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Resolving Statutory Ambiguity with a Split Scienter Approach: The Second Circuit's Approach to the Federal Mail Order Drug Paraphernalia Act

Theresa A. Kleine-Kracht
University of Kentucky

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INTRODUCTION

In an effort to combat the problem of drug abuse in the United States, Congress enacted the Mail Order Drug Paraphernalia Control Act ("MODPCA")[1] as part of the Anti-Drug Abuse Act of 1986.[2] The purpose of the MODPCA was to eliminate the "scourge of drug abuse"[3] afflicting the United States by "reemphasizing that society continues to oppose any glamorization or acceptance of dangerous drug use."[4]

The source for much of the language used in the MODPCA is the Model Drug Paraphernalia Act ("MDPA").[5] The MDPA[6] was formulated in 1979 to assist state legislatures in constructing drug paraphernalia legislation that could withstand constitutional challenges.[7] Similarly, the drafters of the MODPCA attempted to ensure that that Act would pass constitutional muster in the federal courts.[8] In choosing the language for the MODPCA, however, the drafters deviated significantly from the

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[1] 21 U.S.C. § 857 (1986) (repealed in 1990 and reenacted as 21 U.S.C. § 863 (Supp. I 1990)). The 1990 Act adopted almost verbatim the language of the 1986 Act. The only differences between the two are that the current statute 1) dropped the predecessor's scheme requirement and 2) applies to all sales of drug paraphernalia, including intrastate dealings.

[2] Pub. L. No. 99-570, 100 Stat. 3257 (1986) (current version at 21 U.S.C. § 801 (Supp. I 1990)).

[3] *Mail Order Drug Paraphernalia Control Act, 1986: Hearings on H.R. 1625 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 15 (1986) [hereinafter *Hearings*] (statement of Congressman Mel Levine).

[4] *Id.* at 18.

[5] *Id.* at 15 ("H.R. 1625, drafted closely after the Model Drug Paraphernalia Act, deliberately incorporates much of the same language that is contained in the Act.").

[6] DRUG ENFORCEMENT ADMINISTRATION, MODEL DRUG PARAPHERNALIA ACT (1979) [hereinafter MDPA].

[7] *See* Gregory R. Veal, Note, *The Model Drug Paraphernalia Act: Can We Outlaw Head Shops–And Should We?*, 16 GA. L. REV. 137, 139 (1981).

[8] *See Hearings*, *supra* note 3, at 15.

language of the Model Drug Paraphernalia Act. This difference in the language of the two statutes has prompted extensive judicial debate.

The most noticeable difference between the MDPA and the MODPCA is that the MODPCA, as set forth and eventually adopted as H.R. 1625 in 1986, does not contain the subjective scienter language used in the MDPA. The MDPA provides: "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, cultivating . . . inhaling, or otherwise introducing into the human body a controlled substance in violation of this Act."[9] In contrast, both the 1986 and 1990 versions of the MODPCA state only that the term "drug paraphernalia" encompasses "that which is *primarily intended or designed for use* in manufacturing, compounding, converting, concealing . . . inhaling, or otherwise introducing into the human body a controlled substance . . . ."[10]

The discrepancy between the language of the MDPA and that of the MODPCA has resulted in a split among the federal circuit courts over the proper interpretation of the MODPCA. Specifically, the federal circuit courts have disagreed over whether the MODPCA involves an objective, subjective, or split scienter requirement. The Eighth Circuit found that the MODPCA requires proof of an objective scienter.[11] In contrast, the Tenth and Sixth Circuits have concluded that the language of the MODPCA evinces a purely subjective scienter requirement.[12] Finally, the Third and Second Circuits have concluded that the MODPCA requires a split scienter approach.[13]

This Note initially examines the statutory language[14] and the legislative history of the MODPCA.[15] Next, the Note presents the three approaches taken by the Eighth, Tenth, Sixth, Third and Second Circuits in interpreting the scienter language of the MODPCA.[16] The Note then proposes that the split scienter approach adopted by the Second Circuit in *United States v. Schneiderman*[17] should be followed absent a clarifica-

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[9] *Id.* at 181 (emphasis added) (citing MDPA, art. I).

[10] 21 U.S.C. § 857(d) (1986); 21 U.S.C. § 863(d) (Supp. I 1990) (emphasis added).

[11] *See* United States v. Posters 'N' Things, Ltd., 969 F.2d 652, 658 (8th Cir. 1992).

[12] *See* United States v. Murphy, 977 F.2d 503, 505-06 (10th Cir. 1992); United States v. 57,261 Items of Drug Paraphernalia, 869 F.2d 955, 957-58 (6th Cir.), *cert. denied*, 493 U.S. 933 (1989).

[13] *See* United States v. Mishra, 979 F.2d 301, 308 (3d Cir. 1992); United States v. Schneiderman, 968 F.2d 1564, 1566-67 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174).

[14] *See infra* notes 19-23 and accompanying text.

[15] *See infra* notes 24-36 and accompanying text.

[16] *See infra* notes 38-133 and accompanying text.

[17] 968 F.2d 1564 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174).

tion of the issue by Congress or the United States Supreme Court.[18] Of the three interpretations of the scienter requirement, the split scienter approach articulated and applied in *Schneiderman* represents the most accurate reading of the statutory language and the legislative history of the MODPCA, and most closely comports with the goals of the Act.

I. THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF THE MODPCA

The MODPCA makes it illegal for any person to "sell or offer for sale . . .; to use the mails . . . to transport . . .; or to import or export drug paraphernalia."[19] The term "drug paraphernalia" is defined as "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding . . . inhaling, or otherwise introducing into the human body a controlled substance . . . ."[20] To assist courts in interpreting this language, the MODPCA lists fifteen items of drug paraphernalia that exemplify those that are "primarily intended or designed for use" with illegal drugs. This list ranges from multi-use items such as wired cigarette papers to "hard-core" items such as cocaine freebase kits.[21] The MODPCA also identifies eight "objective" criteria that may be considered in determining whether a particular item qualifies as drug paraphernalia.[22] Finally, the MODPCA identifies two exemptions from application of the Act. First, "any person authorized by local, State or Federal law to manufacture, possess, or distribute such items" is exempt from the statute. Second, "any item . . . traditionally intended for use with tobacco products" is exempt from the definition of "drug paraphernalia."[23]

The legislative history of the MODPCA consists of only one hearing before the Subcommittee on Crime of the House Committee on the Judiciary.[24] Although some "ambiguity" is evident from the hearing testimony,[25] the testimony strongly supports a split scienter ap-

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[18] *See infra* notes 134-59 and accompanying text.

