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Head Shops - Legitimate Governmental Interest in Regulating the Sale of Drug Paraphernalia Receives Judicial Recognition

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HEAD SHOPS—LEGITIMATE GOVERNMENTAL INTEREST IN REGULATING THE SALE OF DRUG PARAPHERNALIA RECEIVES JUDICIAL RECOGNITION—*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 102 S. Ct. 1186 (1982).

INTRODUCTION

In recent years an industry has mushroomed which finds its source of profit in the sale of items, commonly called drug paraphernalia, used in the consumption of illegally possessed controlled substances.[1] Several statutes and ordinances have been enacted which seek to prohibit or regulate the sale of drug paraphernalia.[2] These enactments are in response to the patent inconsistency of allowing the sale of items used to illegally consume, cultivate, or test substances which our society has deemed to be contrary to the health and well-being of its members. If it is reasonable to concede that a correlation exists between the open and notorious sale of drug paraphernalia and the incidence of drug abuse, a proposition which is itself contested,[3] then there is support for the legitimacy of society's control of these items.[4] Lawmakers have exhibited con-

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1. *See Drug Paraphernalia: Hearing Before the Select Committee on Narcotics Abuse and Control of the House of Representatives*, 96th Cong., 1st Sess. 31 (1979)

2. Gerson, *Heads Shops: A Legal Haze*, Nat. L.J., Aug. 23, 1982, at 1, col. 2. "Thirty-two statutes and countless localities today have laws on their books regulating or banning the possession, use, manufacture, advertising or sale of so-called drug paraphernalia." There is no federal drug paraphernalia statute.

3. *See* the testimony of Dr. Norman Zinberg, Clinical Professor of Psychiatry at Harvard Medical School stating that "prohibiting the sale of drug paraphernalia will not lessen drug use but may indeed increase the deleterious use of drugs . . ." and that of Dr. Mitchell Rosenthal, a psychiatrist and the President of Phoenix House Foundation that the drug paraphernalia industry "serves to legitimize and condone the use of illegal drugs." Franza v. Carey, 518 F. Supp. 324, 330-31 (S.D.N.Y. 1981).

4. A city clearly has the power through a properly drawn ordinance to discourage the availability of drugs and the acceptance of drug use by prohibiting the sale of drug-related devices. Geiger v. City of Eagan, 618 F.2d 26, 28 (8th Cir. 1980). Local governments are conceded this power based on their legitimate interest in the protection of the health and safety of their citizens. The Supreme Court has said that the fifth and fourteenth amendments do not prohibit governmental regulation for the public welfare, and so long as enactments have a reasonable relation to a proper legislative purpose, i.e. public welfare, and are neither arbi-

cern that the unfettered availability of drug paraphernalia lends an air of legitimacy to the unlawful use of harmful drugs.[5] The primary legal stumbling block to restricting or otherwise controlling the availability of drug paraphernalia is essentially a problem of definition. Many items which localities have sought to control are subject to both legitimate and illicit uses.[6] The numerous localities which have enacted drug paraphernalia laws have used diverse approaches, though most laws have been either criminal, civil or regulatory in nature.[7] Anticipating the pinch of economic loss, manufacturers, distributors and retailers of drug paraphernalia merchandise have attacked this definitional problem, flooding the courts with challenges to the constitutionality of these laws. Although these challenges have been based on numerous legal grounds,[8] the most common have involved challenges based on the doctrines of overbreadth[9] and vagueness.[10]

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trary nor discriminatory, the requirements of due process are met. Nebbia v. New York 291 U.S. 502 (1934).

5. "The general assembly hereby finds and declares that the possession, sale, manufacture, delivery, or advertisement of drug paraphernalia results in the legitimization and encouragement of the illegal use of controlled substances . . . ." COL. REV. STAT. § 12-22-501 (Cum. Supp. 1982). For the effect of the availability of drug paraphernalia on young people that "it's a message, a message that youngsters all over America are getting and believing. It says, 'Getting high is okay.'" 21 WASHBURN L.J. 393 n.12; Rosenthal, *The Headshop Message,* 7 DRUG ENFORCEMENT, pt. 1, at 26 (1980).

6. "[B]ecause the objects have many lawful uses, and because the design characteristics do not distinguish objects intended for lawful use from objects intended for unlawful uses, the object by itself does not provide any basis for an inference of its intended use." Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 933 (6th Cir. 1980). "Needless to say, inanimate objects are neither good nor bad, neither lawful nor unlawful. Inanimate objects do not commit crimes . . . ." Lady Ann's Oddities, Inc. v. Macy, 519 F. Supp. 1140, 1146 (W.D. Okla. 1981). Clearly these excerpts allude to the fact that a pipe, for example, may be used to smoke tobacco (legal) or marijuana (illegal).

