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First Amendment--Drug Paraphernalia Statutes and the Constitution: The Court Creates a Legal Haze

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FIRST AMENDMENT—DRUG PARAPHERNALIA STATUTES AND THE CONSTITUTION: THE COURT CREATES A LEGAL HAZE

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 102 S. Ct. 1186 (1982).

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[1] the Supreme Court addressed for the first time the constitutionality of legislation which regulates the sale of items that can be employed to facilitate the use of illegal drugs. In *Hoffman Estates*, the Court determined that the municipal ordinance's definition of "drug paraphernalia" as those items "designed or marketed for use" with illegal drugs was sufficiently precise to defeat challenges of unconstitutional overbreadth and vagueness.

The ordinance's focus on the design and marketing of items should have been deemed unconstitutionally vague, however, because it fails to provide standards for classifying the many items which have multiple, drug related and non-drug related uses. Persons of "reasonable intelligence" therefore might differ as to the ordinance's application. This failure to provide adequate warning forces retailers to speculate as to whether an item is "drug paraphernalia." In the final instance, however, this determination is made by those empowered to enforce the ordinance. The ordinance's lack of clarity thus invites arbitrary and discriminatory enforcement, contrary to accepted notions of due process.

The Court's decision to select the Hoffman Estates ordinance for review is also suspect. By selecting the unique Hoffman Estates ordinance for review, rather than one of the numerous drug paraphernalia statutes based upon the Model Drug Paraphernalia Act drafted by the United States Department of Justice,[2] the Court did little to bring certainty to the realm of drug paraphernalia legislation.

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[1] 102 S. Ct. 1186 (1982).

[2] MODEL DRUG PARAPHERNALIA ACT (United States Drug Enforcement Admin. 1979) [hereinafter cited as MODEL ACT], *reprinted in Drug Paraphernalia: Hearing Before the Select Comm. on Narcotics Abuse and Control of the House of Representatives*, 96th Cong., 1st Sess. 88-95 (1979) [hereinafter cited as *Drug Paraphernalia Hearing*].

I. FACTS OF *Hoffman Estates*

On February 20, 1978, the Village of Hoffman Estates, Illinois Board of Trustees enacted Ordinance No. 969-1978 regulating the sale of drug paraphernalia.[3] The ordinance prohibits any person from selling "any items, effect, paraphernalia, accessory, or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes,[4] without obtaining a license therefor."[5] Under the ordinance, a business must file affidavits averring that the licensee and its employees have never been convicted of a drug-related offense, and must keep records, to be open for police inspection, of every regulated item sold, including the name and address of the purchaser.[6] Moreover, the sale of any regulated item to a minor is prohibited.[7] Any violation of the ordinance is punishable by a fine of not less than ten dollars, nor more than $500.00, and a separate offense is deemed to occur every day that the violation continues.[8] To facilitate the interpretation of the ordinance, the Village Attorney, Richard Williams, prepared a series of licensing guidelines defining "Paper," "Roach Clips," "Pipes," and "Paraphernalia" as used in the ordinance.[9]

Flipside, Hoffman Estates, Inc., is an Illinois corporation engaged in interstate commerce and located in Hoffman Estates. For three years prior to the effective date of the ordinance, it sold a wide variety of merchandise, including smoking accessories, jewelry, novelty devices, and literature. Items sold included clamps, "alligator clips," mirrors,

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[3] The text of Ordinance 969-1978, entitled "An Ordinance Amending the Municipal Code of the Village of Hoffman Estates by Providing for Regulation of Items Designed or Marketed for Use with Illegal Cannabis or Drugs" is set forth in the Appendix.

[4] Illinois statutes define "cannabis" and other controlled substances in the Cannabis Control Act, ILL. REV. STAT. ch. 56½, § 703 (1971) and the Controlled Substances Act, ILL. REV. STAT. ch. 56½, § 1102(g) (1971).

[5] Village of Hoffman Estates, Ill., Ordinance No. 969-1978 § 1A (May 1, 1978).

[6] *Id.* at § 1D.

[7] *Id.* at § 1C.

[8] *Id.* at § 3.

[9] The Guidelines for Ordinance 969-1978 provide:

LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of canabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 485 F. Supp. 400, 405 (N.D. Ill. 1980), *rev'd*, 639 F.2d 373 (7th Cir. 1981), *rev'd*, 102 S. Ct. 1186 (1982).

pipes of various types and sizes, and a wide variety of cigarette rolling papers in numerous colors.[10]

Soon after the ordinance's enactment, and following an administrative inquiry, the Village Attorney informed Flipside that it appeared to be marketing regulated items. A copy of the ordinance and guidelines was then made available to Flipside. Flipside alleged that it was unable to determine which items were covered by the ordinance, and asked the Village Attorney for guidance. Upon the Village Attorney's advice, Flipside removed from its shelves over eighty items which were believed to be covered by the ordinance.[11]

On May 30, 1978, rather than applying for a license or seeking clarification through the Village's established administrative procedures for licensing ordinances,[12] Flipside filed suit in the United States District Court for the Northern District of Illinois, alleging, *inter alia*, that the drug paraphernalia ordinance was unconstitutionally overbroad and vague.[13] Flipside sought injunctive and declaratory relief and damages.[14]

The district court denied Flipside's motion for a preliminary injunction.[15] Shortly thereafter the court entered a Memorandum Order awarding judgment to the Village, upholding the constitutionality of the ordinance.[16]

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10 The literature sold by Flipside included *A Child's Garden of Grass*, *Marijuana Grower's Guide*, and the magazine "High Times." Flipside also sold clamps, chain ornaments, scales, large water pipes (some capable of being used by four persons), herb sifters, vials, and a variety of tobacco snuff. One of Flipside's display items was a seven by nine inch mirror with "Cocaine" printed on its surface. 485 F. Supp. at 403.

11 *Id.* at 404. When Larry Rosenbaum, a Flipside officer, consulted the Village Attorney concerning which items at Flipside would be covered by the ordinance, he was advised to register all items for his protection. Record at 87-88, *cited in* 639 F.2d at 375 n.1.

12 Ordinance No. 932-1977, the Hoffman Estates Administrative Procedure Ordinance, was enacted prior to the Village's drug paraphernalia ordinance. It allows interested persons to petition for the adoption of an interpretive rule. If the petition is denied, the petitioner may place the matter on the agenda of an appropriate village committee for review. The Village Attorney indicated that, because no one had yet applied for a license, no interpretative rules concerning the drug paraphernalia statute had been adopted. 639 F.2d at 385 n.30.

13 Flipside's complaint alleged that the ordinance is vague and thus void; that its terms violated Article I of the United States Constitution because it interfered with Flipside's business; and that the ordinance violated the commerce clause of the Constitution and deprived Flipside of rights secured by the first, fourth, fifth, and fourteenth amendments. 485 F. Supp. at 404-05. *See infra* note 30 and accompanying text.

