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DRUG PARAPHERNALIA LEGISLATION: UP IN SMOKE?

In recent years, a new industry has evolved that both glamorizes and facilitates illegal drug use. The drug paraphernalia industry is a multi-million dollar business primarily focusing on the sale of a variety of devices used in conjunction with illegal drugs, as well as the sale of kits designed to test or process controlled substances. The primary target market for these products has been this country's young people. The industry "preys on the drug fantasies, real and imagined, of our youth. [I]t sends messages to them that run counter to everything else that we have taught them about drugs." Yet, paradoxically, the devices sold for use with controlled substances are often legal, while the controlled substances themselves are not.

In an attempt to curb illegal drug use, many state and local governments have adopted legislation aimed at eliminating the drug paraphernalia industry. These laws have come under a variety of

1. See Drug Paraphernalia: Hearing Before the Select Comm. on Narcotics Abuse and Control of the House of Representatives, 96th Cong., 1st Sess. 31 (1979) (testimony of Peter B. Bensinger, Administrator, Drug Enforcement Administration) [hereinafter cited as Drug Paraphernalia Hearing].
2. Id. at 87 (prepared statement of Peter B. Bensinger). It has been estimated that there are anywhere from 15,000 to 30,000 "head shops" in the United States. Id. (prepared statement of Peter B. Bensinger). As one jurist remarked: "The term 'head shop' apparently refers to a retail business that sells items useful in producing and injecting drugs that affect the user's head." Delaware Accessories Trade Ass'n v. Gebelein, 497 F. Supp. 289, 290 n. (D. Del. 1980). There are also countless street peddlers and a multitude of stores, which, while not head shops, offer paraphernalia along with other merchandise. Drug Paraphernalia Hearing, supra note 1, at 87 (prepared statement of Peter B. Bensinger).
3. See Drug Paraphernalia Hearing, supra note 1, at 87 (prepared statement of Peter B. Bensinger).
4. Id. (prepared statement of Peter B. Bensinger).
5. Surprisingly, Congress has made no attempt to enact a drug paraphernalia law on the federal level.

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constitutional attacks. In fact, due to the economic impact enforce-
ment could have on those in the marketing chain of prohibited merchandise, most of these laws were challenged even before they were to take effect. As a result, many enforcement programs have been stalled in litigation.¹⁹

There have been three different approaches to the drafting of drug paraphernalia laws. The most frequent of these outlaws drug paraphernalia through criminal sanctions. Yet the amorphous nature of those commodities generally perceived as drug paraphernalia gives rise to two major constitutional difficulties with these laws—vagueness¹² and overbreadth.¹¹ Perhaps in response to these constitutional difficulties, two other drafting approaches have been used. One outlaws paraphernalia through non-criminal (civil) sanctions, providing for fines, revocation of sales licenses and permits, and civil forfeiture.¹² The other, a regulatory approach, does not outlaw drug paraphernalia, but rather regulates the sale of items deemed to be drug paraphernalia by requiring store owners and their salespeople to obtain sales licenses and maintain strict sales records. Civil penalties are then imposed on those failing to comply with these requirements.¹³

This note shows that not only criminal paraphernalia laws but civil and regulatory laws have also often failed to pass constitutional scrutiny. It separately analyzes each variety—criminal, civil, and regulatory—of paraphernalia legislation. The analysis begins by focusing on the first attempts at drafting drug paraphernalia legislation which were found to be unconstitutional, then moves to the Model Act, an archetype of criminal drug paraphernalia legislation. New York State's drug-related paraphernalia law—a sample of civil paraphernalia legislation—and the regulatory ordinance adopted by the Village of Hoffman Estates, Illinois are considered in


8. Drug Paraphernalia Hearing, supra note 1, at 95-96 (prepared statement of Irvin B. Nathan, Deputy Ass't Attorney General, Criminal Division, Dep't of Justice).

9. Id. at 96 (prepared statement of Irvin B. Nathan).

10. See text accompanying notes 98-159 infra.

11. See text accompanying notes 160-177 infra.


depth. Since crucial vagueness and overbreadth problems germinate from both the definition of drug paraphernalia and the requisite mens rea for each offense, these sections also are extensively examined. This note suggests that any attempt to prohibit the sale or marketing of drug paraphernalia either criminally or civilly should not meet judicial approval. It further suggests that properly drafted legislation aimed at regulating drug paraphernalia sales or marketing may be the only approach that could withstand constitutional scrutiny.

THE CRIMINAL LAW APPROACH

In 1979, the Drug Enforcement Administration of the United States Department of Justice, responding to the problem of drafting drug paraphernalia legislation that could survive constitutional attack, drafted a proposed Model Drug Paraphernalia Act \(^{14}\) (the Model Act).

Prior to the drafting of the Model Act, at least six criminal drug paraphernalia laws were unable to pass constitutional muster. \(^{15}\) The basic problem with these laws was their attempt to define drug paraphernalia with requisite constitutional clarity. Three different drafting approaches have been employed in this area of regulation. The first focused solely on the design and/or use of certain objects. \(^{16}\) The second also focused on the design and/or use of certain objects, but supplemented this definition with a list of specific examples of drug paraphernalia. \(^{17}\) While these examples included such items as "roach clips," "cocaine spoons and vials," and "bongs," no further explanation or definition of these items was provided. \(^{18}\) The third supplemented the core definition of drug paraphernalia, focusing on

\(^{14}\) Drug Enforcement Administration, U.S. Dep't of Justice, Model Drug Paraphernalia Act (Aug. 1979) [hereinafter cited as Model Act], reprinted in Drug Paraphernalia Hearing, supra note 1, at 88-95; see Prefatory note to Model Act, supra, reprinted in Drug Paraphernalia Hearing, supra note 1, at 88. The substantive provisions of the Model Act have been reprinted as an appendix to this note. See Appendix A, pp. 274-76 infra. Subsequent references to these provisions will omit the Drug Paraphernalia Hearing page number and include the appendix page number.

\(^{15}\) IND. CODE ANN. §§ 35-48-4-8, -9 (Burns 1977); Ferndale, Mich., Ordinance 692 (Aug. 13, 1979); Eagan, Minn., Ordinance 71 (July 24, 1979); Lawrence, N.J., Ordinance 842-79 (April 18, 1979); Newark, N.J., Ordinance 65, FD (June 22, 1979); Garland, Tex., Ordinance 2788 (April 11, 1977).


\(^{17}\) E.g., IND. CODE ANN. §§ 35-48-4-8, -9 (Burns 1977).

\(^{18}\) See, e.g., id.
the design and/or use of certain objects by listing five characteristics that classify a "pipe or other object suitable to be used for smoking [as a] drug-related device."\(^{19}\)

Judicial disapproval of these early drug paraphernalia laws did not discourage further efforts to frame such legislation. The general consensus that drug paraphernalia should be outlawed\(^{20}\) inspired the DEA to attempt a more inclusive approach to define the evil it sought to condemn.

### The Model Act

The Model Act was initially expected to cure all the defects inherent in earlier legislation. Unfortunately, however, the Model Act did not meet its drafters’ expectations, as its definition of drug paraphernalia\(^{21}\) has also been held to lack constitutional clarity.\(^{22}\) For example, the Model Act includes "roach clips" within its definition of drug paraphernalia. The term roach clip has generally been employed to describe an item used to hold a roach of a marijuana cigarette—that part of a marijuana cigarette which is too small to be held in one’s hand. Therefore, such normally innocuous items as alligator clips, bobby pins, and paper clips, could all conceivably be "roach clips."

Any attempt to prohibit the illegal use of these innocent items creates constitutional problems. The difficulty lies in determining if these items are "roach clips," and hence, unlawful drug paraphernalia, or if they are being used legitimately. This same problem arises when water pipes, rolling paper, and cocaine spoons\(^{23}\) are deemed paraphernalia.