7. *See generally,* Note, *Drug Paraphernalia Legislation: Up in Smoke?,* 10 HOFSTRA L. REV. 239 (1981).

8. *See* Mid-Atlantic Accessories Trade Association v. Maryland, 500 F. Supp. 834, 840-41 (D.Md. 1980). Plaintiff attacked the Maryland statute for vagueness and overbreadth; excess of police power contrary to the due process clause of the fifth and fourteenth amendments; deprivation of property in violation of due process; authorizing illegal searches and seizures contrary to the fourth amendment; interfering with interstate commerce; violating purchasers' right to privacy; and providing for cruel and unusual punishment contrary to the eight amendment.

9. An overboard statute encompasses constitutionally protected conduct within its proscriptive sweep. "[A] governmental purpose to control or prevent

For the first time, the Supreme Court, in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[11] rendered an opinion concerning the validity of a regulatory drug paraphernalia law, which was challenged as being impermissibly vague and overbroad. In *Hoffman*, a unanimous Court upheld the ruling of the District Court for the Northern District of Illinois[12] and reversed the United States Court of Appeals for the Seventh Circuit.[13] The court of appeals held that a municipal ordinance requiring businesses within the municipality to obtain a license if they sold any items "designed or marketed for use with illegal cannabis or drugs,"[14] was facially vague and overbroad. Since the challenged ordinance in *Hoffman*[15] was regulatory in nature, at least one commentator has suggested that the ruling may be of minimal significance.[16] This note will examine the decision rendered by the Court in *Hoffman* and its predictive value, if any, on the question of future facial challenges to drug paraphernalia laws.

THE CASE

Hoffman presented the Court with a pre-enforcement facial challenge to a drug paraphernalia ordinance on the grounds that the ordinance was unconstitutionally vague and overbroad.[17] For several years prior to May 1, 1978, Flipside, Hoffman Estates, Inc. (hereinafter referred to as Flipside) operated a retail enterprise in the Village of Hoffman Estates, Illinois (hereinafter referred to as the Village), which sold a variety of merchandise including phono-

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activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964).

10. A vagueness challenge rests ultimately on the procedural due process requirement of notice, and therefore a statute void for vagueness "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." Connally v. General Construction Co., 269 U.S. 385, 391 (1962).

11. 102 S. Ct. 1186 (1982).

12. 485 F. Supp. 400 (N.D. Ill. 1980).

13. 639 F.2d 373 (7th Cir. 1981).

14. *Id.* at 374; VILLAGE OF HOFFMAN, ILL., ORDINANCE No. 969-1978 (1978).

15. The ordinance in *Hoffman* is atypical in that the ordinance is regulatory in nature, while the majority of other jurisdictions have constructed criminal or civil approaches.

16. Gerson, *supra* note 2, at 8, col. 1.

17. 102 S. Ct. at 1189

graphic records, smoking accessories, novelty devices and jewelry.[18] The Village enacted an ordinance effective May 1, 1978, regulating drug paraphernalia.[19] The ordinance provided that it would be unlawful for any person "to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs . . . without obtaining a license therefor."[20] The Supreme Court emphasized that the phrase "marketed for use" provided a scienter element in the ordinance.[21] In the Court's view, the presence of this element increased the degree of clarity and notice required by due process,[22] since "[u]nder this test [due process], Flipside had ample warning that its marketing activities required a license."[23]

In the licensing process, the ordinance: (1) required the filing of an affidavit by each retailer stating that neither the retailer nor its employees had been convicted of a drug related offense; (2) required businesses licensed under the ordinance to maintain a record of each sale (to be retained for a two year period subsequent to each sale),[24] which included the name and address of each purchaser;[25] (3) prohibited the sale of any regulated items to minors[26] by a business licensed under the ordinance; and (4) provided that violations of the ordinance be punished by fines.[27] The Village's attorney also developed a licensing guideline section which provided definitions of the terms "paper," "roach clips," "pipes," and "paraphernalia."[28] Following an administrative inquiry, Flipside was notified of potential violations and given a copy of the ordinance. Flipside requested clarification of the ordinance's scope of applicability, and removed the suspected items indicated by the Village's attorney.[29]