14 The named defendants were the Village, a home rule municipality of approximately 37,000 persons, and, in their individual as well as official capacities, the president, attorney, chief of police, and trustees of the Village. Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d at 375 n.2.

15 485 F. Supp. at 410.

16 *Id.* While conceding that the Hoffman ordinance was "not a model of legislative clarity," the district court nevertheless held that the crucial words of the ordinance were of common usage, thus providing guidance as to the ordinance's requirements. *Id.* at 406. The

The Court of Appeals for the Seventh Circuit reversed, holding that the ordinance was unconstitutionally vague on its face.[17] The court found that the language of the ordinance and the guidelines, with its design and marketing approach, was vague regarding certain possible applications. The seventh circuit stated that neither the ordinance nor the guidelines distinguish between items that are inherently drug paraphernalia and items which merely can be used as drug paraphernalia, noting that the ordinance's licensing requirements could be triggered by the sale of paper clips next to "Rolling Stone" magazine.[18] Further, the court found that the vague nature of the design and marketing test created a danger of arbitrary and discriminatory enforcement against those with alternative lifestyles.[19] It held that the availability of administrative guidelines and rule-making was insufficient to cure the lack of clarity.[20]

II. Decision of the Supreme Court

The United States Supreme Court, per Justice Marshall, reversed the court of appeals in a unanimous decision, with Justice Stevens taking no part in the consideration or decision of the case.[21] The Court held that the ordinance did not violate Flipside's first amendment rights since it does not restrict speech, but merely regulates the commercial marketing of items which may be used for illicit purposes.[22] It further held that the ordinance is not overbroad, because the overbreadth doctrine does not apply to commercial speech. According to the Court, the ordinance proscribed no other first amendment activities.[23] Finally, the Court found that the ordinance was not void for vagueness, because Flipside did not demonstrate that the ordinance was impermissibly vague in all its applications.[24]

Justice Marshall noted that the Court's first task in a facial chal-

court further held that no first amendment rights were abridged, since the ordinance does not prohibit advertisement or "the expression of commercial ideas." *Id.* at 409. Finally, the court dismissed Flipside's overbreadth claim, finding that the ordinance did not regulate any activity beyond the sale of paraphernalia designed or marketed for use with illegal drugs. *Id.*

17 639 F.2d 373 (1981).

18 *Id.* at 382-83. The court further stated that "it appears that displaying almost any item in the proximity of 'literature encouraging illegal use of . . . drugs' requires the store to obtain a license and have persons sign the register." *Id.* at 382 (footnote omitted).

19 *Id.* at 383-84. *See infra* note 135.

20 *Id.* at 385-86. "But the 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." *Id.* at 386.

21 102 S. Ct. 1186, 1196 (1982).

22 *Id.* at 1192.

23 *Id.*

24 *Id.* at 1193-94.

lenge alleging overbreadth and vagueness[25] is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.[26] If it does not, the overbreadth challenge fails.[27] Next, the facial vagueness challenge must be examined. Assuming the enactment implicates no constitutionally protected conduct, the challenge should be upheld only if the enactment is vague in its application to the complainant—a person engaged in clearly proscribed conduct cannot complain of the ordinance's vagueness as applied to others.[28] Thus, a court should examine the complainant's conduct before analyzing hypothetical applications of the law.[29]

The Court began its analysis of Flipside's facial overbreadth challenge to the ordinance by quickly dismissing the claim that noncommercial speech rights had been abridged.[30] It held that while the ordinance regulated the sale of items "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs," the sale of literature itself is not regulated or prohibited.[31] Therefore, the Court stated the ordinance did not proscribe noncommercial speech. Justice Marshall reasoned that although drug-related designs or names on cigarette papers may subject them to regulation, the ordinance does not regulate speech, but simply regulates the commercial marketing of items whose labels

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25 "A 'facial' challenge, in this context, contends that the law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Id.* at 1191 n.5 (quoting Steffel v. Thompson, 415 U.S. 452, 474 (1974)).

26 In making this determination, a court should evaluate the enactment's ambiguous as well as its unambiguous scope. The law's vagueness will be a factor in an overbreadth analysis. "The Court has long recognized that an ambiguous meaning causes citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area are clearly marked.'" 102 S. Ct. at 1191 n.6 (quoting Baggett v. Bullitt, 377 U.S. 360, 374 (1964)).

27 102 S. Ct. 1191.

28 "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." . . . [T]o sustain such a challenge, the complainant must prove that the enactment is vague " 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' Such a provision simply has no core."

Id. at 1191 n.7 (citations omitted).

29 102 S. Ct. at 1191.

30 Flipside alleged that the ordinance and licensing guidelines infringed upon its first amendment rights in four ways. First, Flipside claimed that the ordinance is overbroad because it penalizes the sale of lawful items, and brings protected speech within its sweep. Second, Flipside alleged that the ordinance placed a prior restraint on those who would sell literature that might subjectively be deemed to be drug oriented when selling items of ordinary use, items which would not otherwise be subject to the ordinance. Third, it asserted that the ordinance infringes upon symbolic speech. The presence of drug-related designs, logos, or slogans will trigger enforcement. Fourth, Flipside claimed that the use of an unspecified "proximity" term to determine whether a display of lawful items will be deemed "marketed for use with illegal . . . drugs" infringed upon constitutionally protected commercial speech. Brief for Appellee at 25, 26.

31 102 S. Ct. at 1192.

suggest that they might be used for an illicit purpose.[32]

Regarding commercial speech,[33] the Court expressed doubt that the ordinance appreciably limited Flipside's communication of information,[34] with the obvious exception of the promotion or encouragement of illegal drug use. Citing *Central Hudson Gas & Electric Company v. Public Service Commission*,[35] however, the Court held that speech promoting illegal transactions may be regulated or banned entirely by a government.[36] Again citing *Central Hudson*, the Supreme Court further held that since the overbreadth doctrine does not apply to commercial speech, claims that the ordinance affects some innocent commercial speech are irrelevant.[37] Justice Marshall stated that Flipside's contention that the ordinance is overbroad because it could extend to "innocent" and "lawful" uses of items confuses the overbreadth and vagueness doctrines. An assertion that Flipside cannot determine whether the ordinance regulates certain items with possible lawful uses states a claim of vagueness, not overbreadth.[38]

Justice Marshall next addressed Flipside's vagueness challenge, relying upon the standards for evaluating vagueness enunciated in *Grayned v. City of Rockford*.[39] The *Grayned* standard identifies two societal goals served by the void-for-vagueness doctrine. First, the doctrine protects against a government's attempt to subject an individual to an ordinance's prohibition without "fair warning" as to what conduct is proscribed. Second, it protects against arbitrary and discriminatory application of the law by ensuring that adequate safeguards are pro-

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32 *Id.*

33 In Virginia State Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976), the Supreme Court extended first amendment protection to "commercial speech": speech proposing a commercial transaction. The *Virginia Pharmacy* Court reasoned that the free flow of commercial information is essential to allow consumers to make informed decisions. *Id.* at 763.