[19] 21 U.S.C. § 863(a)(1)-(3) (Supp. I 1990).

[20] 21 U.S.C. § 863(d).

[21] 21 U.S.C. § 863(d)(1)-(15).

[22] 21 U.S.C. § 863(e).

[23] 21 U.S.C. § 863(f).

[24] *Hearings*, *supra* note 3, at 15.

[25] *See* United States v. Posters 'N'Things, 969 F.2d 652, 657 n.3 (8th Cir. 1992); United States v. Dyer, 750 F. Supp. 1278, 1288 (E.D. Va. 1990) ("'[S]tray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill.'") (citations omitted).

proach.[26] The term "split scienter" refers to an approach that applies either an objective or a subjective scienter standard, depending on the type of drug paraphernalia at issue.[27] Cases involving hard-core drug paraphernalia require an objective scienter showing, while cases involving multiple-use items–items with both legal and illegal uses–require a subjective scienter showing.[28]

The individuals testifying in the congressional hearing consistently cited the "designed for use" language of the MODPCA as mandating an objective scienter standard. For example, Representative Bill McCollum, in questioning Representative Mel Levine, a major proponent of H.R. 1625, stated: "[I]t seems very clear that the word 'designed,' would be very narrow . . . . If the cigarette papers were designed for the purpose of use in the drug manufacturing or the inhaling or the use controlled [sic] substances or whatever, that is fairly clear."[29] The term "designed" signified to McCollum that the objective features and purposes of the item alone would be enough to establish the requisite mens rea for the offense.[30] This same approach was endorsed by Harry Myers,[31] general counsel for the Drug Enforcement Administration, when he spoke of a bong as an example of hard-core drug paraphernalia. Myers stated: "[Y]ou could find a contrived use for this, . . . [b]ut actually this is hard-core drug paraphernalia. You don't have to refer to the merchant's intent, or the manufacturer's intent, or the guy–this item is designed for use to smoke marijuana."[32]

In contrast to the discussion of the "designed for use" language in the MODPCA, discussion of the Act's "intended . . . for use" language[33] focused on the defendant's subjective intent. The dialogue between McCollum and Levine included the following exchange:

> MR. McCOLLUM. What isn't clear is the fact that you have got another word in there "primarily intended for use."

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[26] *Hearings*, *supra* note 3, at 17 (statement of Mr. Levine).

[27] *See* United States v. Schneiderman, 986 F.2d 1564, 1566-67 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174). Although not identifying the separate intent requirements as "split scienter," the court recognizes that paraphernalia "primarily intended" for use with drugs must be accompanied by the subjective intent of the defendant. On the other hand, where items are "designed for use" with illegal drugs due to their "objective features," such features establish *per se* that they are "designed for use" and the scienter element is met. *Id.*

[28] *See Posters 'N' Things*, 969 F.2d at 656-57.

[29] *Hearings*, *supra* note 3, at 47 (remarks of Rep. Bill McCollum).

[30] *See id.*

[31] The witness' name is spelled as both "Meyers" and "Myers" in the *Hearings*. For the purposes of this Note, he will be referred to as Harry "Myers".

[32] *Hearings*, *supra* note 3, at 68 (testimony of Harry Myers, General Counsel, Drug Enforcement Administration).

[33] 21 U.S.C. § 863(d).

> Do you mean to say that intended, even though it was designed for multiple uses, that at the time, the seller . . . [intended] that [drug paraphernalia] be used for the purposes described? Is that the intent the prosecutor would have to prove, the intent of the seller?
>
> MR. LEVINE. The purpose of the language in this section both in the model act, and in my legislation is to identify as clearly as possible the intent of manufacture [sic] and the seller to market a particular item as drug paraphernalia, subject to the interpretation of a trial court.
>
> MR. McCOLLUM. An intent on the part of whom; on the part of the seller?
>
> MR. LEVINE. Well, it would depend on who is being prosecuted, if it was the seller, it would be the intent on the part of the seller. It would be the defendant. It would be the intent on the part of the defendant in a particular trial.[34]

It is clear from the above discussion that the drafters of H.R. 1625[35] intended for the seller's subjective intent to market or sell a particular item as drug paraphernalia to be an element of proof in certain cases. The drafters apparently intended for a subjective scienter to apply only in cases involving multiple-use items. Myers' testimony, which supports this conclusion, provided:

> Those types of items that don't have inherent design characteristics, that say that they are intended for use with drugs, you call derivative drug paraphernalia, they can only be controlled by the lawmakers if the person who is charged with an offense can be shown to have intended that item for an unlawful use.
>
> It is not necessary to show that intent for someone who is selling something that is designed for use with drugs.[36]

II. THE CIRCUIT SPLIT: THE OBJECTIVE SCIENTER, SUBJECTIVE SCIENTER AND SPLIT SCIENTER APPROACHES

Soon after the adoption of the MODPCA in 1986, the federal courts were faced with deciphering congressional intent in deviating from the subjective scienter language of the MDPA. The language of the

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[34] *Id.* at 47-48.

[35] *Id.* at 2-5. The text of H.R. 1625 as presented in the *Hearings* contained the exact scienter language later adopted in 21 U.S.C. § 857 (1986), and reenacted in 21 U.S.C. § 863 (Supp. I 1990). Therefore, the argument also applies to the MODPCA as adopted.

[36] *Hearings*, *supra* note 3, at 69 (testimony of Harry Myers).