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18. *Id.*
19. *Id.* at 1190.
20. *Id.*
21. *Id.* at 1195.
22. *Id.* at 1194-95.
23. *Id.* at 1195.
24. 485 F. Supp. 400, 404, (N.D. Ill. 1980).
25. The ordinance also required the recorded sales information to be made available to police for inspection during normal business hours.
26. In Illinois a minor is defined as anyone under the age of eighteen years. ILL. ANN. STAT. ch. 3, 131 (Smith—Hurd Supp. 1978).
27. 102 S. Ct. at 1190.
28. *Id.*
29. The district court viewed this action by Flipside as proof that the operative words of the ordinance were not vague and were common, ordinary expres-

Rather than applying for a license and submitting the requisite affidavit attesting that neither the retailer nor its employees had been convicted of a drug related offense, Flipside filed suit in the United States District Court for the Northern District of Illinois.[30] Flipside alleged that the ordinance was: (1) vague, in violation of the due process clause of the fifth and fourteenth amendments; (2) overboard, contrary to the first amendment protection of commercial speech; (3) capable of arbitrary enforcement, contrary to the equal protection clause of the fourteenth amendment; and (4) not reasonably related to any legitimate governmental objective in controlling drug abuse, also in violation of the equal protection clause of the fourteenth amendment. After filing suit, Flipside moved for a preliminary injunction to prevent enforcement of the ordinance.[31] After a hearing, the district court rejected Flipside's motion for injunctive relief. On appeal by Flipside of the district court's judgment for the Village, the United States Court of Appeals for the Seventh Circuit reversed.[32] The critical question on appeal was whether the ordinance was so vague as to violate the due process clause of the fifth and fourteenth amendments.[33] Solely on the basis of its analysis of the vagueness issue, the court of appeals held the ordinance unconstitutional,[34] and alluded to the potential fourth amendment problems resulting from the ordinance's record-keeping requirement.[35]

On appeal by the Village, the Supreme Court reversed.[36] The Court noted the error in the appellate court's method and depth of analysis[37] and held that the ordinance was neither facially vague

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sions known to anyone familiar with the English language. "Obviously, plaintiff [Flipside] was not hampered by any vagueness in the words of the subject ordinance." 485 F. Supp. 400, 407 (N.D. Ill. 1980).

30. *Id.* at 402.

31. *Id.*

32. 639 F.2d 373, 377 (7th Cir. 1981).

33. *Id.*

34. Specifically, the court of appeals said the phrase "designed or marketed for use" presented a fatal flaw rendering the ordinance vulnerable to the vagueness challenge. *Id.* at 384-85.

35. The court of appeals implied that the record-keeping requirement might serve as the basis of subsequent search of purchasers for possession of drugs, and that in its opinion the mere fact that a person purchased an item regulated under the ordinance would not, alone, supply the fourth amendment's probable cause criteria. *Id.* at 384-85.

36. 102 S. Ct. 1186.

37. The Court noted that in a facial challenge to the overbreadth and vague-

nor facially overbroad[38] since it did not reach constitutionally protected conduct and was reasonably clear in its application to Flipside.[39]

BACKGROUND

The state of the law with respect to the constitutionality of various drug paraphernalia statutes was one of contradiction, uncertainty, and confusion. Prior to *Hoffman*, courts frequently rendered contrary rulings when reviewing essentially identical drug paraphernalia laws.[40]

Before August of 1976, laws enacted by local and state governments were so vague[41] and overbroad[42] that they were generally

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ness of a law, a court should first examine the overbreadth challenge, and then proceed to the vagueness challenge. 102 S. Ct. at 1191-92.

38. Justice White, in a separate concurring opinion stated that, although he agreed in reversing the court of appeals, he did not "believe it necessary to discuss the overbreadth problem in order to reach this result. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. That opinion should be reversed simply because it erred in its analysis of the vagueness problem presented . . . ." *Id.* at 1198.

39. *Id.* at 1196.

40. The Model Drug Paraphernalia Act (hereinafter cited as MDPA), a criminal approach drafted by the Drug Enforcement Administration of the Department of Justice in August of 1979, was the model for two challenged statutes in Delaware Accessories Trade Association v. Gebelein, 497 F. Supp. 289 (D. Del. 1980) and Weiler v. Carpenter, 507 F. Supp. 837 (D.N.M. 1981). With respect to the operative phrase "used, intended for use, or designed for use" contained in the MDPA and the laws under review in each case, the Delaware District Court ruled that the phrase was not vague or overbroad, but the District Court of New Mexico ruled that it was both vague and overbroad.