34 Flipside did not assert in its brief that its manner of item placement was motivated by a desire to communicate information to its customers. Rather, items that the village considers drug paraphernalia were placed near check-out counters because they are either "point of purchase" items, items usually displayed next to cash registers, or items which are small and prone to shoplifting. 102 S. Ct. at 1192 n.8.

35 Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) (Promotional activity of an electrical utility is protected commercial speech, despite utility's monopoly over sale of electricity).

36 102 S. Ct. at 1192. In *Central Hudson*, the Court noted that no constitutional objection can exist regarding the suppression of commercial speech that does not "accurately inform the public about lawful activity," or which relates to illegal activity. 447 U.S. at 564.

37 102 S. Ct. at 1192.

38 *Id.* at 1192 n.9. This overbreadth contention is apparently not valid because Flipside does not claim that totally innocent items are being proscribed (which would constitute overbreadth) but, rather, that some of the proscribed items have alternative, innocent uses.

39 408 U.S. 104 (1972).

vided to guide law enforcement authorities.[40] Justice Marshall stressed, however, that the *Grayned* standards should not be applied mechanically. Rather, the nature of the enactment determines the degree of vagueness that the Constitution tolerates.[41] Justice Marshall noted, for instance, that economic regulation is subject to a less stringent vagueness test because its subject matter is often more narrow, and because business, by virtue of the economic demands placed upon it, can be expected to consult relevant legislation before taking action.[42] Further, the existence of a scienter requirement in an ordinance may mitigate a law's vagueness, especially with respect to the adequacy of notice.[43] Finally, whether a law threatens to inhibit constitutionally protected rights is extremely probative in a vagueness determination. If protected rights are implicated, a more stringent vagueness test applies.[44]

The Court noted, in applying this analysis, that while the ordinance nominally imposes only civil penalties, the Village's concession that the ordinance is "quasi-criminal" because of its prohibitions and stigmatizing effects might warrant a relatively strict test.[45] In reviewing the ordinance under this stricter criminal test, the Court determined that the law was sufficiently clear as applied to Flipside, hence defeating Flipside's facial challenge.[46] Flipside is required by the ordinance to obtain a license if it sells "any items, effect, paraphernalia, accessory, or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes." Justice Marshall explained that Flipside expressed no uncertainty about which drugs are covered by this description, since Illinois law clearly defines cannabis

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40 Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissably delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Id.* at 108 (footnotes omitted).

41 102 S. Ct. at 1193. For example, enactments with civil rather than criminal penalties receive greater tolerance because the consequences of imprecision are less severe. *Id.*

42 *Id.* at 1191 (citing Smith v. Goguen, 415 U.S. 566, 574 (1974); United States v. National Dairy Products Corp., 372 U.S. 29, 83 (1963)).

43 *Id.* at 1193 (citing Colautti v. Franklin, 439 U.S. 379, 395 (1975); Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952); Screws v. United States, 325 U.S. 91, 101-03 (1945) (plurality opinion)).

44 102 S. Ct. at 1193-94.

45 At argument, village counsel admitted that the ordinance is "quasi-criminal." Transcript of Oral Argument at 4, 5. The court of appeals, in reviewing the effects of the ordinance, stated that "few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of signing names and addresses to a register available to the police." 639 F.2d at 377.

46 102 S. Ct. at 1194.

and other controlled substances.[47] The words "items, effect, paraphernalia,.accessory or thing," however, fail to identify the type of merchandise to be regulated. Thus, according to Justice Marshall, Flipside's vagueness challenge must focus on the clarity of the "designed or marketed for use" language.

While conceding that the ordinance and guidelines do contain ambiguities, the Court decided that the "designed for use" standard was sufficiently clear to cover at least some of the items sold by Flipside.[48] The Court stated that this standard clearly encompasses items principally used with illegal drugs by virtue of their objective features: those features designed by the manufacturer. It suggested that a person of ordinary intelligence would understand that the standard applies to the manufacturer's intent, rather than the intent of a retailer or customer.[49] Further, it is sufficiently clear, according to the Court, that items used principally for non-drug purposes are not "designed for use" with illegal drugs.[50]

Justice Marshall stated that the ordinance's "marketed for use" standard compensates for any ambiguities that the "designed for use" standard might engender. Unlike the design standard, the marketing standard does not require the often ambiguous item-by-item analysis.[51] Rather, the marketing standard describes a retailer's intentional display and marketing of merchandise. With its intent component, the marketing standard necessarily requires scienter, since a retailer could not market an item "for" a particular use without intending that use.[52] Hence, the retailer has ample warning that his marketing activities require a license.

The Court found that under the marketed for use test, Flipside had ample warning that its marketing activities required a license.[53] It held that Flipside clearly violated the ordinance's guidelines by displaying the magazine "High Times" and such books as *Marijuana Growers' Guide* and *The Pleasure of Cocaine* close to pipes and colored rolling papers.[54] Further evidence of Flipside's intent to market drug paraphernalia was

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47 *See supra* note 4.

48 102 S. Ct. at 1195.

49 *Id.* Under the *Grayned* vagueness standard, laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." 408 U.S. at 108. *See supra* note 40.

50 102 S. Ct. at 1195. Additionally, the Court stated that no fair warning issue existed, since Flipside conceded in its brief that this phrase refers to the structural characteristics of an item. *Id.*

51 *Id.* at 1196.

52 *Id.* at 1195.

53 *Id.*

54 *Id.*

the admission by its co-operator that it sold "roach clips,"[55] which are used primarily for illegal purposes.[56]

Justice Marshall noted that since this was a pre-enforcement challenge, no evidence could exist to indicate whether the ordinance had been enforced in an arbitary or discriminatory fashion, or with the aim of inhibiting unpopular speech.[57] He determined, however, that the ordinance's language is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness.[58] While conceding that the risk of arbitrary enforcement was not insignificant,[59] Justice Marshall suggested that the possible adoption by the Village of administrative regulations might eliminate potentially vague or arbitrary interpretations of the ordinance. The Court chose not to address possible problems with future applications of the ordinance, stressing that the appropriate time for their consideration is when they arise.[60]

III. LEGISLATIVE AND JUDICIAL RESPONSES TO THE DRUG PARAPHERNALIA PROBLEM

It seems paradoxical that devices used with controlled substances may be legally obtained, while use of the controlled substance itself is prohibited.[61] The sale of drug paraphernalia has evolved into a billion dollar industry that facilitates, even glamorizes, illegal drug use.[62] Drug paraphernalia is most commonly sold through small specialty stores or

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55 Article I of the Model Act defines "roach clips" as "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." *See supra* note 2.