The Model Act attempts to solve this definitional problem by identifying the prohibited objects in terms of: design and/or potential for drug-related nature of their marketing or possession.\(^{24}\) Thus, the Model Act first defines drug paraphernalia in the very general terms of the object’s design and/or its potential for use with controlled substances. This part of the definition is very similar to the

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20. See Drug Paraphernalia Hearing, supra note 1, at 95-96 (prepared statement of Irvin B. Nathan).
22. See note 97 infra and accompanying text.
23. A "cocaine spoon" is a small spoon-like implement used for inhaling cocaine through one nostril.
first method employed by the pre-Model Act laws.\textsuperscript{25} The Model Act, however, goes on to list the most common forms of drug paraphernalia, just as the second approach employed in the pre-Model Act laws.\textsuperscript{26} Although this list includes bongs, carburetion tubes, carburetion pipes and chillums, these objects are not further defined in other sections of the Act. The second part of the definition sets out a requisite mens rea, requiring that the objects be “used, intended for use or designed for use” with illegal drugs.\textsuperscript{27} The third part sets out guidelines for law enforcement officials and courts by listing factors relevant to the determination of whether an item is drug paraphernalia, such as “[t]he proximity of the object to controlled substances [and] the manner in which the object is displayed for sale.”\textsuperscript{28} 

Comments prepared by the drafters which accompany the Model Act shed some light on the drafters’ thinking in choosing this approach to define drug paraphernalia.\textsuperscript{29} The key element of the Act’s definition is clearly the criminal intent (or mental state) of the person charged with the offense.\textsuperscript{30} Under the Act, therefore, any object that is not used, intended for use, or designed for use in conjunction with illegal drugs is not considered paraphernalia.\textsuperscript{31} Specific intent as to a time or place for use is not necessary.\textsuperscript{32} Presumably, the

\begin{itemize}
  \item 25. See text accompanying note 16 supra.
  \item 26. See text accompanying note 17 supra.
  \item 27. Model Act, supra note 14, art. I, Appendix A, p. 274 infra.
  \item 28. Id.
  \item 29. See Model Act, supra note 14, Comment, art. I, reprinted in Drug Paraphernalia Hearing, supra note 1, at 91-92.
  \item 30. See Model Act, supra note 14, Comment, art. I, reprinted in Drug Paraphernalia Hearing, supra note 1, at 92.
  \item 31. See Model Act, supra note 14, Comment, art. I, reprinted in Drug Paraphernalia Hearing, supra note 1, at 91-92.
  \item 32. Hinging the definition of drug paraphernalia on a specific intent to violate, or to facilitate a violation of, the drug laws also provides “fair warning” to persons in possession of property potentially subject to this Act. . . .

  Actual use of an object to produce, package, store, test or use illicit drugs need not always be shown. An object is considered to be drug paraphernalia whenever the person in control intends it for use with illicit drugs. . . . [The intent] can be proved directly . . . or indirectly through circumstantial evidence. . . . [T]he person in immediate control of an object need not intend to use it personally in connection with drugs. It is enough if he holds the object with the intent to make it available to persons whom he knows will use it illegally. . . .

  Objects whose sole, or at least dominant purpose is to produce, package, store, test or use illicit drugs are considered to be “designed” for such use. A rebuttable presumption exists that these objects are intended for use for the purpose for which they are designed. . . . As such, they are presumed to be drug paraphernalia.

Model Act, supra note 14, Comment, art. I (citations omitted), reprinted in Drug Parapherna-
drafters thought that if the Model Act would provide both fair notice to potential violators of proscribed conduct and guidelines for courts and enforcement officials to consider in determining whether an object is drug paraphernalia, the vagueness objection could not be applied to the Model Act.\footnote{Luckow: Drug Paraphernalia Legislation: Up in Smoke? 1981 [Drug Paraphernalia Legislation] 245}

The Model Act followed the generally accepted approach of defining a crime by both an act and a mental state requirement. It defines four crimes: possession, manufacture or delivery, delivery to a minor, and advertising drug paraphernalia.\footnote{See id., supra note 14, Comment, art. II, reprinted in Drug Paraphernalia Hearing, supra note 1, at 92-93.} In the comments accompanying the Act, the drafters listed the elements of each offense. In the absence of any one element in a given offense, no crime has been committed.\footnote{See id., supra note 14, Comment, art. II, reprinted in Drug Paraphernalia Hearing, supra note 1, at 92-93.}

\textit{Possession}.—This offense requires proof of the following three elements: 1) possession of an object; 2) classifiable as drug paraphernalia; 3) which the possessor intends to use in violation of the Uniform Controlled Substance Act.\footnote{See id., supra note 14, Comment, art. II, reprinted in Drug Paraphernalia Hearing, supra note 1, at 92-93.}

\textit{Manufacture or Delivery}.—This offense also requires proof of three elements: 1) delivery or possession or manufacture with intent to deliver an object; 2) classifiable as drug paraphernalia; 3) that the deliveror, possessor, or manufacturer knows or reasonably should know under the circumstances will be used in violation of the Uniform Controlled Substance Act.\footnote{See id., supra note 14, Comment, art. II, reprinted in Drug Paraphernalia Hearing, supra note 1, at 93.}

\textit{Delivery to a Minor}.—The elements of this offense are essentially the same as those of the “manufacture or delivery” offense discussed above, with the addition of two new elements: 1) the person delivering the object being over eighteen years of age; and 2) the person to whom the object is delivered being under eighteen years of age.\footnote{Id. supra note 14, art. II, § (D), Appendix A, p. 276 infra; see id., Comment, art. II, reprinted in Drug Paraphernalia Hearing, supra note 1, at 94.}

\textit{Advertising}.—This offense, limited to commercial advertising,\footnote{Id. § (D), Appendix A, p. 276 infra; see id., Comment, art. II, reprinted in Drug Paraphernalia Hearing, supra note 1, at 94.}
consists of the following three elements: 1) an object be advertised; 2) which is classifiable as drug paraphernalia; and 3) the advertisor knows or reasonably should know under the circumstances that the advertisement promotes the sale of drug paraphernalia. The drafters intended the offense to apply to both the person advertising the paraphernalia and the person publishing the advertisement. While this offense of advertising could present special constitutional problems based on the relatively recent recognition of first amendment protection for commercial speech, the drafters of the Act dismissed this difficulty, stating that "[c]ommercial solicitation of illegal activities is not protected speech" under the Constitution.

The remainder of the Model Act provides for forfeiture of objects determined to be drug paraphernalia and allows for the severability of any clause held invalid on its face or in its application. The comment accompanying the forfeiture section expressly notes past judicial approval of both the substance and deterrent effect of civil forfeiture laws.

The drafters of the Model Act perceived the key element to be the mental state of the person charged, making mens rea the primary prosecutorial problem. Every manufacturer or distributor could claim to be unaware that the object would be used in conjunction with illegal drugs. For example, a manufacturer or distributor of rolling papers might easily have thought that his papers would be used for rolling tobacco. To address this problem, the drafters of the

41. Model Act, supra note 14, Comment, art. II, reprinted in Drug Paraphernalia Hearing, supra note 1, at 94.  
42. Model Act, supra note 14, Comment, art. II, reprinted in Drug Paraphernalia Hearing, supra note 1, at 94.  
45. Model Act, supra note 14, art. III, Appendix A, p. 276 infra.  
46. Id., art. IV, Appendix A, p. 276 infra.  
47. Id., Comment, art. III, reprinted in Drug Paraphernalia Hearing, supra note 1, at 94-95.  
Model Act discussed three situations in which the knowledge requirement is met. First, the supplier may actually know the object will be used in conjunction with controlled substances. Next is the situation where the supplier knows that there is a high probability that the object will be used in conjunction with controlled substances. The last situation arises where the supplier should reasonably conclude from the facts and circumstances that there is a high probability of the object being used in conjunction with controlled substances. If this is enough to prove knowledge, each manufacturer and distributor must screen his or her clients. To avoid illegal use under these circumstances, he or she must calculate the probability that the object will be used or sold to a particular clientele who will use it in conjunction with controlled substances. Thus, the law requires the manufacturer and distributor of potential drug paraphernalia to exercise a reasonable amount of care in the distribution process and not to distribute these items indiscriminately. Any violation of the Model Act is deemed a crime and any violator may be subject to criminal and/or civil penalties.

THE CIVIL ENFORCEMENT APPROACH: THE NEW YORK LAW

Another approach to drug paraphernalia legislation is illustrated by New York State’s law, which contains no criminal sanctions. New York instead mandates fines, revocation of sales licenses or permits, and forfeiture by violators of items determined to be drug paraphernalia. Sections 850-853 of the New York General Business Law (the New York law) were carefully tailored to avoid the constitutional problems stemming from the definition of paraphernalia.

New York approaches the drafting problem by first defining the design and/or use of a prohibited object and then requiring proof of a defendant’s culpable mental state. Section 850 of the law is a definitional provision; section 851 prohibits the “possession and sale” of drug-related paraphernalia; section 852 delineates the power of municipalities to revoke sales licenses or permits and authorizes forfeiture of drug-related paraphernalia; and section 853 enumerates

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49. Model Act, supra note 14, Comment, art. II, reprinted in Drug Paraphernalia Hearing, supra note 1, at 93.
50. This places a substantial burden on manufacturers and distributors of potential drug paraphernalia.
51. Model Act, supra note 14, Comment, art. II, reprinted in Drug Paraphernalia Hearing, supra note 1, at 94.
52. E.g., Model Act, supra note 14, art. II, § (A), Appendix A, p. 276 infra.
the penalties assessable for violation of the statute.

