck the Draft”).

201. Sullum, *supra* note 2, at 37.

202. *Chong Says He Was Targeted for His Hippie Persona*, CTV NEWS (Sept. 8, 2005, 12:29 PM), http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126189084692_121598284 [hereinafter CTV NEWS].

across the country.²⁰³ Chong's business was among those that were raided.²⁰⁴

Chong's publicist first argued that the bongos were works of art and not for drug use.²⁰⁵ This argument was not entirely frivolous, as many of the pipes were too expensive for casual use, and some had been shown at an art exhibit in Los Angeles.²⁰⁶ But Chong dropped that argument and pled guilty to avoid charges against his son and wife.²⁰⁷ As Robert Vaughn, the Nashville drug paraphernalia attorney, explains, the federal government's "bottom line" is this: "If it's a cylindrical tube with a base on it with a stem projecting from the side with a bowl on it that you face over to smoke, that's a bong It's per se illegal. I don't care if you say that it's for your mantle. I don't care if you say that it's art for art's sake."²⁰⁸

Chong was sentenced to nine months in prison, a \$20,000 fine, and the forfeiture of \$120,000 in assets.²⁰⁹ He also forfeited his domain name and pled guilty on behalf of his company, which is now defunct.²¹⁰ One might glean part of the basis for the sentence from the pre-sentencing brief of Assistant U.S. Attorney Mary Houghton, which argued that, "the defendant has become wealthy throughout his entertainment career through glamorizing the illegal distribution and use of marijuana. Feature films that he made with his longtime partner Cheech Marin, such as 'Up in Smoke,' trivialize law enforcement efforts to combat drug trafficking and use."²¹¹

Up in Smoke depicts Cheech and Chong as blundering dopeheads who constantly address each other as "man," are so stoned that they hardly know what they are doing, and escape misfortune only through dumb luck. Cheech twice accidentally urinates on a policeman's pant leg; both smoke a joint composed of marijuana that has passed through a dog's digestive system; and in one scene a woman snorts Ajax cleanser, thinking it is cocaine. Police drug agents fail to apprehend them only because they are even more inept than Cheech and Chong.²¹² This is glamour? Either Ms. Houghton has never seen one

203. Torsten Ove, *Actor Tommy Chong Gets Nine Months for Selling Pot Pipes*, PITTSBURGH POST-GAZETTE, Sept. 12, 2003, at A-1, available at <http://www.post-gazette.com/localnews/20030912chong0912p5.asp>.

204. *Id.*

205. Sullum, *supra* note 2, at 37.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. Ove, *supra* note 203.

211. Sullum, *supra* note 2, at 37.

212. *See* CHEECH & CHONG'S UP IN SMOKE (Paramount Studios 1978).

of Chong’s movies, or she needs to get out more often. A former co-editor of druggie magazine *High Times* commented, “I’ve never walked away from a Cheech & Chong movie saying to myself, ‘Gee, I want to be more like those guys.’”²¹³

Ms. Houghton’s brief is “a remarkable concession that the government wanted to punish Chong at least partly for making fun of drug warriors and mocking prohibition.”²¹⁴ Again, the “flaunt factor” precipitates selective enforcement. Of the fifty-five people arrested during “Operation Pipe Dreams,” Chong was the only one to serve time in prison.²¹⁵ “This was the government’s payback for all the Cheech and Chong movies that ridiculed the hypocrisy of the government’s War on Drugs,” wrote Chong in his 2006 memoir, *The I Chong*. “The DEA . . . hated the way we portrayed them in movies The Feds took a fictional movie and prosecuted the actor and writer for exercising his freedom of expression.”²¹⁶