56 102 S. Ct. at 1195. In the same section of the store, Flipside had posted a sign, "You must be 18 or older to purchase any head supplies." Record at 30.

57 102 S. Ct. at 1196. *See infra* note 135 and accompanying text.

58 *Id.*

59 Justice Marshall noted that the village attorney, the village president, and the chief of police revealed confusion over the applicability of the ordinance concerning certain items, as well as extensive reliance on the judgment of police officers to interpret the ordinance and enforce it fairly. *Id.*

60 By ignoring possible problems with future applications of the ordinance, the Court greatly simplified its task, at the expense, however, of bringing a greater degree of certainty to the area. *Id.* at 1196 n.21.

61 *See Drug Paraphernalia Hearing*, *supra* note 2, at 31 (testimony of Peter B. Bensinger, Administrator, Drug Enforcement Administration).

62 In its prefatory note to the Model Act, the Drug Enforcement Administration of the United States Department of Justice states:

> [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 Act was drafted has now mushroomed into an industry so well-entrenched that it has its own trade magazine and associations.

MODEL ACT, *supra* note 2.

"head shops."[63] The Drug Enforcement Administration of the Department of Justice (DEA) attributes part of the difficulty encountered by law enforcement officials in halting the sale and use of controlled substances to the availability of drug paraphernalia.[64] In recent years,[65] numerous states and municipalities have enacted laws regulating the sale of drug paraphernalia. These laws do not directly limit the use of illegal substances, but rather prohibit the sale and possession of devices used to prepare or consume drugs.[66]

Regulation of the possession or sale of dangerous drugs to promote the public health, safety and welfare is a valid exercise of the police powers.[67] The Court has given the states broad flexibility in combatting drug use, allowing the states to attack not only specific instances of possession and sale, but also the social and economic conditions under which drug abuse thrives.[68] Regulation of illegal drug use through restrictions on the purchase and sale of drug paraphernalia appears to be

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63 It has been estimated that there are anywhere from 15,000 to 30,000 "head shops" in the United States. *Drug Paraphernalia Hearing*, *supra* note 2, at 87 (Prepared statement of Peter B. Bensinger). Numerous street peddlers and stores also exist which sell paraphernalia along with other merchandise. *Id.* at 87 n.2.

64 *Id.*

65 Anti-drug paraphernalia legislation is not an entirely recent phenomenon, however. California outlawed the possession of opium pipes in 1939, later expanding its regulations to encompass "any device, contrivance, instrument or paraphernalia used for unlawfully injecting or smoking" numerous specified controlled substances. CAL. HEALTH & SAFETY CODE § 11364 (West 1980). Prior to 1975, five states outlawed the possession, but not the sale, of paraphernalia: ALA. CODE § 258(59)(a) (Supp. 1973); CAL. HEALTH & SAFETY CODE § 11364 (West 1975); FLA. STAT. ANN. § 893.13(3)(a)(4)(West Supp. 1975); IND. CODE § 35-24.1-4.1-8 (1975); MISS. CODE ANN. §§ 41-29-105-139 (1973).

The Alabama, Florida, and Indiana statutes have subsequently been revised to prohibit the sale of paraphernalia as well as its possession. ALA. CODE § 20-2-76 (Supp. 1982); FLA. STAT. ANN. § 893.13(4) (West 1976); IND. CODE § 35-48-4-9 (Supp. 1982). California now also outlaws the sale of paraphernalia to minors. CAL. HEALTH & SAFETY CODE § 11364.5 (West Supp. 1981). Mississippi continues to prohibit only the possession of drug paraphernalia. MISS. CODE ANN. §§ 41-29-105(v),-139(e) (Supp. 1980).

66 *See, e.g., infra* note 76. *See generally* Comment, *Drug Paraphernalia Legislation: Up in Smoke?* 10 HOFSTRA L. REV. 239, 240 n.7 (1981).

67 There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.

Whipple v. Martinson, 256 U.S. 41, 45 (1925).

68 In addressing California's approach to drug trafficking regulation, the Supreme Court stated:

Such regulation, it can be assumed, could take a variety of forms. A State might choose to attack the evils of narcotics traffic on broader fronts also through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide.

Robinson v. California, 370 U.S. 660, 665 (1961).

well within this broad power of the states to restrict drug use.[69]

Drafters of drug paraphernalia legislation are confronted with the task of balancing the necessity of precision of language with the goal of flexibility of coverage. When the proper balance is not struck, the constitutional infirmities of vagueness and overbreadth often arise. Both concepts are grounded, regarding states and their subdivisions, in the due process clause of the fourteenth amendment.[70] While both infirmities may exist in the same statute, they nevertheless have distinct meanings and purposes. The void for vagueness doctrine requires that a statute provide persons of common intelligence fair notice of the conduct proscribed.[71] On the other hand, lack of clarity is not a component of the overbreadth doctrine: the terms of the statute may be specific and clear. Rather, a statute is overbroad if "in its reach it prohibits constitutionally protected conduct."[72]

States and municipalities differ in their attempts to devise drug paraphernalia statutes which are broad in scope, yet free from constitutional infirmities. Paraphernalia statutes have taken one of three forms.[73] The first, a civil enforcement approach, is currently embodied in the New York State drug paraphernalia law.[74] In this system, fines, revocation of sales licenses or permits, and forfeiture by violators of items determined to be drug paraphernalia are used to prohibit the possession and sale of drug paraphernalia.[75] The New York law prohibits the possession and sale of enumerated items "used or designed for use" with controlled substances, and contains a scienter requirement.[76] The New York law does not authorize criminal sanctions.

Drug paraphernalia legislation may also take a regulatory form. In

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69 A strong argument can be made that the availability of drug paraphernalia is a "social condition under which [drug use] might be thought to flourish." *See generally* Geiger v. City of Eager, 618 F.2d 26, 28 (5th Cir. 1980); Comment, *The Constitutionality of Drug Paraphernalia Laws*, 81 COLUM. L. REV. 581, 586, 587 (1981); Comment, *supra* note 66, at 241-55.

70 The fourteenth amendment provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

71 Colautti v. Franklin, 439 U.S. 379, 390-91 (1979). *See infra* notes 113-17 and accompanying text.

72 Grayned v. City of Rockford, 408 U.S. 104, 114. *See infra* notes 98-103 and accompanying text.

73 Comment, *supra* note 66, at 241-255.

74 N.Y. GEN. BUS. LAW §§ 850-853 (McKinney Supp. 1982). § 851 provides that: "It shall be a violation of this article for any person, firm or corporation to possess with intent to sell, offer for sale, or purchase drug related paraphernalia under circumstances evincing knowledge that the paraphernalia is possessed, sold or purchased for one or more . . . drug related purposes . . . ." *Id.* § 851.