This statutory scheme differs from the Model Act in several ways. First, New York's law rejects the quadripartite scheme of offenses created by the Act. Proscribing only "possession and sale" of drug-related paraphernalia, it does not expressly prohibit either advertisement of drug paraphernalia or sale of drug-related paraphernalia to minors.44 Second, the definition of paraphernalia in the New York law is less detailed than the definition provided by the Model Act. Drug-related paraphernalia is defined only in the general terms of an object's potential uses.45 While the eight categories of objects listed are similar to those found in the Model Act, this list is less exhaustive than that of the Act.46 Furthermore, the Act's enumeration of specific examples of drug paraphernalia47 does not appear in the New York law. Instead, the final definitional-provision acts as a catchall, broadly defining paraphernalia as those "objects used or designed for" use with controlled substances.48 The third difference between the two laws is that the New York law "defines a violation solely in terms of the alleged violator's apparent, rather than actual

54. Id. § 851. For the statute itself, see text accompanying note 64 infra.
55. "Drug-related paraphernalia" consists of the following objects used for the following purposes:
   (a) Kits, used or designed for the purpose of 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;
   (b) Kits, used or designed for the purpose of manufacturing, compounding, converting, producing, or preparing controlled substances;
   (c) Isomerization devices, used or designed for the purpose of increasing the potency of any species of plant which is a controlled substance;
   (d) Scales and balances, used or designed for the purpose of weighing or measuring controlled substances;
   (e) Dilutents and adulterants, including but not limited to quinine hydrochloride, mannitol, mannita, dextrose and lactose, used or designed for the purpose of cutting controlled substances;
   (f) Separation gins, used or designed for the purpose of removing twigs and seeds in order to clean or refine marihuana;
   (g) Hypodermic syringes, needles and other objects used or designed for the purpose of parenterally injecting controlled substances into the human body;
   (h) Objects, used or designed for the purpose of ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body.
Id. § 850(2).
57. Id. art. I, § 12(a)-(m), Appendix A, pp. 274-75 infra.
58. N.Y. GEN. BUS. LAW § 850(2)(h); see note 55 supra. One might argue that the Model Act is just as broad, since it prefaces its list of specific examples with the phrase "such as." A non-restrictive phrase like "but is not limited to," however, does not appear in this subsection of the Model Act. It can be argued, therefore, that the "objects" listed are drug paraphernalia per se, and hence, the Model Act is not as broad as the New York law.
knowledge of an item’s drug-related purpose.” The fourth difference is the omission in the New York statute of the definitional phrase “includes but is not limited to.” Thus, New York’s law appears, at first glance, attractively narrow.

The final difference, however, broadens the scope of the law. New York’s law omits the Model Act’s list of guidelines concerning the nature of the sale and display of a product — a list that was designed to aid in the legal determination of whether a given object is drug paraphernalia. This omission renders suspect any determination that a shopkeeper is violating the law. Essentially, the statute in its present form provides no means whatsoever for distinguishing between legitimate and illegitimate uses of common objects.

The possession and sale of drug-related paraphernalia, the only offenses listed in the New York law, are combined in one section providing 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 of the drug-related purposes stated in [the definitional section] of this article.

Although the New York law requires that the illegal act be accompanied by a criminal mental state, this statutory language is considerably more vague than the “knowing or under the circumstances where one should reasonably know” standard of the Model Act. The New York law focuses primarily on the alleged violator’s apparent rather than actual knowledge of an item’s drug-related purposes. The New York Legislature eliminated both the actual knowledge requirement and the reasonable man standard of the Model Act. The mental state requirement under the New York law — “under circumstances evincing knowledge” — does not give notice to potential violators of what conduct is proscribed. This notice problem is exacerbated by the lack of explanatory comments or explicit enforcement

61. See generally Drug Paraphernalia Hearing, supra note 1, at 95-96 (Statement of Irvin B. Nathan).
63. Id., Comment, art. I, reprinted in Drug Paraphernalia Hearing, supra note 1, at 92.
64. N.Y. GEN. BUS. LAW § 851 (emphasis added).
guidelines. As a result, arbitrary and discriminatory enforcement of
the law becomes possible.66

Abandonment of the Model Act's four part scheme of drug par-
apheralia offenses — "possession," "manufacture and delivery," "delivery to a minor" and "advertising"67 — seems to narrow the
scope of the New York law. Yet the language of the New York stat-
ute's prohibition of possession and sale is so broad that it may well
cover all the transactions prohibited by the Model Act.68

The remaining two sections of the New York law detail sanc-
tions that may be imposed for violation of the "possession and sale"
section. Section 852 provides for revocation of sales licenses or per-
mits by municipalities69 and forfeiture of paraphernalia to either a
county sheriff or police commissioner.70 It does not, however, provide
for pre- or post-seizure notice or for an adversarial hearing. Section
853 authorizes the imposition of civil penalties ranging from $1,000
to $10,000.71

THE REGULATORY APPROACH: THE HOFFMAN ESTATES
ORDINANCE

To date, the Hoffman Estates approach72 is the exclusive prop-
erty of the Village of Hoffman Estates, Illinois.73 Its ordinance is
unique in that it regulates rather than prohibits the sale of drug par-

66. While New York law enforcement officials may consider the same factors as officials
enforcing the Model Act, they are permitted to consider any other factors deemed relevant in
determining whether an item is drug-related paraphernalia. Thus, arbitrary and discriminatory
enforcement of the New York drug paraphernalia law is unavoidable.
67. See text accompanying notes 36-40 supra.
68. Compare N.Y. GEN. BUS. LAW § 851 with Model Act, supra note 14, art. II,
Appendix A, pp. 274-75 infra.
69. N.Y. GEN. BUS. LAW § 852(1).
70. Id. § 852(2).
71. Id. § 853.
Village of Hoffman Estates, 639 F.2d 373, 378-79 (7th Cir. 1981), prob. juris. noted, 48
U.S.L.W. 3893 (U.S. June 1, 1981) (No. 80-1681). The ordinance has been reprinted as an
appendix to this Note. See Appendix B, p. 277 infra. Subsequent references will include the
appendix page number.
73. Whether other communities will be allowed to follow this approach is shortly to be
determined. The Supreme Court will hear argument on this issue in the near future. Flipside,
(No. 80-1681), noting prob. juris. of 639 F.2d 373 (7th Cir. 1981) (holding ordinance uncon-
stitutional). As this note reveals, see text accompanying notes 98-108 infra, the ordinance is
unconstitutional. Court approval of drug paraphernalia legislation, therefore, will be relegated
to dicta.
it bears no resemblance to the Model Act and resembles the New York law only in its civil nature. As one court explained:

[O]ne of the purposes of the ordinance obviously must be to do indirectly what it claims it cannot do directly — to effectively ban the sale of a broad class of items, some of which may be used with illegal drugs. After all, few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of signing their names and addresses to a register available to the police.74

The Hoffman Estates ordinance requires any person selling drug paraphernalia to obtain a license.75 Each applicant must submit affidavits for himself and for any of his employees authorized to sell paraphernalia, stating that they have never been convicted of drug-related offenses.76 Each day of operation without such a license is punishable by a fine and considered a separate offense.77

The Hoffman Estates ordinance also sets out a second offense — the sale to a minor of any object designed or marketed for use with illegal drugs.78 The law mandates that the licensee maintain records for two years, listing the items sold, the name and address of the purchasers, the times and dates of sales, and the salesperson's signature. These records must be made available to any police officer for inspection during normal business hours.79

The final section of the Hoffman Estates ordinance prescribes civil sanctions in the form of fines for failure to obtain a license and for sales to minors.80 In each case, the fine imposed must be more than $10.00 but less than $500.00.81

The only mental state requirement is that the object be designed or marketed for use with illegal drugs. The ordinance covers "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs."82 Unlike the New York law, the Hoffman Estates ordinance provides licensing guide-

75. Hoffman Ordinance, supra note 72, § 1(A), Appendix B, p. 277 infra.
76. Id. § 1(B), Appendix B, p. 277 infra.
77. Id. § 3, Appendix B, p. 277 infra.
78. Id. § 1(C), Appendix B, p. 277 infra.
79. Id. § 1(D), Appendix B, p. 277 infra.
80. Id. § 3, Appendix B, p. 277 infra.
81. Id.
82. Id. § 1(A), Appendix B, p. 277 infra.
lines to aid in this determination. Although particularly broad, they attempt to list more specifically those objects covered by the law and to distinguish between regulated and unregulated objects.