MODPCA was ambiguous, and the legislative history sparse.[37] In the seminal case relied on by the federal courts, *Village of Hoffman Estates v. Flipside*,[38] the United States Supreme Court let stand a village ordinance requiring "head shop"[39] businesses to obtain a license if they sold items "designed or marketed for use with illegal cannabis or drugs."[40] The Court found that the language "designed for use" was not unconstitutionally vague on its face, because "the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features . . . ."[41] Furthermore, the Court found that the "marketed for use" language saved the ordinance from any vagueness claim, since that language "describes a retailer's intentional display and marketing of merchandise."[42] Hence, the ordinance required a type of subjective scienter on the part of the retailer for those items not designed for use with drugs.[43]

In interpreting and applying the "primarily intended or designed for use" language of the MODPCA, the federal courts had only the *Hoffman Estates* decision and the legislative history of the Act for guidance. By 1992, three distinct interpretations of the scienter language of the Act had developed on the circuit court level. The first of these approaches, the objective approach, interprets the scienter language of the MODPCA as requiring only proof of the objective features of the item. This is the approach taken by the Eighth Circuit.[44] The second approach, the pure subjective approach, requires proof of intent on the part of the defendant to sell the drug paraphernalia prohibited by the Act. The Sixth and Tenth Circuits have adopted this approach.[45] Lastly, the Second and Third

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[37] *See supra* notes 24-36 and accompanying text.

[38] 455 U.S. 489 (1982).

[39] The Supreme Court in *Hoffman Estates* cited the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 606 (1980), in defining the term "head" as a slang term for "[o]ne who is a frequent user of drugs." *Hoffman Estates*, 455 U.S. at 503 n.20.

[40] *Hoffman Estates*, 455 U.S. at 489.

[41] *Id.* at 501.

[42] *Id.* at 502.

[43] *Id.* ("The standard requires scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use.").

For a thorough discussion of the *Hoffman Estates* decision in relation to state drug paraphernalia laws, see Mark T. Davis, *Drug Paraphernalia Laws: Clearing a Legal Haze*, 13 CUMB. L. REV. 273 (1982-83); Michael D. Guinan, Note, *The Constitutionality of Anti-Drug Paraphernalia Laws–The Smoke Clears*, 58 NOTRE DAME L. REV. 833 (1983); Mark A. Richard, Comment, *The Void-for-Vagueness Doctrine in Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.: Revision or Misapplication?* 34 HASTINGS L.J. 1273 (May-July 1983).

[44] *See* United States v. Posters 'N' Things, Ltd., 969 F.2d 652, 658 (8th Cir. 1992).

[45] *See* United States v. Murphy, 911 F.2d 503, 505-06 (10th Cir. 1992); United States v. 57,261 Items of Drug Paraphernalia, 869 F.2d 955 (6th Cir.), *cert. denied*, 493 U.S. 933 (1989).

Circuits have formulated a split scienter approach, which requires a different standard of proof depending on the type of drug paraphernalia at issue.[46] This last approach, specifically the standard set forth by the Second Circuit in *Schneiderman,* is the one this Note endorses as the best approach in light of the language and legislative history of the MODPCA.

A. The Objective Scienter Approach

The objective scienter approach was first formulated by a federal district court in Virginia in *United States v. Dyer*.[47] In *Dyer*, eighteen defendants who were charged with various violations of the MODPCA challenged the statute as unconstitutionally vague. The court in *Dyer* dealt with this challenge by stating that the phrase "designed for use" indicated that Congress intended an objective scienter standard.[48] Indeed, the language of the statute "indicates that objective evidence will satisfy the statutory scheme, for the 'design' of an item can only be analyzed by reference to its objective physical characteristics."[49]

In regard to the MODPCA's structure, the court found the design of the statute to be "inconsistent with a purely subjective standard."[50] The court then rejected the legislative history of the statute as being "ambiguous" and, as a whole, contradictory.[51] Finally, the court noted that the purpose of the MODPCA, which is to facilitate a "frontal assault" on the drug industry by reaching as much drug paraphernalia as possible, would be better advanced by an objective approach than by a subjective approach, because it is easier to prove objective intent.[52] The fact that many items of drug paraphernalia are multi-purpose items did not hinder the court's

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[46] *See* United States v. Mishra, 979 F.2d 301, 308 (3d Cir. 1992); United States v. Schneiderman, 968 F.2d 1564, 1566-67 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174).

[47] 750 F. Supp. 1278, 1283-94 (E.D. Va. 1990).

[48] *Id.* at 1285.

[49] *Id.* (noting that the statutory language may be used to identify items of "hard-core" significance, such as a bong). As additional support for its conclusion, the court noted that the listing of the fifteen items in § 863(d) would be unnecessary if a defendant's subjective intent were required, and that § 863(e) lists only objective criteria. *Dyer*, 750 F. Supp. at 1286. The fact that wooden pipes are also listed within § 863(d)(1) did not create a problem for the *Dyer* court since § 863(e) resolves any ambiguity by exempting items "traditionally" used with tobacco. *Dyer*, 750 F. Supp. at 1286.

[50] *Dyer*, 750 F. Supp. at 1287. The entire structure of the MODPCA focuses on the *item* of drug paraphernalia, rather than any subjective purpose of the defendant. 21 U.S.C. § 863 (Supp. I 1990).

[51] *Dyer*, 750 F. Supp. at 1288-89. The court noted several problems with giving the legislative history "any weight" such as: 1) the absence of committee reports; 2) ambiguities in Levine's testimony; and 3) the fact that not all of the testimony asserts a purely subjective approach. *Id.* These problems are eliminated by using a split-scienter approach.

[52] *Id.* at 1293.

conclusion, because these items, too, "can only be identified as drug paraphernalia by means of objective factors."[53] In conclusion, the court summarized the objective standard by stating:

> It is enough that the government . . . prove beyond a reasonable doubt that the charged items, by virtue of their objective characteristics, manner of sale, advertising and the like, are §857 drug paraphernalia and that defendant was aware of the general character and nature of the items. . . . [The jury] need not find that a defendant subjectively intended that a charged item be used with illegal drugs in order to convict.[54]

A similar interpretation was adopted by the Eighth Circuit in *United States v. Posters 'N' Things, Ltd.*[55] The defendants in *Posters* appealed their convictions for selling drug paraphernalia,[56] claiming that the MODPCA violated their Fifth Amendment due process rights. Specifically, the defendants claimed that, because the MODPCA does not include an express subjective scienter requirement for conviction, the statute creates a strict liability offense.[57] The Eighth Circuit rejected the defendants' claim, finding instead that the MODPCA contains an objective scienter requirement similar to the one established in *United States v. Dyer*.[58]

In reaching its conclusion, the *Posters* court first noted that a traditional subjective scienter approach would place too great a burden on the government in obtaining convictions.[59] Moreover, the court found nothing in the language of the MODPCA to indicate that Congress intended a purely subjective scienter requirement.[60] Indeed, the court determined that the phrase "primarily intended or *designed for use*" establishes an objective scienter requirement since the term "designed" refers to the objective features of an item of drug paraphernalia, not the intent of the seller or manufacturer.[61] The court

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[53] *Id.* Although it is not clear what the court was referring to, it appears that the "objective factors" are the eight factors listed in 21 U.S.C. § 863(e).