75 *Id.* § 852.

76 *Id.* §§ 850, 851.

this approach, currently unique to Hoffman Estates, the sale of drug paraphernalia is regulated, rather than prohibited.[77] This approach requires that sellers of drug paraphernalia obtain a license; no scienter is required to violate the ordinance. Merchants must maintain extensive records concerning purchasers of regulated items. Civil penalties are imposed for violators of the ordinance.[78]

The third, and most common, form of drug paraphernalia legislation is the criminal penalty approach. Criminal drug paraphernalia laws, however, encountered immediate constitutional problems for their overbreadth and lack of clarity in defining drug paraphernalia.[79] In 1979, the DEA responded to these problems by drafting the Model Drug Paraphernalia Act (Model Act).[80] The drafters believed that the Model Act, by defining drug paraphernalia in terms of design and intent for use, would survive constitutional attacks, and serve as a guide to drafters of drug paraphernalia legislation, thus introducing a degree of certainty to the area.[81]

The Model Act is divided into sections of definition and prohibition. "Paraphernalia" is defined in three ways: by definition, by listing items which could be paraphernalia, and by delineating factors to be considered in determining whether an object is drug paraphernalia. Artice I of the Model Act contains a detailed definition of "drug paraphernalia." In subsection one, drug paraphernalia is defined as anything which is "used, intended for use, or designed for use" in introducing controlled substances into the body.[82] A list of thirteen specific items that could be drug paraphernalia is also included in Article I. An intent element accompanies each item, requiring that the listed items be "used, intended for use, or designed for use with illegal drugs."[83] The second subsection of Article I describes fourteen factors that "a court or other authority should consider in addition to all other logically relevant fac-

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77 Comment, *supra* note 66, at 250, 251.

78 *See supra* notes 5-9 and accompanying text.

79 A number of city ordinances enacted prior to drafting of the Model Act were invalidated: Geiger v. City of Eagen, 618 F.2d 26 (8th Cir. 1980) (Eagen, Minnesota ordinance void for vagueness); Music Stop, Inc. v. City of Ferndale, 488 F. Supp. 390 (E.D. Mich. 1980) (Ferndale, Michigan ordinance unconstitutionally fails to give fair notice as to proscribed conduct); Record Museum v. Lawrence Township, 481 F. Supp. 768 (D.N.J. 1979) (Lawrence, New Jersey ordinance void for vagueness and overbroad in impinging upon retailer's first amendment rights of free speech); Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297 (D.N.J. 1979) (Newark, New Jersey ordinance struck down as overbroad).

80 *See supra* note 2.

81 In a Prefatory Note to the Model Act, the DEA stated that the Model Act was drafted with the aim of overcoming constitutional infirmities that have rendered other drug paraphernalia statutes unconstitutional. These infirmities were created by difficulties in defining "drug paraphernalia." MODEL ACT, *supra* note 2.

82 MODEL ACT, *supra* note 2, Article I.

83 *Id.*

tors" "in determining whether an object is 'drug paraphernalia.' "[84] These factors include statements by an owner concerning an object's use, proximity of the object to a controlled substance or direct violation of the Act, and the manner in which the item is displayed.[85]

Article II, the prohibition section of the Model Act, contains criminal penalties[86] for four offenses. Use of, or possession with the intent to use, drug paraphernalia with a controlled substance is prohibited. The delivery or manufacture of drug paraphernalia is prohibited when the deliverer or manufacturer knows or should reasonably know that the item will be used with controlled substances. Special offenses accrue for delivery of drug paraphernalia to a minor. Finally, the advertisement of drug paraphernalia is prohibited when the advertiser knows, or should reasonably know, that the purpose of the advertisement is to promote the sale of items designed or intended for use as drug paraphernalia.[87]

Twelve states and numerous municipalities have enacted drug paraphernalia laws based on the Model Act.[88] The Model Act has failed, however, to avoid the constitutional infirmities of prior drug paraphernalia legislation, but, rather, has been similarly beset by claims of overbreadth and vagueness. Various circuits of the United States courts of appeals have disagreed about the Model Act's constitutionality.[89] In

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[84] *Id.*

[85] *Id.* Other relevant factors in determining whether an item is drug paraphernalia are: prior convictions of an owner relating to controlled substances; the existence of any residue of controlled substances on the object; evidence, direct or circumstantial, that the owner intended to deliver the items to one whom the owner knows or has reason to know will use the items with controlled substances; instructions concerning the item's use; descriptive material covering the item; whether the owner is a legitimate supplier of like or related items; advertising; evidence of the ratio of sales of the item to total sales of the business; the existence and scope of legitimate uses for the item; and expert testimony concerning its use. MODEL ACT, *supra* note 2, Article I.

[86] The determination of the length of imprisonment and the possibility of maximum fines is left to the particular enacting body.

[87] MODEL ACT, *supra* note 2, Article II.

[88] COLO. REV. STAT. §§ 12-22-501,-506 (Supp. 1981); 1980 Conn. Acts 80-224 (Reg. Sess.); DEL. CODE ANN. tit. 9, §§ 4771-75 (Supp. 1982); FLA. STAT. §§ 893.145-.147 (Supp. 1980); ILL. REV. STAT. ch. 23, § 2358-1-5 (1981); IND. CODE §§ 35-4804-8.1 to-8.3 (Supp. 1980); LA. REV. STAT. ANN. §§ 40:1031-1036 (West Supp. 1980); MD. [Crim. Law] CODE ANN. § 287A (Supp. 1980); NEB. REV. STAT. §§ 28-101, -431, -439 to -444 (Supp. 1980); N.J.S.A. 24:21-46 to 21-53 (West Supp. 1980); PA. STAT. ANN. tit. 35, § 780-113(a) (Purdon Supp. 1981); An Act to Amend S.C. Code § 44-53-110, Act No. 400 (Approved June 3, 1982, to be codified Feb., 1983).