The guidelines establish four categories — papers, roach clips, pipes, and paraphernalia. In the papers category, the ordinance creates a distinction between white, tobacco-rolling papers and those of more colorful designs with drug-associated names. The latter are of course regulated; the former are not. The guidelines define the roach clips category by the cryptic phrase, "designed for use with illegal cannabis or drugs and therefore covered." The pipes category distinguishes items in terms of the location of store displays. The pipes covered by the ordinance are those displayed near papers and roach clips or near literature encouraging use of illegal drugs. Pipes displayed otherwise are not covered. Thus, no distinction is made, for example, between pipes, water pipes, and bongs. All pipes, depending on where they are displayed, could be drug paraphernalia. Although the guidelines provide a paraphernalia category, "paraphernalia" is defined in a conclusory way: "if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered." Thus, the most important category, the "paraphernalia" category, is the most ambiguous in that it fails to provide notice to either shop owners or enforcement officials of what items it encompasses.

Unlike the Model Act and the New York law, this definition of drug paraphernalia includes no mental state. Under the Hoffman Estates ordinance, any object that could possibly be used with illegal drugs, if displayed with a potential roach clip, could be paraphernalia. This definition of paraphernalia could create bizarre and unintended results. For example, an ash tray displayed near paper clips or bobby pins would be paraphernalia if sold to a minor.

**Constitutional Problems and Drug Paraphernalia Laws**

A host of factual and constitutional issues have been raised by drug paraphernalia legislation. Some obvious questions stem from the intent element of these laws. First, each of the three laws defines

83. *Id.* License Guidelines, Appendix B, p. 277 infra.
84. See text accompanying note 177 infra.
86. *Id.*
87. *Id.*
88. *Id.*
paraphernalia, in part, as those objects “designed for use” with illegal drugs. Yet the meaning of this language is open to question. Whose intent is determinative — that of the manufacturer, the seller, the buyer, or some combination of these three? When is intent determined — when an item is manufactured, or when it is sold? Who “designs” an object for illegal use — the manufacturer, the seller or the purchaser?

A separate issue arises from the requirement, appearing in both the Model Act and the New York law, of an additional mental state — actual and/or constructive knowledge. Consider the case of the seller who knows that it is highly probable that an object he or she sells will be used in conjunction with controlled substances, or the situation of a seller who could reasonably conclude from the facts and circumstances that there is a high probability that an object he or she sells will be used with controlled substances. Do either or both entail the requisite mental state under the paraphernalia laws previously examined? Although the Model Act attempts to answer these questions in its comments, they are merely explanatory in nature and are not binding on the courts. In contrast, the New York law and the Hoffman Estates ordinance provide no explanatory comments to aid analysis of these questions.

These are the shortcomings of paraphernalia legislation which engender the constitutional difficulties of vagueness and overbreadth that are most frequently litigated. That is not to say, however, that there are no other possible constitutional problems with this type of legislation. There has been much discussion in challenges to the constitutionality of drug paraphernalia laws of problems of federal abstention, the commerce clause, and, the first and fourth

89. See, e.g., High O’ Times, Inc. v. Busbee, 621 F.2d 135, 138-41 (5th Cir. 1980). “In applying the doctrine of abstention, a federal district court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law.” Id. at 138 n.4 (quoting Harman v. Forssenius, 380 U.S. 528, 534 (1965)). The Supreme Court has articulated three categories of cases in which federal courts should abstain:

(1) “cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law”; . . . (2) where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar; and (3) where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings antecedent to a criminal prosecution, or proceedings for the collection of state taxes.

amendments, although no drug paraphernalia law has yet been

the abstention doctrine in drug paraphernalia cases, although they have carefully tested the
cases against the criteria set forth above. See, e.g., High Oil' Times, Inc. v. Busbee, 621 F.2d
135, 138-41 (5th Cir. 1980).

90. U.S. CONST. art. I, § 8, cl. 3. The basic theme of the commerce clause is that "[t]he
validity of state action affecting interstate commerce must be judged in light of the desirability
of permitting diverse responses to local needs and the undesirability of permitting local interfer-
ences with such uniformity as the unimpeded flow of interstate commerce may require." L.
TRIBE, supra note 43, § 6-4, at 325 (emphasis omitted).

The test for determining the validity of a state law affecting interstate commerce is a
tripartite inquiry: 1) The legislation must serve a legitimate local public interest; 2) the legisla-
tion must only affect interstate commerce incidentally; and 3) the legitimate local purpose
must justify the law's impact on interstate commerce. Tobacco Road v. City of Novi, 490 F.
(1970)).

In applying this tripartite test to a drug paraphernalia law, courts have generally found
that the law's objective was control of illegal drug abuse to promote public health and welfare.
See, e.g., Casbah, Inc. v. Thone, 512 F. Supp. 474, 488 (D. Neb. 1980), aff'd in relevant part,
651 F.2d 561 (8th Cir. 1981); Delaware Accessories Trade Ass'n. v. Gebelein, 497 F. Supp.
289, 296 (D. Del. 1980). Thus, these laws serve a legitimate local interest and pass the first
test.

In determining whether a drug paraphernalia law affects interstate commerce only inci-
dentally (the second prong of the test), the approach most frequently taken by the courts was
to limit drug paraphernalia to items used in conjunction with illegal drugs; thus, the impact on
interstate commerce was found to be incidental. See, e.g., id. Finally, the courts moved on to
the "balancing" test of whether the legitimate local interest justified the law's impact on inter-
state commerce. In each case, the local interest was found to justify the impact on interstate
commerce. See, e.g., Casbah, Inc. v. Thone, 512 F. Supp. 474, 488 (D. Neb. 1980), aff'd in
relevant part, 651 F.2d 561 (8th Cir. 1981).

91. U.S. CONST. amend. I. Since the overbreadth doctrine originated in a first amend-
ment context, see L. TRIBE, supra note 43, §§ 12-24 to -30; Note, The First Amendment
Overbreadth Doctrine, 83 HARV. L. REV. 844 (1970), it is not surprising that first amendment
claims against drug paraphernalia laws overlap with overbreadth claims. The distinction is
that overbreadth claims involve all the various activities in the marketing and distribution
chain, including sale and delivery while first amendment claims pertain solely to advertising
Tobacco Road case, the City of Novi's drug paraphernalia law prohibited the sale (and implic-
itly the advertisement), of "drug paraphernalia," a category of items so imprecise under the
particular ordinance in question as to include within its scope the advertising of totally lawful
items. Id. at 544-45. While the court acknowledged that "[c]ommercial speech . . . is entitled
First Amendment protection," id., the court quickly disposed of the claim by finding that
"the challenged ordinance is not directed to speech, commercial or otherwise. Rather, the ordi-
nance prohibits the 'display' of the described items . . . . Hence, the First Amendment chal-
lenge is without merit." Id. at 545.

92. U.S. CONST. amend. IV. This claim is applicable only to criminal drug parapherna-
ilia laws. The problem was succinctly explained by the Eighth Circuit in Geiger v. City of
Eagan, 618 F.2d 26 (8th Cir. 1980).

The ordinance further lacks arrest and search standards for enforcement offi-
cials. Under the ordinance, the possession of a "drug-related device" could be the
basis for an arrest even if there was no controlled substance present. Also, seeing
"any pipe or other object suitable to be used for smoking" could be the basis for a
search to determine if characteristics which turned into a "drug-related device"
voided on these grounds.

The federal courts have responded to constitutional attacks on drug paraphernalia laws in a variety of ways. Although many of the district courts initially upheld laws that closely resembled the Model Act, the Sixth Circuit recently voided on vagueness and overbreadth grounds an ordinance that was virtually identical to the Model Act. A number of district courts have since followed the Sixth Circuit. Various laws not modeled on the Act have also been invalidated for being vague, or overly broad.

Vagueness

The vagueness doctrine is a judicial vehicle enforcing the due process clauses of the fifth and fourteenth amendments. Al-
though this doctrine originated in the criminal law, it has been held to be equally applicable to civil legislation. The policy goals of this constitutionally based requirement were succinctly explained by Justice Marshall, in Grayned v. City of Rockford:

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 impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Thus, the crucial question in the vagueness analysis is whether key phrases defining both prohibited paraphernalia and the mental state in these laws provide adequate notice to potential violators of proscribed conduct as well as explicit enforcement standards for both enforcement officials and courts. Arguably, all the drug paraphernalia laws previously examined fail this two-fold test insofar as they classify many lawful items as drug paraphernalia. In the Model Act, drug paraphernalia is defined as objects “used, intended for use or designed for use” with controlled substances. The New York law defines drug-related paraphernalia as objects “used or designed for the purpose of injecting, inhaling or otherwise introducing” controlled substances into the body. While the Hoffman Estates definition contains no mental state element, it requires that an object be “designed or marketed for use” with illegal drugs. A Dunhill pipe or General MacArthur’s corn cob pipe could fit into any one of these

General Constr. Co., 269 U.S. 385, 391 (1926)): “[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”

103. 408 U.S. 104 (1972).
104. Id. at 108-09.
106. N.Y. GEN. BUS. LAW § 850(h).
definitions. Dunhill Bros. and General MacArthur could be imprisoned under the Model Act, fined under the New York and Hoffman Estates laws, and/or forced to forfeit these items under both the Model Act and the New York law.