41. The principle underlying the prohibition against vague statutes is that fundamental fairness is offended when a person is held criminally responsible for conduct proscribed by laws that could not be reasonably understood. United States v. Harriss, 347 U.S. 612, 617-18 (1954). Because vague laws fail to give adequate notice of what is prohibited, the innocent risk arrest and a danger of arbitrary and discriminatory enforcement exists. To avoid being vague, a statute must give a person of ordinary intelligence fair notice of what is prohibited and provide police with ascertainable enforcement standards. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

42. The overbreadth doctrine prohibits a statute from penalizing innocent or constitutionally protected conduct. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); *cf.* Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (statute prohibiting all picketing void for overbreadth since it directly prohibited peaceful picketing protected by the first amendment).

held to be unenforceable.[43] Primarily in response to these decisions, the Drug Enforcement Administration of the Department of Justice drafted a model criminal act, the Model Drug Paraphernalia Act (MDPA).[44] The MDPA was intended as a model for use by local and state governments in the drafting of their drug paraphernalia laws.[45] Drug paraphernalia enactments have been predominately criminal in form and the MDPA has formed the basis of the majority of the criminal drug paraphernalia acts.[46] The drafters of the MDPA sought to avoid vagueness and overbreadth by making the intent of the person in control of an item critical in defining drug paraphernalia.[47] Consequently, the MDPA simultaneously covers four classes of individuals: manufacturers, distributors, retailers, and possessors of regulated items. Furthermore, in following the generally accepted approach of defining a crime as an act

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43. The laws analyzed in the following cases were deemed unconstitutionally vague or overbroad. Geiger v. City of Eagan, 618 F.2d 26 (8th Cir. 1980); Record Head Corp. v. Sachen, 498 F. Supp. 88 (E.D. Wis. 1980); Record Museum v. Lawrence Township, 481 F. Supp. 768 (D.N.J. 1979); Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297 (D.N.J. 1979); Housworth v. Glisson, 485 F. Supp. 29 (N.D. Ga. 1978).

44. Drug Enforcement Administration, U.S. Department of Justice, MODEL DRUG PARAPHERNALIA ACT (Aug. 1979), *reprinted in Drug Paraphernalia Hearing, supra* note 1, at 88-95.

45. This Model Act was drafted, at the request of State authorities, to enable states and local jurisdictions to cope with the paraphernalia problem. The Act takes the form of suggested amendments to the Uniform Controlled Substances Act . . . . Instead of creating separate, independent paraphernalia laws, it seems desirable to control drug paraphernalia by amending existing sections of the Uniform Controlled Substances Act.

MODEL DRUG PARAPHERNALIA ACT, prefatory note, *reprinted in Drug Paraphernalia Hearing, supra,* note 1 at 88.

46. Various forms of the Model Drug Paraphernalia Act have been enacted by at least ten state legislatures (Connecticut, Florida, Illinois, Indiana, Louisiana, Maryland, Nebraska, New Jersey, New York, and South Carolina). Delaware Accessories Trade Association v. Gebelein, 497 F. Supp. 289, 290-91 (D. Del. 1980).

47. To insure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge or criminal intent of the person in control of an object a key element of the definition. Needless to say, inanimate objects are neither 'good', nor 'bad', neither lawful nor 'unlawful'. Inanimate objects do not commit crimes. But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adopt it for illegal use, the object can be subject to control and the people subjected to prosecution . . . .

MODEL DRUG PARAPHERNALIA ACT, comment, Article I (1979).

coupled with a requisite mental state,[48] the MDPA defines four crimes: possession, manufacture or delivery, delivery to a minor, and advertising of drug paraphernalia.[49] Although the MDPA included the element of *mens rea*,[50] which may save an otherwise vague or overbroad law,[51] the MDPA has not been upheld in all of its manifestations.[52]

In addition to the criminal approach in the drafting of drug paraphernalia laws, jurisdictions can also use a civil format. Civil approaches mandate fines, revocation of sales licenses or permits, and forefeiture by violators of items determined to be drug paraphernalia. This approach to drug paraphernalia legislation is best

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48. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 178, 191-92, 238 (1972).

49. Possession requires proof of 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.

Manufacture or delivery 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 that the paraphernalia will be used in violation of the Uniform Controlled Substance Act.

Delivery to a minor requires proof of the same elements as the manufacture or delivery offense, with the addition of: 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.