[54] *Dyer*, 750 F. Supp. at 1293.

[55] 969 F.2d 652 (8th Cir. 1992).

[56] *Id.* at 654. The items involved were pipes, bongs, scales, roach clips, and cocaine mirrors.

[57] *Id.* at 656; *see* United States v. Morissette, 342 U.S. 246, 249 (1952) (reiterating the rule that strict liability criminal statutes may only be applied to regulatory offenses or offenses involving a small penalty).

[58] *Posters*, 969 F.2d at 658 (citing *Dyer*, 750 F. Supp. 1278, 1286-87 (E.D. Va. 1990)).

[59] *Id.* at 657; *see also Dyer*, 750 F. Supp. at 1290.

[60] *Posters*, 969 F.2d at 657.

[61] *Id.* at 658 (emphasis added).

found additional support for its conclusion in the language of *Dyer*[62] and in the analysis of the United States Supreme Court in *Hoffman Estates*.[63]

The *Posters* court also looked to other provisions within the MODPCA to support its conclusion. Relying heavily on *Dyer*, the court noted that section 863(d) of the Act,[64] which lists fifteen items that exemplify those primarily intended or designed for illegal purposes, contains only items which by their objective features alone indicate use with illegal drugs.[65] Likewise, the omission of the defendant's subjective intent from section 863(e)'s list of objective criteria to consider in deciding whether a particular item is drug paraphernalia[66] indicates that the defendant's subjective intent is irrelevant.[67] Finally, the court stated:

> [T]he whole structure of section 857 supports an objective scienter reading: first the statute "provides a definition and enumerates examples of drug paraphernalia," then "it sets forth various objective factors to be assessed, followed finally by specific, objectively based exclusions. The entire structure focuses on the items of drug paraphernalia, not on the purposes of the defendant."[68]

The court in *Posters*, like the court in *Dyer*, did not find the legislative history of the statute persuasive as to either the subjective or the objective scienter approach.[69] Although it did "consider" the legislative history, the court stated that it remained "unconvinced . . . [because] what little legislative history exists is either contradictory or of no help in interpreting the statute."[70]

Having found that the MODPCA requires an objective scienter, the *Posters* court addressed the defendants' claim that the statute unconstitutionally creates a strict liability offense. The court rejected the defendants'

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[62] Because these items may be identified by their physical characteristics and design features, there is no need for a demonstration of the defendant's subjective intent. Where the illicit purpose of the manufacturer or designer is embodied in the object itself, that purpose is apparent to all who perceive the object. "All that is required is for persons to open their eyes to the 'objective realities' of the items sold in their businesses." *Id.* (quoting *Dyer*, 750 F. Supp. at 1285 (citations omitted)).

[63] *Id.* (citing Village of Hoffman Estates v. Flipside, 455 U.S. 489, 501 (1982) (The "designed for use" language "encompasses at least an item that is principally used with illegal drugs by virtue of its objective features.")).

[64] 21 U.S.C. § 863(d) (Supp. I 1990).

[65] *Posters*, 969 F.2d at 658.

[66] 21 U.S.C. § 863(e) (Supp. I 1990).

[67] *Posters*, 969 F.2d at 658.

[68] *Id.* (quoting United States v. Dyer, 750 F. Supp. 1278, 1287 (E.D. Va. 1990)).

[69] *Id.* at 657; *see also Dyer*, 750 F. Supp. at 1288-89.

[70] *Posters*, 969 F.2d at 657 n.3.

argument, noting that the MODPCA "does not concern conduct prohibited at common law . . . and, therefore . . . is not unconstitutional simply on the basis that it does not contain a traditional subjective scienter requirement."[71] In support of this conclusion, the court cited several statutory provisions that were held to be constitutional even though they penalized conduct deemed criminal and contained severely modified scienter requirements or no scienter requirement at all.[72]

B. The Subjective Scienter Approach

As more courts were forced to interpret the scienter language of the MODPCA, many variations on a single basic approach, which this Note classifies under the "subjective scienter" approach, evolved. In all of these cases, the courts interpreted the "primarily intended or designed for use" language to require proof of the defendant's intent to sell the items as drug paraphernalia, although the exact burden placed upon the government in proving this intent differed for each court.

The first court to adopt a pure subjective scienter interpretation was the U.S. District Court for the Eastern District of New York in *United States v. Main Street Distributing.*[73] In *Main Street Distributing,* the defendant challenged the constitutionality of the MODPCA on three grounds: (1) the definition of drug paraphernalia was impermissibly vague as applied; (2) the absence of a scienter requirement violates due process; and (3) the burden of proof with respect to intent is unjustifiably shifted to the defendant.[74] The court concentrated on defendant's second claim and rejected it after concluding that the "definitional language of § 857, its legislative history and the interpretation of similar clauses in other statutes" support the imposition of a subjective scienter requirement.[75] The court also stated:

> [Section 857's] focus is simply on a defendant's use of the mails . . . to facilitate transactions involving items that a defendant has designed or

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[71] *Id.* at 659.

[72] *See id.* (citing Hamling v. United States, 418 U.S. 87, 94 (1974) (holding that an obscenity statute does not require the government to prove that the defendant knew that the materials were obscene); Sipes v. United States, 321 F.2d 174, 179 (8th Cir.) (holding that 26 U.S.C. § 5851, which prohibits possession of certain firearms, does not require proof of scienter), *cert. denied,* 375 U.S. 913 (1963)); *see also* States v. Mishra, 979 F.2d 301, 306 (3d Cir. 1992) (citing United States v. Eagle, 806 F.2d 425 (3d Cir. 1986), as supporting a similar conclusion–that the absence of a scienter requirement would not render the MODPCA unconstitutional).

[73] 700 F. Supp. 655, 663-66 (E.D.N.Y. 1988).

[74] *Id.* at 663.

[75] *Id.* at 666.