If Chong’s movies affected his sentence, it is a case of constitutionally protected expression used as a sentencing factor. If Chong’s attorney were to have argued against the practice, however, he would have found little support in U.S. Supreme Court case law. He may perhaps have gained some traction from *Dawson v. Delaware*, a 1992 case in which the Supreme Court held that consideration of the defendant’s membership in a white racist prison gang could not be used against him at sentencing, as this violated his First Amendment right to freedom of association.²¹⁷ The Court has applied the overbreadth doctrine to freedom of association as well as freedom of speech.²¹⁸

But *Dawson* had a wrinkle that would probably keep it from serving as useful precedent in Chong’s case: Dawson’s membership in an anti-black gang was inadmissible because it had no relevance to his crime, which was the murder of a white person.²¹⁹ The government would probably argue that, in Chong’s case, his appearance in drug-related movies *was* relevant to his paraphernalia business because buyers would associate his name with illegal drugs. After all, Chong’s picture was on the pipes, and his company was named after one of his

213. Sullum, *supra* note 2, at 37.

214. *Id.*

215. CTV NEWS, *supra* note 202.

216. Sullum, *supra* note 2, at 37.

217. *Dawson v. Delaware*, 503 U.S. 159, 165 (1992).

218. *See City of Chicago v. Morales*, 527 U.S. 41, 52–53 (1999) (considering, but rejecting overbreadth argument, where ordinance’s impact did not impair First Amendment right of “free association”).

219. *Dawson*, 503 U.S. at 166.

movies, *Nice Dreams*.²²⁰ In other words, Chong was flaunting it. Given the courts' attitude toward anything drug-related, the government would probably win on this one. Ever since *Flipside*, federal courts have declined to take seriously any chilling effect on free speech that drug paraphernalia laws might have.

If actor Steve McQueen had been convicted of reckless driving, would the sentencing judge have been allowed to take into account that McQueen had appeared in one of the movies' most exciting car chases in *Bullitt*?²²¹ One can imagine a prosecutor saying, "Your honor, the defendant has become wealthy in his film career by glamorizing reckless driving." Perhaps actors should be advised not to commit crimes that mirror their on-screen deeds lest their movie careers be used against them at sentencing. Or perhaps, again, this is a line of reasoning that courts wouldn't even consider if drugs were not involved.

III.

"NOT IN FRONT OF THE CHILDREN": SUGGESTIONS FOR A TRUCE IN THE WAR ON DRUG PARAPHERNALIA

Why does law enforcement target paraphernalia when it could concentrate its resources on combating the drugs themselves? The DEA has said that drug paraphernalia promotes and glamorizes illegal drug use.²²² The National Drug Intelligence Center, a component of the U.S. Department of Justice, says that paraphernalia manufacturers use bright, trendy colors and put skulls, dragons, devils, and wizards on their products to glamorize drug use and attract teenagers and young adults.²²³ It is believed that "[o]utlawing the open advertisement and sale of drug paraphernalia will send a clear message to impressionable adolescents and others that society does not condone the use of drugs."²²⁴ Again, the "flaunt factor" prevails.

"By enforcing the drug paraphernalia laws," says Mary Beth Buchanan, the U.S. Attorney for the Western District of Pennsylvania and the overseer of Operation Pipe Dreams, which nabbed Tommy Chong, "we will . . . eliminate the demand for illegal substances by eliminating those products that are used to ingest and inhale illegal

220. Ove, *supra* note 203; CTV NEWS, *supra* note 202.

221. See *BULLITT* (Warner Brothers 1968).

222. MDPA, *supra* note 48, Prefatory Note.

223. NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, DRUG PARAPHERNALIA FAST FACTS (2003), <http://www.justice.gov/ndic/pubs6/6445/6445p.pdf>.

224. Nathan Statement, *supra* note 52, at 97.

substances."²²⁵ But since all kinds of everyday objects, including aluminum foil, soda cans, and even apples, may be used to ingest illegal drugs,²²⁶ Buchanan's statement seems preposterous.