Advertising is limited to commercial advertising, and consists of three elements: 1) an object be advertised; 2) which is classifiable as drug paraphernalia; 3) and the advertiser knows or reasonably should know under the circumstances that the advertisement promotes the sale of drug parahernalia. Luckow, *supra* note 7, at 245-46.

50. The crucial, functional phrases found throughout the MDPA are: "used, intended for use, or designed for use . . ." (Article I, Definitions); "to deliver it to persons whom he knows, or should reasonably know . . ." (Article I, part 2 —relevant factors to be considered in determining whether an item is drug paraphernalia — item 6); "use, or to possess with intent to use . . ." (Article II, Offenses and Penalties § A); "knowing or under circumstances where one reasonably should know . . ." (Article II, Offenses and Penalties, §§ B, D).

51. Scienter may save a statute or ordinance from vagueness and overbreadth, but the Supreme Court has never stated that scienter necessarily saves a statute from such challenge. Amusement Devices Association v. Ohio, 443 F. Supp. 1040, 1050-51 (S.D. Ohio 1977).

52. *See,* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916 (6th Cir. 1980), *vacated and remanded,* 101 S. Ct. 2998 (1981); Back Door Records v. City of Jacksonville, 515 F. Supp. 857 (E.D. Ark. 1981); Information Management Services, Inc. v. Borough of Pleasant Hills, 512 F. Supp. 1066 (W.D. Pa. 1981); Weiler v. Carpenter, 507 F. Supp. 837, 842 (D.N.M. 1981).

exemplified by the statutory enactment of the New York Legislature.[53] Each of these sanctions was present in the New York statute. In a district court challenge to its constitutionality,[54] the civil nature of the statute did not save it from being found impermissibly vague.[55] New York's civil approach varied in several respects from the MDPA. New York's statute defined violations in terms of a violator's apparent knowledge of an item's drug related purpose, as opposed to the MDPA's requisite actual knowledge. New York's statute provided a less detailed definition of drug paraphernalia without the specific examples enumerated in the MDPA. The New York statute, unlike the MDPA, did not contain a prohibition of advertising or sales to minors.[56] Finally, the New York statute contained no severability clause.[57] The district court's primary problem with the New York statute originated from a perceived inadequacy of enforcement standards.[58]

Variations of the civil and criminal approaches, and others which bear little resemblance to either the MDPA or New York's statute (other than provisions for criminal or civil penalties), also met frequently with mixed judicial fates.[59] Despite the contradictory rationale and justifications reflected in the decisions by the lower federal courts, a common theme or tendency emerged, par-

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53. N.Y. GEN. BUS. LAW §§ 850-853 (Consol. Supp. 1980-1981).

54. Franza v. Carey, 518 F. Supp. 324 (S.D.N.Y. 1981).

55. The district court in *Franza*, citing the Supreme Court in A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 (1925) ruled that a lower standard could not be applied to the New York statute when measured against the constitutional prohibition of vagueness ("It is not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."). 518 F. Supp. at 333.

56. 518 F. Supp. at 328.

57. *See* Note, *supra* note 7, at 248-49.

58. "Since drug paraphernalia legislation of necessity must seek to regulate the sale of items that have both legitimate and drug-related uses, such legislation must specify the limited circumstances in which the sale of such items is unlawful." *Franza*, *supra* note 54 at 342.

59. Cases holding such laws constitutional include: Brache v. County of Westchester, 658 F.2d 47 (2d Cir. 1981); Gasser v. Morgan, No. 49-2287, U.S.L.W. (N.D. Ala. Sept. 10, 1980); Tobacco Road v. City of Novi, 490 F. Supp. 537 (E.D. Mich. 1979). Cases holding such laws unconstitutional include: Geiger v. City of Eagan, 618 F.2d 26 (8th Cir. 1980); Record Head Corp. v. Sachen, 498 F. Supp. 88 (E.D. Wis. 1980); Magnani v. City of Ames, 493 F. Supp. 1003 (S.D. Iowa 1980); Knoedler v. Roxbury Township, 485 F. Supp. 990 (D.N.J. 1980); Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297 (D.N.J. 1979).

ticularly with respect to pre-enforcement challenges. When a court could envision *any* abuse resulting from vagueness or overbreadth in applying a drug paraphernalia law, the law would likely be held unconstitutional. However, the Second Circuit Court of Appeals ruled in *Brache v. County of Westchester*[60] that the scope of a challenged ordinance properly covered *some* of the items the plaintiff had on sale. Therefore, the plaintiff lacked standing to challenge hypothetical applications of the ordinance which may have prohibited the sale of items not properly covered.[61] The decision in *Brache* is significant because much of this reasoning resurfaces in the Supreme Court's decision in *Hoffman*. Although the regulatory approach of the *Hoffman* ordinance is unique, the decision directly addresses facial challenges regardless of the species of the particular enactment under review.