[89] *Compare* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916 (6th Cir. 1980) (invalidating ordinance as void for vagueness), *vacated*, 102 S. Ct. 2227 (1982) *with* Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213 (11th Cir. 1982) ("designed for use" standard refers to an object's structural characteristics, and is not unconstitutionally vague); Hejira Corp. v. McFarlane, 660 F.2d 1356 (10th Cir. 1981) (definition of drug paraphernalia as "any machine, instrument, tool, equipment or device which is primar-

Record Revolution No. 6, Inc. v. City of Parma,[90] the Court of Appeals for the Sixth Circuit invalidated an Ohio ordinance based almost verbatim on the Model Act. It held that the "designed for use" with controlled substances standard was vague and overbroad because no design characteristics were enumerated to distinguish lawful items from unlawful drug paraphernalia.[91] Stating that the types of objects that can be used as drug paraphernalia are "limited only by the imagination of the user," the *Parma* court held that since many items which the ordinance deems as "paraphernalia" have no unique design characteristics, the design standard is overbroad.[92] In *Casbah, Inc. v. Thorne*,[93] on the other hand, the eighth circuit upheld a Nebraska statute based on the Model Act, holding that it did not suffer from vagueness or overbreadth. It determined that the statute's "designed for use" with controlled substances language did not render it unconstitutionally vague, since the language referred to an object's physical attributes, rather than to the intent of the person charged with the violation.[94] It further found that the statute's intent requirement saved it from unconstitutionally overbroad inclusion of innocent items.[95]

IV. ANALYSIS OF THE *HOFFMAN ESTATES* Decision

The Supreme Court in *Hoffman Estates* determined that the ordinance's "designed or marketed for use" standard provided retailers with adequate warning as to which items are proscribed.[96] By focussing on the objective features of each item sold, however, the ordinance is impermissibly vague because it fails to provide guidance concerning items designed for multiple, legal and illegal, uses. The retailer is thus forced to speculate as to the scope of the ordinance.

The ordinance's lack of clarity invites arbitrary and discriminatory interpretation by law enforcement officials. By upholding this ordinance, the Supreme Court sanctioned the confusion and potential abuse which the vagueness doctrine seeks to prevent.[97] Further, by selecting the Hoffman Estates ordinance for review, rather than the more numer-

ily adopted, designed or intended" for illegal drug use); Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981) (upholding Nebraska statute), *cert. denied*, 102 S. Ct. 1642 (1982).

90 638 F.2d 916 (1981), *vacated*, 102 S. Ct. 227 (1982).

91 *Id.* at 930.

92 *Id.* at 930, 931.

93 651 F.2d 551 (8th Cir. 1981).

94 *Id.* at 560.

95 *Id.* The Court stated that a seller is within the law as long as he does not actually know the buyer's purpose, and as long as existing objective factors do not indicate to him that illegal use will occur. *Id.* at 561 n.12.

96 102 S. Ct. at 1186.

97 *See supra* note 40 and accompanying text.

ous laws based on the Model Act, the Court bypassed an opportunity to bring a greater degree of certainty to the field of drug paraphernalia legislation. The Court was correct, however, in holding that the ordinance is not overbroad.

A. OVERBREADTH ANALYSIS

A statute is facially void for overbreadth if it " 'does not aim specifically at evils within the allowable area of (government) control, but . . . sweeps within its ambit other activities that constitute an exercise' " of protected expressive or associational rights.[98] An overbroad statute creates a chilling effect on constitutionally protected conduct.[99] The Court recognizes, however, that it is impossible to draft a statute which will never impinge upon a protected right.[100] Hence, a law will not be adjudged void on its face for overbreadth unless its infringement upon protected activities is substantial. Minor infringements, by necessity, will not be grounds for invalidation.[101]

The overbreadth doctrine applies only when first amendment rights are endangered.[102] However, the Court has held that the doctrine does not apply to commercial speech, reasoning that commercial speech, linked to commercial well-being, is not as susceptible as non-commercial speech to the chilling effect created by overbroad regulation.[103] The determination of whether commercial or non-commercial speech is

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98 L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24 (1978) (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (statute prohibiting all picketing restricts peaceful picketing protected by the first amendment, and is hence void on its face)).

99 "An overbroad statute might serve to chill protected speech. First amendment interests are fragile interests and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute." Bates v. State Bar of Arizona, 433 U.S. 350, 380 (1977).

100 *See infra* note 110 and accompanying text.

101 In Broadrick v. Oklahoma, 413 U.S. 601 (1973), state employees challenged an Oklahoma statute which prohibited civil service employees from belonging to any political party committee, running for any paid political office, or taking part in the affairs of any political party or campaign "except to exercise [the] right [as citizens] privately to express . . . opinion[s] and vote." *Id.* at 604 n.1. The Court rejected the employees' facial challenge, holding that while the law may reach certain protected areas of conduct, such as wearing campaign buttons and displaying bumper stickers, such infringements were insubstantial when compared to the legitimate applications of the law. *Id.* at 609-18. *Broadrick* thus seems to indicate that the Court will use a balancing test to determine whether the infringement upon protected interests outweighs the state interest reflected in the statute. If so, the statute is void for overbreadth. *See generally* L. TRIBE, *supra* note 98, at § 12-25.

102 *See generally*, L. TRIBE, *supra* note 98, at § 12-24; Note, *The First Amendment Overbreadth Doctrine*," 83 HARV. L. REV. 844 (1970).

103 Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. at 566 n.8; 433 U.S. 350, 380-81. The Court in *Virginia Pharmacy* noted that different degrees of protection are accorded to commercial and non-commercial speech. 425 U.S. 748, 772 n.24. To justify this difference, the Court reasoned that commercial speech may be more durable since it is essential for commercial success, and, therefore, it is unlikely that advertising would be entirely foregone due to the threat of an overbroad statute.

threatened is thus of crucial importance in an overbreadth analysis. It is essential that a court fully explore the nature of the alleged infringement upon first amendment activities.

The Court in *Hoffman Estates* determined that the Village ordinance did not embrace non-commercial speech, but simply regulated the commercial marketing of items whose labels suggest use for an illicit purpose.[104] Justice Marshall reasoned that the ordinance does not regulate the sale of literature itself, but rather regulates the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs."[105] Hence, no first amendment activity is threatened. This reasoning ignores, however, the possibility that merchants will be deterred from selling this literature out of fear that its proximity to other items will, under the terms of guidelines,[106] taint the items, causing them to be deemed drug paraphernalia. The ordinance may thus force the merchant to choose between the display of literature that encourages drug use and the display of otherwise innocent items.[107]

Even assuming that a merchant could be deterred from displaying literature for this reason, this infringement upon protected rights does not appear sufficiently substantial to warrant an overbreadth finding. A merchant can avoid most of the resulting hardship by not displaying the literature "within proximity of" the suspect items.[108] While this forces a merchant to display merchandise in a manner he might not ordinarily choose, he is not prevented from displaying the merchandise, nor is he prevented from displaying the items prominently. *Broadrick v. Oklahoma*[109] must be read here as a balancing test, weighing the legitimate and illegitimate applications of a law. A statute will be upheld in the face of minor constitutional infringements if a strong state interest exists to outweigh the burdens imposed. It does not appear that the threatened overbroad applications of the Hoffman ordinance are of sufficient magnitude to outweigh the state's interest in preventing drug abuse through the proper application of the ordinance. Thus, the Hoffman ordinance is not unconstitutionally overbroad.[110]

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104 102 S. Ct. at 1192.