Indeed, Buchanan's position assumes that people will not use drugs if they can't smoke them with fancy-colored acrylic bonges. Buchanan has it backwards. Most drug users focus on the drug and the feelings it gives them,²²⁷ not on the instruments they use to ingest the drugs. Buchanan's statement is like saying that she will get people to stop eating by taking away their silverware.

Although there are scores of scientific studies on the role of hypodermic needles in drug addiction and the spread of disease,²²⁸ there do not appear to be any scientific studies of the effects of other drug paraphernalia, such as bonges, roach clips, and chillums, on drug use. In the case of needles, most studies have shown that providing sterile needles to injecting drug addicts does not increase the incidence of drug use.²²⁹ In fact, the behavior of injecting addicts, who will re-inject themselves with dirty needles despite the risk of HIV infection, indicates that their main concern is ingesting the drug any way they can, no matter how inferior the instrument. While there is a degree to which persons, places, and objects can rekindle an addict's drug

225. Sullum, *supra* note 2, at 31.

226. See, e.g., DeMarzo, *supra* note 68, at 8 (describing using a Coke can to smoke drugs); Sullum, *supra* note 92, at 34–35 (describing how a foil pipe and an apple pipe are made).

227. See Craig Reinerman et al., *The Contingent Call of the Pipe: Bingeing and Addiction Among Heavy Cocaine Smokers*, in *CRACK IN AMERICA 77–97* (C. Reinerman & H. Levine eds., Univ. of Cal. Press 1997); RONALD K. SIEGEL, *INTOXICATION: IN PURSUIT OF ARTIFICIAL PARADISE 207–27* (1989); Jeffrey L. Fortuna & David A. Smelson, *The Phenomenon of Drug Craving*, 40 *J. PSYCHOACTIVE DRUGS* 255, 255 (2008).

228. E.g., Sherry Deren, *Migrant Drug Users: Predictors of HIV-Related Sexual and Injection Risk Behaviors*, *J. IMMIGR. MINORITY HEALTH* (Dec. 18, 2008); Faran Emmanuel, *Coverage to Curb the Emerging HIV Epidemic Among Injecting Drug Users in Pakistan: Delivering Prevention Services Where Most Needed*, 19 *INT'L J. DRUG POL'Y (SUPPLEMENT)* 59 (2008); Dezheng Huo, *Needle Exchange and Injection-Related Risk Behaviors in Chicago: A Longitudinal Study*, 45 *J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES* 1 (2007).

229. See NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *PUB. NO. 02-4733, PRINCIPLES OF HIV PREVENTION IN DRUG-USING POPULATIONS: A RESEARCH-BASED GUIDE* (Mar. 2002), <http://archives.drugabuse.gov/PDF/POHP.pdf>; David Vlahov & Benjamin Junge, *The Role of Needle Exchange Programs in HIV Prevention*, 113 *PUB. HEALTH REP.* 75, 79 (1998), available at http://www.co.cowlitz.wa.us/health/communityhealth/syringe_exchange/Role_NEP_HIV_prev.pdf; *Needle Exchange Programs Promote Public Safety*, ACLU (May 31, 2006), <http://www.aclu.org/drugpolicy/harm/10850res20060531.html>.

desires,²³⁰ a search of the scientific literature reveals no studies identifying an addiction to drug paraphernalia, as such. A person who is trying to break a drug addiction might be well advised to toss out his paraphernalia,²³¹ but there does not appear to be any evidence that preventing people from having paraphernalia is likely to prevent craving or addiction from occurring in the first place.

While the policy wisdom behind the war on drugs can certainly be questioned,²³² the policy reasons behind the war on paraphernalia seem even more doubtful. Why, then, do we continue to make war on paraphernalia? An Immigration and Customs Enforcement agent who raided five South Florida head shops in March 2006 declared, “These shops sell a dangerous lie about drugs and drug use. It is obvious they want people to think it’s OK to take drugs. This is simply unacceptable.”²³³ If you are a government official and you see drugs as a paramount evil that must be eradicated, anyone who sells items that are meant to be used with illegal drugs (despite his claim that they have other, innocent uses) is simply mocking you, in the same way that Cheech and Chong ridiculed authorities in *Up in Smoke*. If you have governmental power at your fingertips, you are likely to exercise it against people who flaunt their drug use.