ANALYSIS

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[62] the Court rendered three specific holdings. First, the Court held that the village ordinance, licensing and regulating the sale of items displayed with, or within the proximity of, literature encouraging the illegal use of cannibis or illegal drugs, did not violate Flipside's first amendment rights. The Court reasoned that, at best, the ordinance merely regulated the commercial marketing of items that might be used for an illicit purpose and did not restrict speech as such.[63] Secondly, the Court held that the ordinance's phrase "designed for use" was not facially vague since this standard encompassed at least one item that was principally used with illegal drugs based on the item's objective features.[64] The "designed for use" standard was deemed to be sufficiently clear,

60. 658 F.2d 47 (2d Cir. 1981).

61. In affirming the lower court, the court of appeals stated that as long as the plaintiffs are selling single use items to which the ordinance may be applied, even an articulated threat of broader enforcement should not enable them to challenge other applications of the ordinance until a broader use of the ordinance is actually initiated. "[I]f a statute has a core meaning that can reasonably be understood, then it may validly be applied to conduct within the core meaning, and the possibility of such a valid application necessarily means that the statute is not vague on its face." *Id.* at 51.

62. 102 S. Ct. 1186 (1982).

63. *Id.* at 1192.

64. *Id.* at 1195. The Court said that this standard referred to objective features designed by the manufacturer of an item.

since it covered some items sold by Flipside.[65] Finally, the Court held that the ordinance as a whole was sufficiently clear and, consequently, the speculative danger of arbitrary enforcement did not render it void for vagueness.[66]

The significance of the decision in *Hoffman,* however, is not contained in the specific holdings enumerated by the Court. Rather, its significance is found in the Court's method of analysis. This method facilitates a decision that falls comfortably in line with those decisions since *Nebbia v. New York*[67] in which the Court has deferred to the legitimate exercise of public policy formation by state and local legislatures, particularly with regard to issues concerning public welfare.[68] In *Hoffman,* the Court said that in a challenge of facial overbreadth and vagueness, a court's initial task is to determine whether the enactment reaches a substantial

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65. *Id.* The Court noted that the ordinance explicitly addressed roach clips and specially-designed pipes, both sold by Flipside.

66. *Id.* at 1196 n.21.

67. [A] state is free to adopt whatever economic policy [that] may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . . 291 U.S. 502, 537 (1934).

68. *See also:* South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177, 190-91 (1938) ("[w]hen the action of a legislature is within the scope of its power, fairly debatable questions as to reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body . . . ."); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("the existence of facts supporting the legislative judgment is to be presumed . . . not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) (where the Burger Court followed the precedent of *Carolene Products, supra,* and refused to use the due process clause to invalidate socio-economic legislation.); Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963) (holding that the Kansas legislature was free to decide for itself that legislation was needed to prohibit the business of debt adjusting); Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific R.R., 393 U.S. 129, 138 (1968) (conflicting character of the evidence left "little room for doubt that the question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives.").

amount of constitutionally protected conduct. For example, the Court held that a substantial amount of constitutionally protected conduct was inhibited by an anti-picketing statute in *Thornhill v. Alabama*,[69] since that statute prohibited peaceful picketing protected by the first amendment. In *Hoffman*, the Court said that when an enactment does not reach a substantial amount of constitutionally protected conduct, the overbreadth challenge must fail. The facial vagueness challenge is addressed after the overbreadth question is resolved.[70] The Court said a facial vagueness challenge would be proper only when the enactment under review is vague in all its applications.[71] The methodology in *Hoffman* reflects an underlying policy of judicial self-restraint evident in *Nebbia* and its progeny. The practical result of this methodology is that future facial challenges to drug paraphernalia laws will likely prove unsuccessful. First, the decision in *Hoffman* indicates that the core activities associated with the commercial merchandizing of drug paraphernalia will not be accorded constitutinally protected conduct status. Second, it is unlikely that a jurisdiction will be so inept at draftsmanship as to write a law in such vague terms as to have *no* application to the conduct of those who deal in drug paraphernalia.

In the context of the *Thornhill* and *Hoffman* decisions, the adjective "substantial" appears to carry the synonomous meaning of "fundamental," such that a "substantial amount of constitutionally protected conduct" is but another way of saying "fundamental constitutionally protected conduct," or more succinctly "fundamental right."[72] With respect to the constitutional challenges

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69. 310 U.S. 88 (1946).