Defining drug paraphernalia in terms of an object’s actual use obviously poses no vagueness problem. Since neither manufacturers nor retailers use these objects, however, defining drug paraphernalia solely in terms of an object’s actual use would preclude prohibition by law of sale or marketing of these objects. Inasmuch as the real purpose of these laws is curtailment of the drug paraphernalia industry, the legislative purpose would not be served by defining drug paraphernalia only in terms of an object’s actual use. While it is thus not surprising that many paraphernalia laws have also included the object’s designed or intended use within their definition, the statutory language in a majority of these laws, on close analysis, gives inadequate notice of what is prohibited.

**Designed For Use.**—In *Smith v. Roark*, the West Virginia law defining drug paraphernalia as “objects designed to be primarily useful as drug devices.”

As used in this section, “drug device” means an object usable for smoking marijuana, for smoking controlled substances defined as tetrahydrocannabinols, or for ingesting or inhaling cocaine, and includes, but is not limited to:

(i) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
(ii) Water pipes;
(iii) Carburetion tubes and devices;
(iv) Smoking and carburetion masks;
(v) Roach clips; meaning 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;
(vi) Chamber pipes;
(vii) Carburetor pipes;
(viii) Electric pipes;
(ix) Air-driven pipes;
(x) Chillums;
(xi) Bongs;
(xii) Ice pipes or chillers; and
(xiii) Miniature cocaine spoons, and cocaine vials.

*Id.* § 60A-4-403a(C).

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108. *See text accompanying notes 1-13 supra.*
110. W. VA. CODE § 60A-4-403a (Supp. 1981). The statute provides that a violation occurs whenever a “person conducts, finances, manages, supervises, directs, or owns all or part of a business which for profit, in the regular course of business or as a continuing course of conduct, manufactures, sells, stores, possesses, gives away or furnishes objects designed to be primarily useful as drug devices.” *Id.* § 60A-4-403a(b)(1). The statute also attempts to define “drug devices.”
rily useful as drug devices was tested for vagueness. The statute was struck down because it did not pass either vagueness test. The court noted that a countless number of items are easily adaptable and functionally suitable for illegal uses even though they are usually thought to be legal devices. The court found that when the statutory language is applied to most smoking devices, one is left to speculate as to whether the object's primary design or purpose is licit or illicit. The statute itself is devoid of any standards by which one might assess or measure a given object in order to determine the purpose for which it is primarily designed. Absent statutory standards, the primary design of the bulk of the smoking aids and devices embraced by the statute is generally not discernible with sufficient certainty as to enable one of ordinary intelligence to know whether a given item is primarily designed for use as a drug device. The citizen, then, is left at his peril to judge for himself. The law enforcement officer is encouraged, at his whim, to level arbitrary and discriminatory charges. The judge and jury are left to speculate in similar fashion.

Even the repetition in the West Virginia law of the Model Act's thirteen specific examples of drug paraphernalia was not sufficient to save the law.

In Indiana Chapter, *NORML v. Sendak*, a three judge panel invalidated Indiana's paraphernalia law, which contained the words "used, designed for use, or intended for use" — the same language employed by the Model Act. While acknowledging that absolute precision in drafting legislation is not a constitutional requirement, the court maintained that the phrase "designed for use" contained in the statute failed to meet the constitutionally mandated standard of sufficient clarity. The panel explained:

The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of parapher-

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111. *Id.* § 60A-4-403(b)(1).
112. No. 80-2110, slip op. at 10.
113. *Id.* at 11.
114. *Id.* at 10.
117. No. TH-75-142-C, slip op. at 13.
nalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the statute] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.118

Although this finding alone might well have been sufficient to invalidate the law, the court also discussed another major defect in the phrase "designed for use." The law failed to indicate who had to design an item for use as paraphernalia.119 Although the court offered three possible interpretations, each was found to be unsatisfactory.120 The first was that the law could be limited in scope to those objects designed by the manufacturer for illegal drug use. However, objects arguably within the scope of the law could then still be used for legitimate or prohibited purposes. "The shop owner or buyer may be surprised to learn that his separation gin, pipe, hand mirror, or paper clip qualifies as paraphernalia because the original manufacturer had built the item with the idea that it would be used for the ingestion of controlled substances."121 The second alternative was that the law could be limited to those objects designed by the shop owner for illegal drug use.122 This interpretation could also lead to the unsatisfactory result of a consumer violation of the law based on the seller's intent. The third alternative was to limit the law to those objects designed by the possessor for illegal drug use.123 The court

118. Id.
119. Id.
120. See id. at 13-14. In Delaware Accessories Trade Ass'n v. Gebelein, 497 F. Supp. 289 (D. Del. 1980), the court approached the question differently, noting that "the legislature intended to define drug paraphernalia with sole reference to the state of mind of the one who engaged in the activity alleged to have violated the statute." Id. at 292. Since the statute in question was based on the Model Act, the court further examined the comments to the Model Act: "To insure that innocently possessed objects are not classified as drug paraphernalia, [the definition] makes the knowledge or criminal intent of the person in control of the object a key element of the definition." Id. at 293 (quoting Model Act, supra note 14, Comment, art. I, reprinted in Drug Paraphernalia Hearing, supra note 1, at 91). The court summarized by defining drug paraphernalia as "any item that the person who engaged in the conduct alleged to have violated the act used or intended or planned to be used to produce or consume a controlled substance in violation of the drug laws." Id. As a result, the definition of drug paraphernalia was held not to be unconstitutionally vague. Id.; accord, Cashab, Inc. v. Thone, 512 F. Supp. 474 (D. Neb. 1980), aff'd in relevant part, 651 F.2d.551 (8th Cir. 1981).
121. No. TH-75-142-C, slip op. at 13.
122. Id.
123. Id. at 14.
was also not satisfied with this alternative since

\[\text{[a]gain there is no way of knowing what items are paraphernalia and what items are lawful to possess. One cannot tell in advance whether a paper clip, hand mirror, teaspoon, or corncob pipe will be labeled paraphernalia. Whether an item is paraphernalia will depend on the characterization given by the arresting officer, deputy prosecutor, or judge. In addition to the lack of notice given to those subject to the statute, this broad definition of paraphernalia is not sufficiently explicit to prevent arbitrary or selective enforcement.}\]

Legislation based entirely on the Model Act, including the phrase "used, designed for use or intended for use," was struck down on vagueness grounds by the Sixth Circuit in *Record Revolution No. 6, Inc. v. City of Parma.* The court found that

\[\text{[t]he major ambiguity in defining drug paraphernalia in terms of the "design" of items is the lack of any design characteristics that distinguish lawful purposes from unlawful purposes. The type of object that can become, or be used as drug paraphernalia is limited only by the imagination of the user.}\]

This, in the court's view, was unconstitutional vagueness.

*Franza v. Carey* interpreted the phrase "designed for the pur-

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124. *Id.*


126. *Id.* at 930 (citation omitted). The analysis presented in *Parma* appears sound. In fact, a number of district courts have already invalidated the Model Act on the basis of its reasoning. *See* note 94 *supra.* It has been suggested, however, that the court in *Parma* mis-interpreted the phrase "designed for use." *Note,* *Anti-Drug Paraphernalia Laws: Void for Vagueness?*, 61 B.U. L. Rev. 453, 469-72 (1981). In that article, the author opines that "designed for use" ought to be applied as a subjective test "focusing on the state of mind of the designer or manufacturer." *Id.* at 471 (footnote omitted). The author analogizes to the Prohibition era cases which applied a subjective test when construing the phrase "designed or intended" in that context. *See* id. (citing United States v. Nosowitz, 282 F.2d 575 (2d Cir. 1922). The analogy is suspect. The Act which contained that language, National Prohibiton Act, ch. 18, § 18, 41 Stat. 305, 313 (1919), has been repealed. Ch. 740, 49 Stat. 872 (1935). More importantly, assuming that a subjective application is a correct interpretation, it would not effectuate the purpose of the law — to eliminate the drug paraphernalia industry. So long as there are no particular design characteristics that distinguish items used for lawful purposes from those used with illegal drugs, under the suggested interpretation it would be virtually impossible to establish that a manufacturer designed the item for illegal drug use without a confession from the manufacturer himself. Certainly, no manufacturer would confess to violating the law. As a result, the law would serve no purpose, making application of a subjective standard a futile course of judicial lawmaking.