Jon Gettman, a former staff member of the National Organization for the Reform of Marijuana Laws (NORML) and, before that, a head shop owner (his shop’s slogan: “Everything You Need but the Weed”),²³⁴ admitted in an article in *High Times* in 1987 that head shop owners were partly at fault for their troubles:

The problem with the freewheeling paraphernalia market I participated in was that we were pandering to an illegal interest in the marketing of our goods. Much like sex is used to sell cars, we were, in retrospect, using drugs to sell knick-knacks . . . Marketing products involves some glamorization. And some of the young are at-

230. See Neil Levy, *Autonomy and Addiction*, 36 CANADIAN J. PHIL. 427, 442 (2006) (“Addicts are too fragmented for normal attention-distraction techniques to have much chance of succeeding; instead they are most successful when they structure their environments so that the cues which remind them of the drugs are entirely absent.”).

231. See *id.*

232. See, e.g., Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11, 11 (2009) (“[D]rug laws can have moral and practical side effects so destructive that they argue against ever using legal institutions in this manner.”); Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507, 539–47 (2006) (arguing that national drug prohibition undermines advantages of decentralized federalist system); Jack B. Weinstein, *Standing Down from the War on Drugs*, 75 N.Y. ST. B.J. 55, 55 (2003) (“Overly strict laws offer no real deterrent to drug activity.”).

233. Sullum, *supra* note 2, at 30.

234. *Id.* at 32–33.

tracted by glamour, though no one as yet offered any hard evidence that young kids decide to try marijuana because they want to try out some neat new bong But sometimes, knowingly or not, goods were sold to teenagers partly because we heads were sympathetic to rebellion. Our arrogance precluded any consideration of self regulation, and eventually various communities attempted to either regulate or eliminate paraphernalia stores.²³⁵

Gettman acknowledges that the paraphernalia industry cannot ask for more freedom than the marketers of alcohol and tobacco are allowed and that the industry must become scrupulous about not selling to minors:

We must acknowledge that the paraphernalia industry requires some legislation. I think it was, and is, wrong to market adult items to children—whether it be tobacco, illegal drug taking, or gambling. I also think it is wrong to inflame people’s lust to sell merchandise.

. . . .

Society disapproves of the advertising of drugs or drug-related activity which encourages kids to copy adult drug taking. The constructive parts of anti-paraphernalia laws are those which make merchants follow the same rules and customs for marketing marijuana paraphernalia that the alcohol and tobacco merchants must follow: not in front of the children.²³⁶

Gettman’s words suggest a moderate position between that of an all-out war against drug paraphernalia and the flaunting of drug use and its accessories. This moderate position is perhaps what paraphernalia laws were trying to reach in the first place when they focused on the “manner of display.” Drafters and enforcers of paraphernalia laws would have felt compromised by saying, “It’s all right to sell paraphernalia as long as you keep it low profile,” but maybe that’s what some of them really meant. Otherwise, why treat the head shop owner who sells mostly paraphernalia, prominently displayed and maybe with marijuana symbols on it, differently from the typical pharmacy that may have a few glass pipes and rolling papers on an inconspicuous back shelf? As Gettman says: “not in front of the children.”

Paraphernalia vendors might never have aroused the wrath of communities and local authorities if they had treated their wares in much the same way they treat pornographic magazines—as an adult item that is discreetly kept out of children’s view, without any glaring

235. Jon Gettman, *Parity: the Drug Paraphernalia Issue*, HIGH TIMES, Apr. 1987, at 30, available at <http://www.textfiles.com/magazines/TOXICSHOCK/ts-086.txt>.