> intends for use as drug paraphernalia. . . . [S]o long as drug paraphernalia is defined by the *defendant's intent*, there can be no question . . . as to Congress's ability to regulate such conduct. . . .[76]

One year later, in *United States v. 57,261 Items of Drug Paraphernalia*,[77] the Sixth Circuit confronted an issue similar to the one decided in *Main Street Distributing*. In *57,261 Items of Drug Paraphernalia*, the court reviewed two drug paraphernalia cases in which the government sought civil forfeiture of certain drug paraphernalia owned by the defendants. The defendants challenged the action by asserting that the MODPCA was unconstitutionally vague, or, in the alternative, had been misapplied in their cases.[78] The court, relying on *Hoffman Estates*, stated that "it is clear that the federal statute may not be applied under its terms to items intended for innocent use. The statute requires intent . . . . The explicit intent requirement saves the statute from this claim of vagueness."[79] The court then defined the intent requirement, stating that "[t]he statute requires an intent to distribute the items for drug use. The person to whom the statute is being applied . . . must have knowledge that there is a strong probability that the items will be used in this way."[80] Thus, the Sixth Circuit interpreted the statute's "primarily intended or designed for use" language to mandate a subjective scienter showing by the prosecution.[81] The court therefore concluded that the Act, on its face and as applied, is valid, and upheld the defendants' convictions.[82]

In *United States v. 3520 Brighton Boulevard*,[83] the court was confronted with a civil forfeiture action in which the defendants sought dismissal based on the argument that the MODPCA was facially void for vagueness.[84] The *3520 Brighton Boulevard* court, relying on *Hoffman Estates*[85] and basic canons of statutory construc-

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[76] *Id.* (emphasis added).

[77] 869 F.2d 955 (6th Cir.), *cert. denied*, 493 U.S. 933 (1989).

[78] *Id.* at 956.

[79] *Id.* at 957.

[80] *Id.*

[81] *Id. But see* United States v. Dyer, 750 F. Supp. 1278, 1290 (E.D. Va. 1990) (citing *57,261 Items of Drug Paraphernalia* as establishing an objective scienter requirement: "The Sixth Circuit . . . implicitly approved the objective approach when it upheld the district court's conclusion that 'in this country these items are intended for use with controlled substances.'" (citations omitted)).

[82] *57,261 Items of Drug Paraphernalia*, 869 F.2d at 958.

[83] 785 F. Supp. 141 (D. Colo. 1992).

[84] *Id.* at 142 (citing Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982)).

[85] *Id.* at 143 ("[A] law's vagueness may be ameliorated if it requires proof of scienter or mens

tion,[86] determined that the employment of a subjective scienter requirement cures any vagueness present in the MODPCA.[87] The court cited the language and the legislative history of the MODPCA in support of its conclusion that Congress intended a subjective scienter requirement.[88] Based upon these two factors, the court formulated the following standard: "[T]he government must prove that a defendant knew an item to be drug paraphernalia and intended that the item be used for a drug-related purpose before [the government] can establish a violation of § 863."[89] Such a subjective scienter requirement successfully avoids the "trap for the innocent" problem that so often arises with vagueness challenges[90] because, under the subjective scienter approach, a defendant cannot be convicted merely for selling an item that falls under the definition of drug paraphernalia. Instead, the government must prove that the defendant knew and intended the item to be used with illegal drugs.

The Tenth Circuit recently adopted a subjective scienter approach to the MODPCA in *United States v. Murphy*.[91] In *Murphy*, the trial court had dismissed a twelve-count indictment charging the defendants with various violations of the MODPCA. The district court found that the MODPCA was unconstitutionally vague for not providing a scienter requirement.[92] Relying on *United States v. Schneiderman*,[93] the Tenth Circuit reversed, ruling that "a scienter standard is 'implied by the wording of the definitional section.'"[94] Indeed, the court in *Murphy*

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rea, especially with respect to adequacy of notice that given conduct is proscribed." (quoting *Hoffman Estates*, 455 U.S. at 499)).

[86] *Id.* ("The failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law . . . .") (quoting Liparota v. United States, 471 U.S. 419, 426 (1985)).

[87] *Id.* at 144.

[88] *Id.* at 143. The *3520 Brighton Boulevard* court also relied upon the Sixth Circuit's interpretation of the MODPCA in *57,261 Items of Drug Paraphernalia* as requiring "subjective scienter." *Id.*

[89] *Id.* at 144.

[90] *Id.*

[91] 977 F.2d 503 (10th Cir. 1992). A federal district court in Florida, in United States v. Tobacco Emporium, No. 91-227-CR-T-17, 1992 WL 80624 (M.D. Fla. 1992) (unreported opinion), also recently touched upon the scienter issue in deciding the probable cause burden required to establish a violation of the MODPCA. The court stated that "the government must establish a reasonable belief that some person knowingly used the Postal Service . . . as part of a scheme to sell drug paraphernalia and a reasonable belief that the items being sold were items of drug paraphernalia." *Id.* at *2. Thus, the Middle District of Florida would apparently require a showing of subjective scienter.

[92] *Murphy*, 977 F.2d at 504.

[93] 968 F.2d 1564 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174).

[94] *Murphy*, 977 F.2d at 504 (quoting *Schneiderman*, 968 F.2d at 1567).

expressly "adopt[ed] the position of [its] sister circuit" in finding that the MODPCA requires proof of scienter.[95] The court then turned to the task of defining the MODPCA's scienter requirement. Based upon the legislative history, the language of the MODPCA, and the reasoning of the *Schneiderman* court, the *Murphy* court stated: "[W]e find Defendant's arguments insufficient to override the strong presumption that § 857 required proof of criminal intent. We therefore hold that the 'primarily intended' language in § 857(d) constitutes the requisite scienter element of the offense charged."[96] Specifically, the statute requires proof of the "intent of the defendant on trial."[97] Although the court relied on *Schneiderman*, the Tenth Circuit failed to deal with the "designed for use" language of the statute. As a result, the court in *Murphy* in effect interpreted the scienter language of the MODPCA as mandating a pure subjective scienter approach rather than the split scienter approach adopted in *Schneiderman*.[98]

C. The Split Scienter Approach

In *United States v. Schneiderman*,[99] the Second Circuit reversed a federal district court's holding that the MODPCA was unconstitutionally vague.[100] The defendants in *Schneiderman* had moved to dismiss a fourteen-count indictment that charged them with selling and conspiring to sell drug paraphernalia through the use of an interstate conveyance and with laundering and conspiring to launder money.[101] The district court found the omission of the MDPA's intent language from the MODPCA to be a controlling factor in concluding that Congress intended proof of scienter to be unnecessary for a conviction under the MODPCA.[102] In distinguishing the *Hoffman Estates* decision,[103] the district court stated that the drug paraphernalia ordinance in *Hoffman Estates* was "regulatory in nature,"[104] while a criminal statute such as

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[95] *Id.* at 505. The court also cited *Schneiderman* in support of its conclusion that the MODPCA is not vague on its face and as applied. *Id.* at 504 (citing *Schneiderman*, 968 F.2d at 1568).