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pose” as found in New York law.\textsuperscript{128} Looking first to the comments in the Model Act for a definition, the court determined that the phrase referred to “the subjective intent of the alleged violator rather than the physical characteristics of a particular item.”\textsuperscript{129} The court then went on to distinguish the New York law from the Model Act:

Although in the context of the Model Act “designed” may have been intended to refer to the subjective intent of a manufacturer of drug paraphernalia, in the context of the [New York law], which does not seek directly to regulate the activities of manufacturers, the conclusion that “designed for the purpose” refers to the subjective intent of the person charged with the violation is consistent with the ordinary meaning of “designed.” Moreover, [the statute] does not utilize “designed for the purpose” in the disjunctive with “intended for the purpose” or “intended to be used,” which might have suggested that “designed” was used in a sense other than referring to subjective intent.\textsuperscript{130}

The analysis behind this interpretation is questionable. While the law is concededly not directed at manufacturers, it does not follow a fortiori that a retailer can design an object for a specific purpose.

If this interpretation is followed, the purpose of the law will be defeated. Retailers of potential drug paraphernalia are not in the business of designing objects to be used with illegal drugs; their sole objective is to make a profit. The law, therefore, will not work to inhibit retail sales of an object unless a retailer knows that the purchaser will convert or modify the object for use with illegal drugs. The purchaser’s intent would then be transferred to the retailer, who will simply close his eyes to the purchaser’s intended use of the object. Thus, the law must be arbitrarily enforced, or not enforced at all.

The Hoffman Estates ordinance\textsuperscript{131} was also recently voided by the Seventh Circuit on vagueness grounds. In \textit{Flipside, Hoffman Estates Inc. v. Village of Hoffman Estates},\textsuperscript{132} the court analyzed the phrase “designed or marketed for use.” The Hoffman Estates Ordinance is directed only at the retailer, not the manufacturer. Following the \textit{NORML} analysis, the court explained:

\textsuperscript{128} N.Y. GEN. BUS. LAW § 850; \textit{see} note 55 \textit{supra}.
\textsuperscript{129} 518 F. Supp. at 335.
\textsuperscript{130} \textit{Id.} at 336 (footnote omitted).
\textsuperscript{131} Hoffman Ordinance, \textit{supra} note 75, Appendix B, p. 277 \textit{infra}.
\textsuperscript{132} 639 F.2d 373 (7th Cir. 1981), \textit{prob. juris. noted}, 49 U.S.L.W. 3893 (U.S. June 1, 1981) (No. 80-1681).
An additional element of vagueness in the "designed for use with drugs" standard is added by the fact that the manufacturer, not the retailer, designs the items sold. Consequently, the design intent of the manufacturer, not the regulated seller, triggers the retailer's duty to obtain a license and the customer's obligation to sign a register available to the police.\textsuperscript{133}

The phrase "marketed for use" was also determined to be vague because of "the danger of arbitrary and discriminatory enforcement by those charged with enforcement of the ordinance."\textsuperscript{134} Thus, the focus on an object's design in defining paraphernalia is constitutionally impermissible, for it fails to provide adequate notice of what objects are prohibited.

\textit{Intended For Use.---}The court in Record Revolution No. 6, Inc. \textit{v. City of Parma} could not sever the "designed for use" phrase from the statutory definition.\textsuperscript{135} Had it been able to do so, the remaining definition of drug paraphernalia would have included objects "used or intended for use" with illegal drugs. Although the \textit{Parma} court did not reach the question, its vagueness analysis of the phrase "designed for use" is equally applicable to the phrase "intended for use."

In \textit{Weingart v. Town of Oyster Bay},\textsuperscript{136} the District Court for the Eastern District of New York interpreted the phrase "intended to be used" which appeared in a local drug paraphernalia ordinance. The court held that, "whether it be the seller's intent or the buyer's intent, or even the manufacturer's intent, the ordinance still is unconstitutional."\textsuperscript{137} The controlling intent could not be that of the manufacturer or the retailer, since each had the same intention: to make money. Even if the manufacturer designed an item for certain purposes, "[h]is intention is a different factor and undoubtedly like that of the retailer is an intention to make a dollar."\textsuperscript{138} The court was not satisfied with the buyer's intent because the buyer's state of mind would then determine the propriety of the seller's action. The court explained that "[a]n ordinance which places upon the seller the burden of substantial fines if the purchaser's intention is drug-related, would be unconstitutional under the principle of \textit{Coats [sic]}

\begin{thebibliography}{133}
\bibitem{133} \textit{Id.} at 381.
\bibitem{134} \textit{Id.} at 381-85.
\bibitem{135} 638 F.2d at 932. \textit{See also} text accompanying notes 125-130 \textit{supra}.
\bibitem{136} No. 79-C-2932 (E.D.N.Y. Dec. 17, 1979).
\bibitem{137} \textit{Id.}, slip op. at 15.
\bibitem{138} \textit{Id.} at 16.
\end{thebibliography}
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against Cincinnati.\textsuperscript{139} Although no other court has addressed the issue, the analysis of "designed for use" that the Eastern District followed appears sound and should be equally applicable.

Keeping in mind that the sections of paraphernalia legislation defining prohibited items may be unconstitutionally vague, the laws may still be saved by application of the well-recognized rule that purposeful or willful action in violation of a statute removes the need for notice, since a prospective defendant who knows his conduct is illegal is already on notice.\textsuperscript{140} Several federal district courts have invoked this rule in their analysis of paraphernalia statutes, thereby sustaining the laws against vagueness challenges.\textsuperscript{141} The courts, however, remain divided as to what language will properly define a purposeful or willful action requirement. Many of the paraphernalia laws attempt to fulfill this requirement with the phrase "under circumstances where one reasonably should know"\textsuperscript{142} or similar language, but the attempt is not always successful.\textsuperscript{143}

None of the three laws considered — the Model Act, the New York law, or the Hoffman Estates Ordinance — has discovered a constitutionally viable method to distinguish between prohibited and permissible uses of would-be drug paraphernalia. In an attempt to solve the vagueness problem, legislation was drafted that defined violations in terms of both an act requirement and a mens rea: Both possession of items of paraphernalia and some form of mental state would now be necessary to violate the paraphernalia laws. While many statutes that also employed a constructive knowledge element were voided, two courts actually upheld the "reasonably should

\textsuperscript{139} Id. The decision in Weingart was rendered orally from the bench. Id. at 3. Judge Pratt was referring to Coates v. City of Cincinnati, 402 U.S. 611 (1971).

\textsuperscript{140} See Screws v. United States, 325 U.S. 91, 102 (1945).


Knowledge.—In Delaware Accessories Trade Association v. Gebelein, the court found that a “reasonably should know” provision did not require a merchant to judge the buyer’s purpose from the surrounding circumstances, although it put the dealer on notice that his conduct must conform to the law. The court concluded that “[t]he seller is safe as long as . . . the objective facts that are there for him to observe do not give fair notice that illegal use will ensue.”

Employing a slightly different analysis, in World Imports, Inc. v. Woodbridge Township, another court found that the “reasonably should have known” standard was essentially the equivalent of an actual knowledge standard, since the same evidence would be necessary to prove intent in both cases. Without a confession, knowledge could be found only by evidence showing that a defendant must have known of an object’s impermissible use.

Yet recent discussion by the Sixth Circuit, approving the analysis of the federal district court in New Jersey, suggests that the constructive knowledge approach does not solve the vagueness problem. In Knoedler v. Roxbury Township, the district court had considered a paraphernalia ordinance containing the phrase “has reasonable cause to believe” and found it lacked constitutional specificity. The court explained:

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\text{[T]he seller faced with the Roxbury ordinance has to . . . determine what the customer intends to do with the items of purchase. Certainly in a case where the purchaser announces his or her intention to utilize the paraphernalia purchased for an illegal purpose, the seller would be placed in no dilemma; however, the question arises as to what would create a reasonable belief in the mind of the seller in the absence of such an unlikely announcement by the purchaser. Does the purchaser’s age, sex, mannerisms or dress afford to a seller reason to believe that the paraphernalia will be used for an illegal purpose? Or should the nature of the purchaser’s companions or the items he or she carries be determinative? These questions indicate the difficulty that a merchant, as well as a law enforcement officer, would have, in the absence of an admission by}
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145. Id. at 294.
147. Id. at 433.
148. Id.
the purchaser, in determining what gives rise to a reasonable belief that a purchaser intends to utilize the paraphernalia for an illegal purpose. An additional concern is whether it is proper to charge an owner of a department store, or any other store, with responsibility for a sales clerk’s determination as to whether the person purchasing an item, especially an innocuous one such as a weight scale or a spoon, intends to utilize it for improper and illegal purposes.\textsuperscript{160}

In \textit{Record Revolution No. 6 Inc. v. City of Parma}, the Sixth Circuit also found the “reasonably should have known” standard unconstitutionally vague. Citing the \textit{Knoedler} result with approval, the court concluded that “[d]efining the offense of knowingly distributing drug paraphernalia in terms of the weakness of an individual’s ability to perceive rather than his criminal intent provides insufficient guidance to the distributors covered by this subsection and to those persons charged with the responsibility of enforcing it.”\textsuperscript{161}

The New York law varies slightly from other paraphernalia laws by employing the phrase “under circumstances evincing knowledge”\textsuperscript{165} to define the specific intent required. Under this definition, the crucial question becomes: In what circumstances does knowledge become manifest? As previously explained, New York provides no answers to the question.\textsuperscript{168} Hence, merchants and enforcement officials are faced with the difficult determination of what gives rise to “circumstances evincing knowledge” that a purchaser intends to use an object with illegal drugs. Without an admission by a purchaser or merchant, the enforcement officers and the courts are left with insufficient guidance under New York’s constructive knowledge standard.