105 *Id.* (citing Guidelines, *supra* note 9).

106 Guidelines, *supra* note 9.

107 Flipside contended that this inhibiting effect on literature serves as a prior restraint on its first amendment rights. Brief for Appellee at 25 (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)).

108 This assumes, however, that the merchant can determine, to the satisfaction of law enforcement officials, what constitutues "proximity." "Proximity" is not defined in the ordinance or guidelines.

109 413 U.S. 601. *See supra* note 101.

110 Policy considerations suggest that it would be unwise to allow such a minimal burden on the rights of retailers to topple the Hoffman ordinance for overbreadth. It is the rare legislature indeed that can draft a law which *in no instances* will threaten a protected right. *Cf.*

The restriction of the overbreadth doctrine to infringements on first amendment activities substantially limits the doctrine's applicability to drug paraphernalia legislation. The *Hoffman Estates* Court did not address, but clearly did not follow, the overbreadth approach of the sixth circuit in *Record Revolution No. 6, Inc. v. City of Parma*.[111] In finding the Parma drug paraphernalia ordinance overbroad, the sixth circuit stated that the overbreadth doctrine prohibits a statute from making innocent or protected conduct criminal.[112] The protection of "innocent" conduct obviously greatly expands the scope of the overbreadth doctine, and would make almost all drug paraphernalia legislation constitutionally suspect for overbreadth. The Supreme Court has consistently held that in order to void a statute for overbreadth, constitutionally protected, rather than merely innocent, conduct must be proscribed.[113]

B. VAGUENESS ANALYSIS

A law is void on its face under the due process clause if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[114] Unlike overbreadth, the proscribed conduct need not be protected by the first amendment to be unconstitutionally vague.[115] The Court in *Grayned v. City of Rockford*[116] enunciated a two-pronged vagueness test: a statute must provide fair warning as to what activities are proscribed, and it must provide explicit standards to prevent arbitrary and discriminatory enforcement.[117] The

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Kunz v. New York, 340 U.S. 290, 304 (1951) (Jackson, J., dissenting) ("it is very easy to read a statute to permit some hypothetical violation of civil rights but difficult to draft one which will not be subject to the same infirmity"). The degree of infringement is of critical importance. If minor infringements upon protected rights were sufficient to void a statute for overbreadth, legislatures would be constructively prevented from performing their law making function.

Justice Marshall also noted that the only commercial speech implicated by the ordinance was the "attenuated" interest in display and marketing of the items. The only communication of commercial information that results is the promotion of illegal drug use. Such speech proposes an illegal transaction, which can be regulated or banned entirely. 102 S. Ct. at 1192 (citing 447 U.S. 557, 563-64).

111 638 F.2d 916. *See supra* note 90 and accompanying text.

112 *Id.* at 927.

113 L. TRIBE, *supra* note 98, at § 12-24; Comment, *supra* note 69, at 588.

114 L. TRIBE, *supra* note 98, at § 12-28 (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)).

115 Lanzetta v. New Jersey, 306 U.S. 451 (1939) (statute criminalizing "gang" membership void for vagueness); L. TRIBE, *supra* note 98, at § 12-28.

116 408 U.S. 104, 108. *See supra* note 39 and accompanying text.

117 *Id.* As with overbreadth analyses, vagueness determinations highlight the basic tension between drafting an extremely precise statute whose scope is consequently narrow, and drafting a broad, flexible statute which, while perhaps satisfying the initial legislative goal, proscribes innocent conduct as well. *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

level of statutory clarity requisite to satisfy these two demands increases if the statute threatens the exercise of constitutionally protected rights.[118]

Vagueness challenges to drug paraphernalia legislation are founded on the theory that the term "drug paraphernalia" is too ill-defined to give adequate notice as to proscribed items.[119] Thus, the Hoffman ordinance's definition of "drug paraphernalia" as any item "designed or marketed for use" with illegal drugs[120] must be analyzed to determine whether it provides retailers with the requisite warning. For Justice Marshall and the Court, this definition sufficed to provide persons of common intelligence fair warning as to what is proscribed.[121]

The *Hoffman* Court decided that the "designed . . . for use" standard clearly means that items "principally used" for non-drug purposes, by virtue of their objective features, are not "designed . . . for use" with illegal drugs, and hence not regulated by the ordinance.[122] This standard requires that a retailer make a determination as to the manufacturer's intent regarding design. By focussing on the design of the manufacturer, however, the ordinance fails to address items which have many established uses, both licit and illicit. Instead, this interpretation assumes that a single, easily discernible manufacturing intent exists for each item. Some items may have only drug-related uses. Obviously, a syringe is clearly "designed . . . for use" with drugs, and a retailer would be warned by the statute that he was selling a regulated item. Many other items, however, become drug paraphernalia based on the user's later adaptation, rather than because of their objective features. Attempting to classify various pipes, spoons, clips, rolling papers, and other merchandise which have common legitimate uses, on the basis of whether or not they are designed to be "principally used" with illegal drugs is a speculative exercise. It would appear difficult to assert with any degree of certainty that a retailer would usually know the intent of the manufacturer of such multi-use items. Because of this uncertainty, the Hoffman ordinance fails to give adequate notice as to what is a regulated item.[123]

Another problem with the ordinance is that the "designed or mar-

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118 102 S. Ct. at 1193 (citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); *Grayned*, 408 U.S. at 109).

119 *See generally* Comment, *supra* note 69, at 593; Comment, *supra* note 66, at 257.

120 Village of Hoffman Estates, Ill., Ordinance No. 909-1978, § 1 (see Appendix).

121 *See supra* notes 39-60 and accompanying text.

122 102 S. Ct. at 1195.

123 Noting that the Hoffman ordinance's requirements could be triggered by the sale of paper clips next to "Rolling Stone" magazine, the Court of Appeals for the Seventh Circuit stated that "there is no way for a seller to determine which particular items or arrangement of merchandise will require a license." 639 F.2d at 382-83.

keted for use" standard begs the question at issue. The court of appeals noted that the standard's application presupposes that retailers can make the determination of whether an item is drug paraphernalia because they are actually engaged in the business of selling items designed or manufactured for use with illegal drugs.[124] Flipside denies this characterization of its business.[125]

It is also obvious that the ordinance's definitional problems cannot be resolved simply by promulgating supplemental guidelines.[126] Such guidelines would introduce further definitional problems. If, as the Court believes, the designed for use standard sufficiently defines items to be classified as "drug paraphernalia," then the guidelines would be unnecessary. On the other hand, if guidelines are viewed as a necessary supplement to the ordinance's text, an examination of the existing Hoffman guidelines reveals that they may create more confusion than clarity. The guidelines, for example, indicate that pipes are not covered by the ordinance if "displayed away from the proximity of" colored paper, and "not displayed within the proximity of roach clips, or literature encouraging illegal use of . . . drugs."[127] Nowhere in the ordinance or guidelines is "proximity" defined, however. The retailer is thus forced to decide whether an item is drug paraphernalia by speculating as to the meaning of "proximity," a determination about which persons of common intelligence might reasonably differ. Reliance upon supplementation of these guidelines as a method of salvaging the ordinance thus seems misplaced.