[96] *Id.* at 505-06.

[97] *Id.* at 506.

[98] *See infra* notes 99-118 and accompanying text.

[99] 968 F.2d 1564 (2d Cir. 1992). *cert. denied*, 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174).

[100] United States v. Schneiderman, 777 F. Supp. 258 (S.D.N.Y. 1991).

[101] *Id.* at 259.

[102] *Id.* at 266.

[103] *See supra* notes 38-43 and accompanying text.

[104] For example, the ordinance at issue in *Hoffman Estates* only imposed a fine of $10.00 to $500.00 for selling drug paraphernalia with a license. Village of Hoffman Estates v. Flipside, 455

the MODPCA requires "a greater degree of specificity."[105] After some discussion of the legislative history and prior case law, the district court then concluded that "the statute is nothing more than a 'convenient tool for harsh and discriminatory enforcement by . . . prosecuting officials, against particular groups deemed to merit their displeasure.'"[106] Accordingly, the district court held that the MODPCA violated the Due Process Clause of the Fifth Amendment.[107]

The Second Circuit rejected the district court's conclusion, stating: "Because we conclude that § 857 includes a scienter requirement, it is not unconstitutional, either on its face or as applied to defendants."[108] Moreover, the court found the "primarily intended or designed for use" language to be indicative of congressional intent to require some showing of mental state, despite the fact that the language of the MODPCA does not conform verbatim with the MDPA's scienter language.[109] In defining MODPCA's scienter requirement, the court essentially proposed a two-category approach.[110] The first category is composed of derivative (i.e., multi-purpose) drug paraphernalia and requires the government to prove subjective scienter on the part of the defendant.[111] The second category involves hard-core drug paraphernalia that by the nature of its objective features "establish *per se* that [it is] designed for use with illegal drugs . . . ."[112]

The *Schneiderman* court found support for this categorical approach to the scienter requirement in the legislative history and prior case law on the MODPCA. Relying in part on Mel Levine's testimony before the House Subcommittee that the language "primarily intended for use" requires intent on the part of the defendant,[113] the court found that a showing of the subjective intent of the person charged with the offense is necessary for derivative items.[114] This subjective scienter requirement involves a showing

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U.S. 489, 492 (1982).

[105] *Schneiderman*, 777 F. Supp. at 270.

[106] *Id.* at 271 (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940))).

[107] *Id.*

[108] United States v. Schneiderman, 968 F.2d 1564, 1565 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174).

[109] *Id.* at 1566. The departure-type reasoning that was successful in the district court, and unsuccessful in the court of appeals, was also used in another Second Circuit case, United States v. Hong-Laing Lin, 962 F.2d 251, 256-57 (2d Cir. 1992), but only to prove that Congress, in expressly listing the fifteen items of drug paraphernalia in 21 U.S.C. § 863(d), did not intend for cocaine vials to be covered under the MODPCA.

[110] *See Schneiderman*, 968 F.2d at 1567.

[111] *Id.*

[112] *Id.*

[113] *Id.* (citing *Hearings*, *supra* note 3, at 47-48); *see supra* note 34 and accompanying text.

[114] *Schneiderman*, 968 F.2d at 1567.

by the government that the "defendant knew there was a strong possibility" that items would be used with illegal drugs, not that "the items would necessarily be used in connection with illegal drugs."[115] In discussing the second category, the court cited *Hoffman Estates* and *Dyer* in support of the proposition that the phrase "designed for use" within a drug paraphernalia statute covers an item that is "'principally used with illegal drugs by virtue of its objective features.'"[116]

Relying on these decisions, the Second Circuit concluded that "if the objective features of an item establish *per se* that it is 'designed for use' with illegal drugs, the scienter element is satisfied."[117] Since the *Schneiderman* court had recognized a scienter requirement for the MODPCA, the defendant's vagueness claims necessarily failed.[118]

In *United States v. Mishra*,[119] the Third Circuit faced a constitutional challenge to the MODPCA similar to the one resolved in *Schneiderman*. Like the court in *United States v. Murphy*,[120] the *Mishra* Court relied to a large extent on *Schneiderman*.[121] In *Mishra*, the defendant entered a conditional guilty plea to a twelve-count indictment but reserved his right to challenge the constitutionality of the MODPCA.[122] On appeal, Mishra argued that the MODPCA was unconstitutionally vague and that the statute impermissibly created a strict liability offense.[123] After examining the legislative history and the language of the statute, the court rejected Mishra's strict liability theory, stating that "Congress intended to include an intent provision in § 857. The key language is contained in subsection § 857(d), which describes 'drug paraphernalia' to include those items 'primarily intended or designed for use' with illegal drugs."[124]

In defining the scienter standard required by the MODPCA, the Third Circuit began by noting that the MODPCA involves "two points" of proof by the government.[125] First, the government must show that the defendant intended to sell, or offer for sale, the items

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[115] *Id.*

[116] *Id.* (quoting Village of Hoffman Estates v. Flipside, 455 U.S. 489, 501 (1987); United States v. Dyer, 750 F. Supp. 1278, 1284-86 (E.D. Va. 1990)).

[117] *Id.*

[118] *Id.* at 1567-68.

[119] 979 F.2d 301 (3d Cir. 1992).

[120] 977 F.2d 503 (10th Cir. 1992).

[121] *Mishra*, 979 F.2d at 306.

[122] *Id.* at 303.

[123] *Id.*

[124] *Id.* at 306 (quoting United States v. Schneiderman, 968 F.2d 1564, 1566 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174)).