In \textit{Franza}, the court interpreted this constructive knowledge standard to be the same as the “reasonably should know” standard in the Model Act.

Under this standard, the numerous state and local officials charged with enforcing the statute are told that a violation occurs when the “circumstances” indicate that the seller reasonably should know the drug-related purpose of an item rather than when the seller actually intends the item to be used for a drug-related purpose or knows of its ultimate drug-related use.\textsuperscript{164}

The court then identified the problem: “While the definition of drug

\textsuperscript{150} Id. at 993.
\textsuperscript{151} 638 F.2d at 936.
\textsuperscript{152} N.Y. GEN. BUS. LAW, § 851; see text accompanying notes 56-71 supra.
\textsuperscript{153} See text accompanying notes 65-66 supra.
\textsuperscript{154} 518 F. Supp. at 341 (footnote omitted).
paraphernalia focuses on the intent of the individual charged, thereby giving him notice of the prohibited conduct, a violation of [the New York law] depends upon undefined circumstances that leave enforcement officials and courts free to find violation on an ad hoc basis." This situation was determined by the court to be unconstitutional vagueness.\footnote{158}

The Hoffman Estates ordinance\footnote{157} requires no intent or mens rea. Instead,

\[\text{[t]he} \ldots \text{guidelines purport to define the type of} \ldots \text{approach that is indicative of the sale of items for use in conjunction with illegal drugs} \ldots \text{[I]t appears that displaying almost any item in the proximity of "literature encouraging illegal use of} \ldots \text{drugs" requires the store to obtain a license and have, i.e., purchasers sign the register} \ldots \text{Perhaps the village would not construe the ordinance in this manner. But the point is that there is no way for a seller to determine which particular items or arrangement of merchandise will require a license.}^{158}\]

Therefore, the Hoffman Estates ordinance was found unconstitutionally vague.\footnote{160}

\textit{Overbreadth}

Vagueness is not the only constitutional infirmity of drug paraphernalia legislation. "The concept of ‘overbreadth’ applies where the language of a statute or ordinance, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution."\footnote{160} As with vagueness, overbreadth is grounded in the due process clause of the fourteenth amendment.\footnote{161} Although these two doctrines overlap to some extent, vagueness is concerned primarily with statutory failure to provide fair notice of what is prohibited, while overbreadth focuses on statutory deprivation of fundamental rights.\footnote{162} Since "the thrust of overbreadth reasoning is \ldots to emphasize undue deterrence of protected activities by whatever type of

\begin{footnotes}
\item[155.] \textit{Id.} at 341-42.
\item[156.] \textit{Id.} at 338.
\item[157.] Hoffman Ordinance, \textit{supra} note 72, Appendix B, p. 277 \textit{infra}.
\item[158.] The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d at 382-83.
\item[159.] \textit{Id.} at 386.
\item[160.] Note, \textit{supra} note 91, at 854.
\item[161.] Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297, 1304 (D. N.J. 1979); see Note, \textit{supra} note 91, at 853.
\end{footnotes}
burden," no distinction is made between penal and civil laws.

Paraphernalia laws face overbreadth problems when they attempt to regulate items having lawful uses merely because they also have prohibited uses. Rolling papers provide an excellent illustration of this problem. While they have been legally used to make tobacco cigarettes since they were first marketed, every drug paraphernalia law arguably regulates them because they can be used for rolling marijuana cigarettes.

In the past, overbreadth was strictly a first amendment doctrine, invalidating laws that restricted the exercise of first amendment freedoms. A prerequisite to operation of the doctrine was the invasion of a constitutionally protected right. Thus, the question arises of which constitutionally protected right is involved in the regulation of sales of items for general use. Are they first, fourth, or fourteenth amendment rights, or rights derived from the commerce clause? The case law does not indicate that any of these rights are invaded by regulating the sales of these items, inasmuch as an invasion of any of these rights would have been independent grounds sufficient to strike down paraphernalia laws. Apparently ignoring this analytical question, the courts have recently expanded the scope of overbreadth by applying it to drug paraphernalia laws.

In Record Revolution No. 6, Inc. v. City of Parma, the Sixth Circuit described the overbreadth doctrine as “prohibit[ing] a statute from making innocent or constitutionally protected conduct criminal. . . . The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct.” The court held that three challenged paraphernalia laws based on the Model Act were unable to “specify clearly the very limited circumstances in which the manufacture, sale, or use of . . . common items is unlawful;” as a result, they were unconstitutionally overbroad.

In Bambu Sales, Inc. v. Gibson, the court took a more traditional approach to the overbreadth issue, looking for an invasion of constitutionally protected rights. In Bambu Sales, the constitutionally protected right to engage in interstate commerce was allegedly

163. Note, supra note 91, at 854 (footnote omitted).
165. 638 F.2d at 927 (citations omitted).
166. Id. at 928.
167. Id. at 932.
HOFSTRA LAW REVIEW

invaded by a Newark ordinance prohibiting the sale, display, and advertisement of, *inter alia*, plaintiff's rolling papers.\(^{169}\) Since the statute focused exclusively on the intent of the purchaser, the ordinance was found to be overly broad as applied to any other class of defendants in the marketing chain.\(^{170}\)

The major distinction between *Bambu Sales* and contrary case law is that the Newark ordinance contained no specific intent requirement, but only the general phrase "designed for or ordinarily used in."\(^{171}\) This distinction is quite significant because the inclusion of a mens rea element in an offense is often enough to save the law.\(^{172}\)

In *Record Head Corp. v. Sachen*,\(^{173}\) the court expanded upon the *Bambu Sales* overbreadth analysis in finding a Wisconsin ordinance unconstitutional:

Most "drug paraphernalia" ordinances share the same basic problem. They attempt to regulate the sale of articles having legal as well as illegal uses. This makes [the ordinance] overly broad as well as vague. . . . Mere possession is ordinarily not sufficient to raise a presumption of intent to use a thing for an unlawful purpose. . . . Even if a person sells lawful goods to someone he knows intends to use them illegally, the seller is not necessarily guilty of a crime. . . . The act of sale is not enough to prove the seller's intent to engage in the buyer's intended illegal act. Thus, [the ordinance] threatens the innocent seller of "instruments" with criminal penalties for mere possession, even though the person who intends to use the items unlawfully suffers nothing for his possession.\(^{174}\)

Similarly, a persuasive argument can be made for finding New York's drug paraphernalia law overly broad. As previously dis-

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169. The plaintiff was the sole distributor of cigarette papers imported from Spain and marketed under the name "Bambu." *Id.* at 1298.

170. *Id.* at 1305. The court compared the regulation of drug paraphernalia to the regulation of alcoholic beverages. In that field, concern for the public welfare is so significant and governmental power to regulate alcoholic beverages is conceded virtually limitless, that no individual constitutionally protected rights have been recognized. *Id*. The court held, however, that "[i]t would be constitutionally overbroad to denounce the advertising, display, sale or offer to sell such articles as potatoes, barley, corn, sugar, molasses, and yeast merely because these articles, as well as any other starch or sugar, can be fermented or used in fermentation to manufacture alcoholic beverages." *Id.*


174. *Id.* at 92 (citations omitted) (footnotes omitted).
cussed, New York's law contains only a constructive knowledge requirement—"under circumstances evincing knowledge." If this intent element were severed from the law, it would then contain no culpable mental state. There would also then no longer be any distinction between the New York law and the unconstitutionally broad Newark ordinance in Bambu Sales. Even if the constructive knowledge requirement is not severed, the Parma analysis would be equally applicable to the New York law, because the statute fails to specify the limited circumstances under which the possession or sale of drug paraphernalia is unlawful.