70. 102 S. Ct. at 1191.

71. *Id.*

72. The nature of fundamental rights, like the question of their source of origin, under our constitutionally based government, is one which, perhaps, reasonable men may reasonably disagree. Professor Bickel's analysis may best address the nature of the elusive beast:

> [A]lthough the constitution plainly contains a number of admonitions, it states very few plain principles; and few are universally accepted. Principles that may be thought to have wide, if not universal, acceptance may not have it tomorrow, when the freshly coined, quite novel principle may, in turn, prove acceptable. The true distinction . . . relevant to the bulk of the Court's business, lies not so much between more and less acceptable principles as between principles of different orders of magnitude and complexity in the application. This distinction can be sensed, and can serve as a caution, but no one has succeeded in defining it, and hence

raised by Flipside, the Court has adopted a sliding-scale standard of permissibility which is measured against the conduct or activity addressed by the statute under challenge. Presumably, the Court is saying that varying degrees of overbreadth or vagueness are required to invalidate different enactments. With respect to the vagueness challenge, the Court said, "the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."[73] The primary objective of the drug paraphernalia ordinance in *Hoffman* was the regulation of an economic or commercial activity. Therefore, the ordinance was not deemed to be directed towards any substantial amount of constitutionally protected conduct (a.k.a. fundamental rights), and a less stringent test was in order.[74]

Clearly, the Court would not accord fundamental right status to "commercial activity promoting or encouraging illegal drug use,"[75] and therefore the constitutional standard required was less stringent. Considering the economic conduct which Flipside sought to exempt from the application of the ordinance, the Court strongly implied that since fundamental rights were not at peril, the Court only needed to find a rational relationship between the ordinance and the legitimate interest of protecting the public welfare. Therefore, in light of the conduct in question, the rational relationship between the ordinance and the public welfare was evident, and the ordinance was a proper exercise of legislative judgment.

The rational relationship test, which seems to be the proper standard of judicial scrutiny required in view of the conduct involved in *Hoffman*, triggers a nearly non-existent requirement of justification on the part of a state or local government. The Village had to show a legitimate object of discouraging the use of harmful drugs, and that the regulation of drug paraphernalia was a rational

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it is not serviceable as a rule.
J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOOK ON CONSTITUTIONAL LAW 418 n. 16 (1978).

73. 102 S. Ct. at 1193-94.

74. *Id.* at 1193. "Thus, economic regulation is subject to a less strict vagueness test because its subject-matter is often more narrow, and because businesses . . . can be expected to consult relevant legislation in advance of action."

75. *Id.* at 1192.

means to this legitimate end. On the sliding-scale standard of permissibility, the rational relationship test is, in practical terms, close to no test whatsoever. On the other hand, if an ordinance was directed toward fundamental rights, (e.g., religion,[76] privacy,[77] or association[78]) undoubtably such conduct would warrant stricter scrutiny, and would place a greater burden of justification upon the government enacting the ordinance. At this extreme of the sliding-scale standard, the proper test would be whether a compelling interest is shown by the state or local government which might justify encroachment upon a fundamental right.

Just as the Kansas legislature was accorded the deferrence to enact legislation concerning the business of debt adjusting in *Furgenson v. Skrupa*,[79] a conduct of questionable fundamentality, *Hoffman* indicates that a jurisdiction may also seek to regulate or prohibit the business of selling drug paraphernalia. *Hoffman* is a declaration to jurisdictions that drug paraphernalia laws are a legitimate exercise of legislative judgment. This declaration further indicates that the exercise of legislative judgment should not result in a wholesale, pre-enforcement intrusion by the judiciary. Any future judicial participation in this area will properly be confined to case-by-case examinations of the application of an enactment to a specific party alleging injury. In the future, facial challenges will not be permitted to preclude a hearing on the merits. Further, when the facts of a controversy indicate that any of a party's questioned activities were proscribed with reasonable clarity by the drug paraphernalia enactment under challenge, the injured party will be said to have received the requisite due process notice. The Court refused to speculate on potentially abusive constitutional applications, leaving such matters to be resolved as they arise.[80]

One could argue that such expansive deference to legislative perogative in a preponderantly commercial activity leaves signifi-

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76. U.S. CONST. amend I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peacebly to assemble and to petition the Government for a redress of grievance."

77. Roe v. Wade, 410 U.S. 113 (1973); Eisentadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965).

78. *See supra* note 67.