Although the Court noted that a scienter requirement may mitigate a law's vagueness,[128] commentators have asserted that a scienter requirement cannot cure a vague statute or regulation.[129] Under the Court's reasoning, the Hoffman ordinance is not vague because it prohibits retailers from "intentionally," "willingly," or "knowingly" marketing items used with illegal drugs. One "knowingly" commits an offense when he knows that his actions will bring about a certain result. It is immaterial that one knows that intent is an element of the offense, or that intentionally causing such a result is statutorily prohibited.[130] Since it is knowledge of the consequences of one's actions, not knowledge of the existence of the law, which is relevant, it appears that a vague

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124 *Id.*

125 *Id.*

126 *See, e.g., supra* note 9.

127 *Id.*

128 *See supra* note 43.

129 *See, e.g.*, W. LEFAVE & A. SCOTT, JR., CRIMINAL LAW § 11 at 86, 87 (1972); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952) (Jackson, J., dissenting).

130 W. LEFAVE & A. SCOTT, JR., *supra* note 129.

statute is not clarified by a scienter element.[131] It is possible for a retailer to "willfully" display items that are in fact "drug paraphernalia" (which under the Court's reasoning, would indicate that he knew that the item was drug paraphernalia), without fair warning or knowledge that the items are indeed proscribed.

The second prong of the *Grayned* vagueness standard requires that a statute be sufficiently clear so as to prevent the danger of arbitrary or discriminatory application by enforcement officials. Justice Marshall, particularly impressed by the ordinance's marketing standard, found the ordinance clear enough so that "the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness."[132] This pronouncement, however, is based upon the Court's belief that the ordinance's "designed or marketed for use" standard has no definitional problems. The ordinance's demonstrated definitional problems, as well as its circularity—the presupposition that a retailer knows what items are "designed or marketed for use with illegal drugs" because he engages in their sale[133]—creates the possibility of arbitrary enforcement. Due to the multiple uses of many items which potentially could be deemed "drug paraphernalia," enforcement officials are free to make subjective determinations as to their use. The possibility that such determinations will be based in part or whole upon the decision-maker's perception of a person's or group's lifestyle is very real.[134] The vagueness of the Hoffman Estates ordinance thus allows for potential harassment of those with lifestyles different from those enforcing the ordinance.[135]

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131 *Id.*

132 102 S. Ct. at 1196 (footnotes omitted).

133 *See supra* note 124 and accompanying text.

134 The seventh circuit noted that Hoffman Estates had already demonstrated bias when stating in their brief: "Defendant village does expect that the marketing approach that encourages drug use by youth will be eliminated by responsible businesses and conducted under reasonable regulation by other businesses," a stigma that should not be attached according to the tastes of village officials. 639 F.2d at 384 (citing Brief for Appellee at 11).

135 The seventh circuit in *Hoffman Estates* found that a genuine danger exists that the ordinance will be used to harass individuals choosing lifestyles and views different from those of the cultural majority. The court emphasized that if an item is not considered drug paraphernalia *per se*, then subjective factors are introduced into the interpretation of a retailer's marketing approach. *Id.* at 383. Quoting Housworth v. Glisson, 485 F. Supp. 29, 38 (N.D. Ga. 1978), *aff'd*, 614 F.2d 1295 (5th Cir. 1980), the court stated:

> Most people may agree that selling devices which may have no obvious purpose other than to facilitate the use of dangerous drugs threatens the community's health, welfare and safety. But the decision of which devices fit this category becomes more difficult when something as innocuous and susceptible of legal or merely decorative use as a "marijuana pipe" is involved. Whether selling this merchandise falls within the ordinance's prohibition is a debatable question, *particularly when conflicting lifestyles and political views suffuse the decision-maker's perception of what buyers will do with the product.*

639 F.2d at 383-84 (emphasis in the original).

C. SELECTION OF CASE FOR REVIEW

The Supreme Court's selection of the Hoffman Estates ordinance for review seems unusual in light of the widespread litigation concerning drug paraphernalia laws based on the Model Act.[136] Unlike the Model Act, which has been adopted by twelve states and numerous municipalities, the Hoffman ordinance, with its regulatory approach, is peculiar to the Village of Hoffman Estates. Differences between the Hoffman Estates ordinance and laws based on the Model Act are sufficiently significant that the determination of the constitutionality of one will not resolve the constitutionality of the other.[137] The Court has remanded *Record Revolution No. 6 v. City of Parma* for reconsideration in light of the *Hoffman Estates* decision.[138] The confusion in the lower courts is, therefore, far from resolved by the *Hoffman Estates* decision. By choosing to review the Hoffman ordinance, the Court has left the constitutionality of laws based upon the Model Act in doubt, hence bringing very little certainty to the field of drug paraphernalia legislation.

V. CONCLUSION

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, the Supreme Court determined that defining "drug paraphernalia" as those items "designed or marketed for use" with illegal drugs provided sufficient clarity to defeat a vagueness challenge. By focussing on design, however, the ordinance fails to provide adequate guidance as to items which have multiple lawful and drug-related uses. This lack of clarity forces retailers to speculate as to the items covered by the ordinace, and invites arbitrary and discriminatory enforcement by law enforcement officials. Drug abuse remains a very serious problem in this country, and easy access to items which facilitate the use of illegal drugs can only exacerbate the problem. This does not justify, however, the regulation of such devices by unconstitutional means.

JEFFREY J. VAWRINEK

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136 *See supra* note 89 and accompanying text.

137 The Model Act, unlike the Hoffman ordinance, contains a mental state element concerning the intent of the item's user—the item must be "used, intended for use or designed for use" with illegal drugs. The sole mental state language in the Hoffman ordinance concerns objects which are "designed or marketed for use" with illegal drugs. Whereas the Model Act contains criminal penalties, the Hoffman ordinance is "regulatory in nature." Unlike the Hoffman ordinance, the Model Act includes no guidelines as to proscribed items, but merely includes a laundry list of regulated merchandise.

138 Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916 (1981).

APPENDIX

Village of Hoffman Estates Ordinance No. 969-1978 AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

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

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

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

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

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

A. License Required:

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

B. Application:

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

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia-

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

E. Regulations:

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

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

Items designed or Marketed for use with illegal cannabis or drugs $150.00.

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

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

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