[125] *Id.* at 307.

at issue.[126] Second, the government must demonstrate that the items at issue are "drug paraphernalia" as defined by the statute.[127] Like the *Schneiderman* court, the court in *Mishra* held that the government could meet its burden in one of two ways.[128] One approach is for the government to establish that the item is "primarily intended" for drug use. To do so, the government must establish that "the defendant seller contemplated, or reasonably expected . . . that the item sold or offered for sale would be used with illegal drugs."[129] This could be proven by evidence such as the "manner in which the item was displayed, how it was advertised, . . . or any of the other factors listed in § 863(e) which the statute suggests should be considered."[130] In other cases, the government may establish that the items were "designed for use" with illegal drugs.[131] Unlike the decision in *Schneiderman*, however, under the *Mishra* holding, an individual would be convicted only if "the defendant seller was aware of the general nature of the item–i.e., that the defendant knew that the item sold or offered for sale is generally known to be used with illegal drugs."[132] Hence, the government must prove intent even for items primarily designed for drug use. Such intent "may be inferred by the jury from extrinsic factors such as those listed in § 863(e)."[133]

III. AN ARGUMENT IN FAVOR OF THE *SCHNEIDERMAN* SPLIT SCIENTER APPROACH

The federal circuit courts have struggled in interpreting the MODPCA due to the ambiguity of the Act's scienter language. The fact that several circuit courts have read the same seemingly simple language as mandating such divergent scienter requirements emphasizes that Congress must rectify this problem of interpretation. Unfortunately, Congress is not likely to remedy this problem soon, considering that it failed to amend or clarify the scienter language when it reenacted the MODPCA in 1990.[134] Moreover, the United States Supreme Court, which obviously could

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 308.
[132] *Id.*
[133] *Id.* Examples of the extrinsic factors to be considered are "instructions . . . provided with the item," "national and local advertising," and expert testimony. 21 U.S.C. § 863(e)(1), (2) & (8) (Supp. I 1990).
[134] *See supra* note 1.

resolve the MODPCA scienter dilemma, recently declined an opportunity to do so.[135] Absent a clarification of the issue by Congress or the Supreme Court, federal courts should follow the split scienter approach as set forth by the Second Circuit in *United States v. Schneiderman.*[136] The *Schneiderman* approach is logically consistent with the MODPCA's language and legislative history, the majority of prior decisions on the issue, and the due process rights of the defendants.

Although the Third Circuit Court of Appeals in *Mishra* purported to adopt the split scienter approach taken by the Second Circuit in *Schneiderman,*[137] the actual split scienter standard adopted in *Mishra* is quite different. For example, the Third Circuit adopted a tougher standard for items "designed for use" with illegal drugs, requiring that the government prove that the defendant "knew that the item sold . . . is generally known to be used with drugs."[138] Hence, the government must prove intent on the part of the defendant, no matter the type of drug paraphernalia. *Schneiderman,* in contrast, permits the scienter requirement to be satisfied by the objective features of the item alone.[139] One major benefit of the *Schneiderman* approach is that it places a lesser burden on the government for hard-core paraphernalia, while continuing to protect defendants from unjust convictions involving multi-use items. By requiring a showing of intent for items of hard-core drug paraphernalia, the *Mishra* court removed virtually all the benefits of an objective standard.

The scienter language of the MODPCA indicates that both a subjective and an objective scienter should be considered, not one or the other.[140] The court in *United States v. Posters 'N' Things, Ltd.*[141] effectively ignored the "primarily intended . . . for use" language of section 863(d)[142] when it concluded that the phrase "designed for use" mandated a purely objective scienter.[143] The solution offered by the *Dyer* court–that the defendant's intent can be determined by objective criteria[144]–does not comport with the normal usage of the term "intend-

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[135] United States v. Schneiderman, 968 F.2d 1564 (2d Cir. 1992), *cert. denied,* 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174).

[136] 968 F.2d 1564 (2d Cir. 1992), *cert. denied,* 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174).

[137] *See supra* notes 120-34 and accompanying text.

[138] *See* United States v. Mishra, 979 F.2d 301, 306-08 (3d Cir. 1992).

[139] *See Schneiderman,* 968 F.2d at 1567.

[140] *See supra* notes 19-23 and accompanying text.

[141] United States v. Posters 'N'Things, Ltd., 969 F.2d 652 (8th Cir. 1992).

[142] 21 U.S.C. § 863(d) (Supp. I 1990).

[143] *Posters,* 969 F.2d at 657; *see supra* notes 58-68 and accompanying text.

[144] *See supra* notes 52-53 and accompanying text.

ed." The term "intended" normally signifies a defendant's subjective intent, which, although it can be established by circumstantial evidence, is not truly considered with an objective scienter.[145] Likewise, the Sixth and Tenth Circuits, in concluding that the MODPCA requires proof of a subjective intent on the part of the defendant in all cases, ignored the "designed for use" language of the MODPCA. It is inconceivable that Congress would have intended an entire section of the scienter language of the Act to be disregarded.

The question remains, then, as to why the circuit courts interpreted the scienter language as requiring either a purely objective or a purely subjective scienter. Two possible reasons for requiring a purely objective approach are a desire for simplicity in application and political conservativism. Similarly, the Sixth and Tenth Circuits may have chosen a subjective standard in order to maintain consistency and protect the rights of the criminal defendants. None of these reasons, however, can justify such heavy-handed manipulation of the plain language of the Act. The *Schneiderman* approach avoids this type of manipulation and, unlike the interpretations of other courts, gives meaning to the entire scienter phrase of section 863(d).[146]

Although the legislative history on the MODPCA is sparse, the testimony of Mel Levine and Harry Myers clarifies the intent of the drafters in choosing the scienter language of the MODPCA.[147] Any ambiguity that arises from the "contradictory" testimony of the Congressmen is resolved when read in light of the split scienter approach set forth in *Schneiderman*. Indeed, both Levine and Myers alluded to a differentiation between multi-purpose items and hard-core items. Multi-purpose or derivative items require a consideration of the intent of the defendant.[148] Hard-core items, on the other hand, require a consideration of the objective features of the item, rather than the mental state of the defendant.[149]

A case such as *Hoffman Estates*[150] illustrates a proper reading of scienter language. Although the language of the city ordinance at issue in *Hoffman Estates* was different from that of the MODPCA, the

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[145] BLACK'S LAW DICTIONARY 810 (6th ed. 1990) (defining intent as "a state of mind in which a person seeks to accomplish a given result through a course of action."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1176 (1986) (defining intent as "having the mind or will concentrated on some end or purpose.").