Although the Sixth Circuit did not reach the overbreadth issue in analyzing the Hoffman Estates ordinance, the question was addressed by the court below. By focusing on the statutory definition of drug paraphernalia, the court found the ordinance constitutionally permissible:

[T]he language of the ordinance is carefully designed to reach only that activity which the village may legitimately regulate—the sale of paraphernalia designed or marketed for use with illegal drugs. Plainly, by no construction of the Constitution has the plaintiff any right to sell, either in the village of Hoffman Estates or anywhere else, any "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs..." The ordinance does not regulate any activity beyond this, and thus is not overbroad.

Since the circuit court found that this language did not define drug paraphernalia in a constitutionally permissible fashion, the district court's reliance on the statutory definition was misplaced. Keeping in mind that the Hoffman Estates ordinance lacks any requirement of a seller's intent, the Bambu Sales analysis and its expansion by the court in Record Head are clearly applicable to the Hoffman Estates ordinance. They suggest that the Hoffman Estates ordinance is overly broad in its present form.

MODEL DRUG PARAPHERNALIA LAW

Although the regulatory nature of the Hoffman Estates ordinance represented a step in the right direction, the law itself was

175. See text accompanying notes 53-71 supra.
176. See text accompanying notes 165-167 supra.
overly ambitious in scope and far too technical. Inasmuch as the lawmaker's real concern is the paraphernalia industry's encouragement of drug abuse by young people,\textsuperscript{178} a possible solution is a regulatory scheme aimed directly at sales transactions between retailers and minors.

A model for such a scheme can be found in state regulation of the liquor industry. In New York, for example, liquor retailers must be licensed, and sales to minors are prohibited.\textsuperscript{179} Failure to comply with this prohibition can result in license suspension, revocation,\textsuperscript{180} substantial fines, and/or jail terms.\textsuperscript{181}

In the drug paraphernalia context, a major stumbling block has been the task of defining prohibited items in a constitutionally permissible manner. One solution to this problem would be to limit the scope of the regulation to smoking implements. Since most states already prohibit the sale of tobacco products to minors,\textsuperscript{182} they cannot possess these items for any lawful purpose.

There are two reasons for comparing this proposed Model Drug Paraphernalia Law to the liquor, rather than the current tobacco, restrictions. First, prohibitions of tobacco sales to minors have been ineffectual due largely to lack of enforcement. The liquor industry, however, is strictly monitored, not only by local law enforcement, but often by specialized agencies such as New York's State Liquor Authority and local Beverage Control Boards.

Second, the minimal penalties for selling cigarettes to a minor would not be a deterrent in the multimillion dollar paraphernalia industry. In fact, more substantial fines than in the liquor industry would be necessary, since revocation of a license to sell liquor puts the retailer out of business, while revocation of a license to sell smoking implements may affect only 10% of a retailer's gross sales. Enormous fines and jail terms are the necessary incentives for compliance and enforcement.

The other major difficulty in prior legislation — the mental state requirement — would be obviated in this scheme because the only intent necessary to violate the statute would be the retailer's

\textsuperscript{178} Drug Paraphernalia Hearing, supra note 1, at 87 (prepared statement of Peter B. Bensinger).

\textsuperscript{179} N.Y. ALCO. BEV. CONT. LAW §§ 63-65 (McKinney 1970).

\textsuperscript{180} Id. § 17(3).

\textsuperscript{181} N.Y. PENAL LAW § 260.20(5) (McKinney 1980).

The benefits to be derived from this regulatory scheme are substantial. First, licensing requirements will virtually eliminate rampant street peddling of paraphernalia. Second, community pressure, in economic form, can be brought to bear on the few merchants who might be willing to be branded sellers of paraphernalia. Most important, this scheme will erect a barrier between the paraphernalia industry and our nation’s youth, and will end the conflicting signals that drugs are harmful but the tools to utilize them are acceptable.

A valid statute should avoid constitutional difficulties of vagueness and overbreadth and can be further justified by the additional layer of presumed constitutionality when protecting minors. While retaining the substance and direction of drug paraphernalia legislation, the following statute should pass constitutional muster:

MODEL DRUG PARAPHERNALIA LAW

Section 1: Definitions

As used in this Act, unless the context clearly requires otherwise, the following words and phrases shall have the meanings ascribed to them in this section.

(A) “Smoking Implements” includes the three varieties of devices used for smoking as defined herein, namely pipes, water pipes, and rolling papers.

(B) “Pipe” means a tube with a small bowl at one end used or designed for smoking.

(C) “Water Pipe” means a pipe in which smoke is inhaled through liquid to cool the smoke.

(D) “Rolling Papers” are gummed cigarette-size papers, treated to burn slowly, used for encircling any substance to be smoked.

(E) “Minor” means any person actually or apparently under eighteen (18) years of age.

(F) “Sale” means any transfer, exchange, or barter in any manner or by any means whatsoever for consideration, and includes all sales made by any person, whether principal, proprietor, agent, servant, or employee.

Section 2: Licensing

(A) Any person as principal, clerk, agent, servant, or employee who sells smoking implements must first obtain a license to do so.

(B) Applications for a license to sell smoking implements may be obtained from the Department of State.
Along with the application, applicants shall submit affidavits that the applicant and each and every employee authorized to sell such items has never been convicted of a drug-related offense. Licenses will not, under any circumstances, be issued to a minor.

All licenses must be renewed annually unless the licensee has been convicted of a drug-related offense. Any licensee convicted of a drug-related offense must immediately report such conviction to the Department of State for reconsideration of their licensing application.

Section 3: Offenses.

(A) It shall be unlawful for any person or persons as principal, clerk, agent, servant, or employee to sell smoking implements without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

(B) It shall be unlawful for any principal to allow an unlicensed clerk, agent, servant, or employee to sell smoking implements.

(C) It shall be unlawful for any person or persons as principal, clerk, agent, servant, or employee to sell smoking implements to a minor.

(D) It shall be unlawful for a minor to represent that he or she is of age for the purpose of asking for, purchasing, or receiving smoking implements. No minor shall attempt to purchase smoking implements from any person. No minor shall possess smoking implements.

(E) It shall be unlawful for any person to misrepresent the age of a minor for the purpose of inducing the sale of smoking implements to a minor. No person shall buy or give smoking implements to a minor.

Section 4: Penalties

Any violation of this Act shall be deemed a misdemeanor. Each day that such violation shall continue shall be deemed a separate and distinct offense.

(A) Any person found in violation of § 3(A), (E) of this Act shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) and/or imprisoned for not more than one (1) year.

(B) Any person found to be in violation of § 3(B)-(C) of this Act shall have their license revoked and be fined not less than five hundred dollars ($500.00) nor more than one thousand dollars
($1,000.00) and/or imprisoned for not more than one (1) year.

(C) Any person found to be in violation of § 3(D) of this Act shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00).

CONCLUSION

While drug abuse among this nation’s youth is certainly a matter of legitimate state concern, present drug paraphernalia laws are not a well-tailored solution to the problem. As has been demonstrated, such legislation is too frequently both unconstitutionally vague and overly broad.

This note suggests a new approach—a carefully drafted regulatory scheme based on the familiar liquor laws—which will prohibit the sale of smoking implements to minors. This proposal addresses the core concern which prompted legislative action—the need to curb teenage drug abuse—without the constitutional difficulties which plagued earlier attempts to control the burgeoning paraphernalia industry.

Elizabeth Luckow
APPENDIX A
MODELL DRUG PARAPHERNALIA ACT*

ARTICLE I
(Definitions)

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

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

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species 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, 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) Dilutents 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;

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* Drug Enforcement Administration, U.S. Dep't of Justice, Model Drug Paraphernalia Act (Aug. 1979). The Act has been reprinted here without the comments prepared by the Drug Enforcement Administration.
DRUG PARAPHERNALIA LEGISLATION

(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 the object, as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug Paraphernalia;
(7) Instructions, oral or written, provided with the object concerning its use;
(8) Descriptive materials accompanying the object which explain or depict its use;
(9) National and local advertising concerning its use;
(10) The manner in which the object is displayed for sale;
(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
(12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;
(13) The existence and scope of legitimate uses for the object in the community;
(14) Expert testimony concerning its use."

ARTICLE II
(Offenses and Penalties)

SELECTION (designations of offenses and penalties section) of the Controlled Substances Act of this State is amended by adding the following after (designations 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.
APPENDIX B

HOFFMAN ESTATES ORDINANCE*

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, . . . which additional section shall read as follows:

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 therefor. 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 requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

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

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

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

Section 2: That the Hoffman Estates Municipal Code be amended by adding [to the section on] 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.

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 cannabis 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.