236. *Id.*

advertisements or displays. A key word in the Village of Hoffman Estates ordinance in *Flipside* was that the covered items were “*marketed* for use with illegal cannabis or drugs”²³⁷ It was the method of marketing that offended the community, more than the items themselves.

Still, authorities should recognize that they create more difficulties when they try to ban an item than when they try to regulate it. Outright prohibition often pushes the banned item into an underground market where it may be *easier* for minors to get it.²³⁸ Alcohol and tobacco are legal, but advertising is severely limited so as to minimize children’s exposure to them. Manufacturers of alcohol and tobacco comply with these restrictions rather than forfeit their ability to sell these lucrative products. The government is able to regulate alcohol and tobacco sales and marketing because these items are legal. When the Model Act was introduced, the DEA admitted the difficulties in drafting such a criminal law and suggested civil law alternatives such as licensing, zoning, forbidding sales to minors, and regulating the form of advertising.²³⁹ While civil regulation may have some stigmatic effect, this is a small price to pay for protecting children from certain items—such as alcohol, tobacco, pornography, and drug paraphernalia—that children do not have the maturity to handle on their own. But, as this article has sought to demonstrate, using the criminal law to combat an evil that is so difficult to define as “drug paraphernalia” inevitably leads to confusion about the law, selective enforcement, and chilling effects on free speech. Civil law can tolerate a lesser degree of precision in its language than criminal law because the consequences to individuals are not as severe. The Village of Hoffman Estates may have had an inkling of the right approach back in 1978 when it decided to regulate, rather than criminalize, paraphernalia.

CONCLUSION

Governments will never win a war on drug paraphernalia because a wide variety of ordinary objects, including pens, apples, garden hoses, aluminum foil, plastic bottles, brass pipes, buckets, and soda

237. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 506 (1982).

238. See Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 512–14 (1997) (describing how prohibiting drugs creates a black market); Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 515 n.80 (1990) (noting that “drugs are still widely available to, and widely used by, students despite prohibition”).

239. Nathan Statement, *supra* note 52, at 98.

cans, can be converted into drug paraphernalia.²⁴⁰ In order to wipe out drug paraphernalia once and for all, the government would have to ban all of the aforementioned items and probably a great many others. As demonstrated in this article, the efforts of legislators and law enforcement to curtail the use of drug paraphernalia are sometimes laughable in the clumsiness of their definitions and the randomness of their enforcement. But, to merchants who are arrested for selling what is perceived to be "drug paraphernalia," there is nothing laughable about such laws. Nor is there anything humorous in the chilling effect that these laws may have on citizens' rights to speak out for changes in drug policy. Though laws against drug paraphernalia ostensibly target the "paraphernalia" items themselves, a closer look at the text of the laws, as well as statements made by lawmakers and police, indicate that the real targets of the laws are types of behavior that "glamorize" illegal drug taking and "mock" anti-drug laws. While the drug paraphernalia laws were an overreaction to the problems caused by drug paraphernalia, they appear to have been motivated, at bottom, by a legitimate concern that the marketing and unregulated sale of such items encourage illegal drug use by children.

The zealous pursuit of drug prohibition has caused lawmakers and courts to apply due process and First Amendment principles less rigorously in the context of drug paraphernalia than they do in other contexts. Nevertheless, paraphernalia manufacturers and retailers may be at fault for the selective enforcement against them by not taking greater responsibility for the effects of their industry on minors. The protection of minors would be better achieved through civil, rather than criminal law, by making paraphernalia legal but regulating its sale and marketing to minors, and thereby reducing the "flaunt factor," in much the same way that alcohol and tobacco are regulated.

240. See Sullum, *supra* note 92, at 34–35; DeMarzo, *supra* note 68, at 8.

APPENDIX

THE MODEL DRUG PARAPHERNALIA ACT (1979)

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 of 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 used 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 substances 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 this 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 State 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.