[146] 21 U.S.C. § 863(d) (Supp. I 1990).

[147] *See supra* note 70 and accompanying text.

[148] *Hearings*, *supra* note 3, at 48 (statement of Mel Levine) and 69 (statement of Harry Myers).

[149] *See supra* note 36 and accompanying text.

[150] *See supra* notes 38-43 and accompanying text.

analysis undertaken and conclusions drawn by the Supreme Court are persuasive. The city ordinance in *Hoffman Estates* involved items "designed or marketed for use with" drugs. The Supreme Court interpreted the "designed for use" language as requiring an objective scienter that could be established by "virtue of [the items'] objective features, i.e., features designed by the manufacturers,"[151] and the "marketed for use" language as requiring a type of subjective scienter analysis.[152] The *Schneiderman* court's approach is very similar to the approach implicitly condoned in *Hoffman Estates*,[153] in that the *Schneiderman* court gives each phrase of the MODPCA its own meaning.[154] Also, the fact that every United States Court of Appeals that has addressed the issue, except for the court in *Posters*, has interpreted the scienter language of the MODPCA to require *some* proof of the defendant's subjective intent[155] indicates that a normal reading of the statute would mandate the use of a subjective scienter for at least certain items.

Finally, the split scienter approach taken in *Schneiderman* strikes an appropriate balance between the government's legitimate goal of disabling the illegal drug industry by curtailing the drug paraphernalia industry and the defendant's due process rights and general interest in protection from ambiguous criminal statutes. The specific subjective scienter standard set forth in *Schneiderman*–that the defendant need only know that there is a strong possibility that the items of paraphernalia would be used with illegal drugs[156]–alleviates much of the burden that a stricter requirement, such as the one set forth in *United States v. 3520 Brighton Boulevard*,[157] would place on the government. In addition to aiding the government, the split scienter standard protects the defendant from the possible adverse consequences of a purely objective standard[158] and from the "trap of the

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[151] Village of Hoffman Estates v. Flipside, 455 U.S. 489, 501 (1982).

[152] *Id.* at 502.

[153] *Id.* at 501.

[154] United States v. Schneiderman, 968 F.2d 1564, 1567 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174).

[155] United States v. Mishra, 979 F.2d 301, 307 (3d Cir. 1992) (requiring a split scienter approach); United States v. Murphy, 977 F.2d 503, 505 (10th Cir. 1992) (requiring proof of criminal intent); *Schneiderman*, 968 F.2d at 1567 (requiring a split scienter approach); United States v. 57,261 Items of Drug Paraphernalia, 869 F.2d 955, 957 (6th Cir.), *cert. denied*, 493 U.S. 933 (1989) (requiring "an intent to distribute the items . . .").

[156] *Schneiderman*, 968 F.2d at 1567; *see supra* note 115 and accompanying text.

[157] 785 F. Supp. 141, 144 (D. Colo. 1992) ("[T]he government must prove that a defendant knew an item to be drug paraphernalia and intended that the item be used for drug-related purposes.").

[158] This is especially true considering that the penalty for a violation of the MODPCA is a maximum of three years imprisonment, a possible high fine, and seizure and forfeiture of the items by the government. 21 U.S.C. § 863(b), (c) (Supp. I 1990).

innocent" with which the *3520 Brighton Boulevard* court was so concerned.[159]

CONCLUSION

Difficulties involving application of the MODPCA in light of discrepancies between the MDPA's scienter language and the scienter language of the MODPCA arose soon after the MODPCA's passage in 1986. This disagreement has led to a distinct split of interpretation between the circuits with the rendering of conflicting decisions in the Second, Third, Sixth, Eighth and Tenth Circuits. The Tenth and Sixth Circuits, in *Murphy* and *57,261 Items of Drug Paraphernalia,* interpreted the MODPCA as requiring some type of subjective scienter—one that would force the prosecution to prove that the defendant understood that the item would be used with illegal drugs.[160] In contrast, the Eighth Circuit in *Posters* interpreted the language of the MODPCA as involving a purely objective scienter requirement, reasoning that the objective scienter approach, as first set forth in *Dyer*, best addressed the goals of Congress in adopting the legislation and was a "proper" reading of the MODPCA.[161] Finally, the Second and Third Circuits, in *Schneiderman* and *Mishra,* found that the statute requires a split scienter approach, depending on the type of item at issue in the case.[162] In the Second Circuit, where the item is hard-core paraphernalia the prosecution may establish a violation of the MODPCA by focusing on the objective features of the item. Where the item has multiple uses, proof that the defendant knew that there was a strong possibility that the item would be used with illegal drugs is required. In the Third Circuit, proof of intent must be established for both types of paraphernalia but items of hard-core paraphernalia require satisfying a lesser burden of proof than that applied in the case of multi-use items.[163]

The standard set forth in *Schneiderman* is clearly the best approach considering the language and legislative history of the MODPCA and the

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[159] *3520 Brighton Boulevard*, 785 F. Supp. at 143; *see supra* note 90 and accompanying text.

[160] United States v. Murphy, 977 F.2d 503, 506 (10th Cir. 1992); United States v. 57,261 Items of Drug Paraphernalia, 869 F.2d 955, 957 (6th Cir. 1989).

[161] United States v. Posters 'N' Things, Ltd., 969 F.2d 652, 657-58 (8th Cir. 1992); *see supra* notes 58-70 and accompanying text.

[162] United States v. Mishra, 979 F.2d 301, 307 (3d Cir. 1992) (discussed *supra* at notes 125-33 and accompanying text); United States v. Schneiderman, 968 F.2d 1564, 1567 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W. 3512 (U.S., Feb. 22, 1993) (No. 92-1174) (discussed *supra* at notes 110-18 and accompanying text).

[163] *See supra* notes 128-32.

defendant's constitutional interests. Besides these factors, *Schneiderman* also allows for just results. In situations involving hard-core drug paraphernalia, the items are such that the defendant should not be permitted to plead ignorance–a cocaine freebase kit has no uses other than those connected with cocaine. On the other hand, when dealing with multi-purpose items, such as rolling papers or certain types of pipes, a defendant could very well intend to use the items in totally legal ways. The *Schneiderman* standard adequately protects such a defendant from the unjust application of an excessively objective standard of proof.

Theresa A. Kleine-Kracht