79. 372 U.S. 726.

80. 102 S. Ct. at 1196.

cant questions unanswered regarding the potential infringement of constitutionally protected individual activities. The concern is that constitutionally protected activities peripheral to the core commercial activity associated with the sale of drug paraphernalia may be placed at jeopardy without threshold judicial intervention. The Court alluded to this possibility, and suggested a stricter judicial scrutiny may be justified when criminal sanctions accompany an enactment.[81] Despite this admonition, it is noteworthy that criminal drug paraphernalia laws patterned on the MDPA that have followed *Hoffman* have been consistently upheld as constitutionally valid.[82] However, the Court clearly states that in this area of conduct such potential abuses, including discriminatory applications, can properly be addressed on a case-by-case basis as they arise in future applications.[83] This case-by-case approach coincidentally serves the underlying policy of judicial self-restraint.

CONCLUSION

With regard to drug paraphernalia enactments, a facial challenge of overbreadth will succeed only when the enactment reaches a substantial amount of constitutionally protected conduct. Facial challenges of vagueness will succeed only when the enactment is impermissibly vague in *all* of its applications. Therefore, when an enactment does not reach constitutionally protected conduct and is reasonably clear in its application to a specific party, the enactment will not be viewed as facially overbroad or vague. At first

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81. *Id.* at 1193 ("[t]he Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."). But despite this warning, the Court in this instance said "Flipside's facial challenge fails because, under the test appropriate to either quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside." 102 S. Ct. at 1194.

82. *See* High Ol' Times, Inc. v. Busbee, 673 F.2d 1225 (11th Cir. 1982); New England Accessories Trade Assoc., Inc. v. City of Nashua, 679 F.2d 1, 3 (1st Cir. 1982) ("Although both the statute and the ordinance are patterned on the [MDPA], they are different in significant respects . . . ."); Tobacco Accessories & Novelty Craftsman Merchant's Assoc. of Louisiana v. Treen, 681 F.2d 378 (5th Cir. 1982). Note that North Carolina's drug paraphernalia statute is also based on the MDPA. N.C. GEN. STAT. §§ 90-113.20-.24 (Cum. Supp. 1981).

83. *Id.* at 1196; ("We do not suggest that the risk of discriminatory enforcement is insignificant . . . ."); *citing* Seagram & Son v. Hostetter, 384 U.S. 35, 52 (1966) ("Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimensions, it will be time enough to consider any such problem when they arise.").

blush this synopsis of the Court's decision, like the specific holdings from which it is derived, appears reasonably simple, but inconclusive. At this level of analysis one easily could be tempted to question whether the *Hoffman* decision has any predictive worth regarding other types of drug paraphernalia laws, such as the MDPA type, or the New York approach. However, when one asks "Why?", the real significance of the decision in *Hoffman* becomes readily apparent. The answer is illuminated when one considers the methodology that the Court employed.

The decision in *Hoffman* should serve notice that facial challenges to this non-fundamental area of conduct will likely receive a judicial cold shoulder. Further, the *Hoffman* decision afforded the Burger Court an opportunity to reaffirm its basic policy of noninterference by the judiciary in the exercise of legislative judgment in this area of the law. To this end, *Hoffman* served as a convenient means for the reaffirmation of the policy of judicial restraint. The course seems set. The merchandising of drug paraphernalia, which a jurisdiction is free to leave untethered by statutory constraints, is nonetheless not, *per se*, an area of conduct worthy of wholesale judicial intervention. The Court clearly adopts the position in *Hoffman* that an as-applied judicial approach adequately prevents any potential invasions of fundamental rights that may result from specific applications of particular enactments.

The overbreadth requirement that a substantial amount of constitutionally protected conduct must be at jeopardy, and the vagueness requirement that only reasonable clarity need be present, in practical terms, place a nearly insurmountable obstacle in the path of those engaged in this area of enterprise who might raise a facial challenge. This methodology, and the accompanying minimal requirements necessary to thwart facial challenges placed upon state and local governments, should end, as a practical matter, their successful consideration in the future.

An additional rationale of the *Hoffman* decision, in line with *Nebbia* and like decisions, might also flow from the fact that the chancellor's foot has changed,[84] and its measure is that of the

84. Equity is a roughish thing; for law we have a measure, know what to trust to; equity is according to conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make his foot the standard for the measure we call a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's conscience.

Court under Chief Justice Burger. But this proposition presents an area of analysis worthy of separate and direct examination.

James A. Atkins

H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY, 50 n.8 (1948).