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Possession or Delivery of Drug Paraphernalia is Prohibited.

John B. Milano Jr.

STATUTE NOTE

CRIMINAL LAW—Texas Controlled Substances Act—Possession or Delivery of Drug Paraphernalia is Prohibited.

Texas Controlled Substances Act, *as amended by*, TEX. REV. CIV. STAT. ANN. art. 4476-15, §§ 1.02(8) & (2a), 4.07, 5.03, 5.15 (Vernon Supp. 1982).

The 67th Texas Legislature amended the Controlled Substances Act of 1973 to incorporate an anti-drug paraphernalia measure based on the Drug Enforcement Administration's (DEA) Model Anti-Drug Paraphernalia Act (Model Act).[1] The statute, in pertinent part, prohibits the possession, delivery and manufacture of drug paraphernalia.[2] It became effective on Sept. 1, 1981.[3]

Prior to the drafting of the Model Act, attempts at controlling drug paraphernalia by statute or local ordinance did not fare well against constitutional challenges.[4] Most of the statutes and ordinances were unconstitutionally vague.[5] President Carter requested that the DEA formulate

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1. *See* 1981 Tex. Sess. Law Serv., ch. 277, §§ 1-7, at 742-46 (Vernon); MODEL DRUG PARAPHERNALIA ACT (Drug Enforcement Administration 1979).

2. *See* TEX. REV. STAT. ANN. art. 4476-15, § 1.02 (29) (Vernon Supp. 1982). Drug paraphernalia is defined as any, "equipment product or material of any kind," that is to be used in conjunction with a controlled substance. *Id.*

3. *See* 1981 Tex. Sess. Law Serv., ch. 277, §§ 6-7, at 745-46 (Vernon). The bill passed the House on April 14, 1981 by a vote of 136 Yeas, 9 Nays and 1 abstention. It passed the Senate on May 29, 1981 by viva-voce vote. *Id.* §§ 6-7, at 745-46.

4. *See, e.g.*, High Ol' Times, Inc. v. Busbee, 621 F.2d 135, 141 n.9 (5th Cir. 1980) (statutes generally have not weathered attacks); Geiger v. City of Eagan, 618 F.2d 26, 28 n.5 (8th Cir. 1980) (many cases involving constitutional questions); Magnani v. City of Ames, 493 F. Supp. 1003, 1005 n.1 (S.D. Iowa 1980) (several courts have passed on constitutionality question).

5. *See, e.g.*, Music Stop, Inc., v. City of Ferndale, 488 F. Supp. 390, 392-93 (E.D. Mich. 1980) (ordinance vague, no fair notice); Knoedler v. Roxbury Township, 485 F. Supp. 990, 994 (D. N.J. 1980) (court struck ordinance for vagueness); High Ol' Times, Inc. v. Busbee, 456 F. Supp. 1035, 1041-43 (N.D. Ga. 1978) (district court held statute vague), *aff'd per curiam*, 621 F.2d 141 (5th Cir. 1980).

and support the passage of a model act.[6] The DEA's research revealed the paraphernalia industry to be a "multi-million dollar big business that facilitate[d] and glamorize[d] drug use."[7] Ultimately, the DEA believed the 30,000 "headshops" in the United States contributed to controlled substance abuses by the public, especially youth.[8] Further study indicated that, due to limited federal funds, this "parasitic industry" was best dealt with on a state and local level.[9] The DEA, therefore, drafted what it purported to be a constitutionally sound paraphernalia act.[10]

Most attempts to regulate the paraphernalia industry have been challenged soon after enactment.[11] State or local anti-drug paraphernalia acts are commonly challenged for vagueness in defining paraphernalia or overbreadth in application.[12] Under the due process clause of the fourteenth amendment, all criminal statutes must meet certain, specific requirements.[13] Statutes and ordinances which do not give an individual notice of what is and is not prohibited have been struck on the ground of vagueness.[14] Moreover, a statute which is vague is usually overbroad in that it often prohibits innocent or constitutionally protected conduct.[15] In a sig-

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6. *See Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 96th Cong., 1st Sess. 87 (1979) (statement of Peter B. Bensinger, Administrator, DEA).

7. *Id.*

8. *See id.*

9. *See id.* at 87-88.

10. *See id.* at 88.

11. *See, e.g.*, Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 921 (6th Cir. 1980) (legal action commenced one day after effective date), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981); High Ol' Times, Inc. v. Busbee, 621 F.2d 135, 138 (5th Cir. 1980) (action filed on effective date); Atkins v. Clements, No. CA-4-81-459K (N.D. Tex. Sept. 1, 1981) (temporary restraining order issued on statute's effective date).

12. *See, e.g.*, Tobacco Road v. City of Novi, 490 F. Supp. 537, 545 (E.D. Mich. 1980) (plaintiff contends ordinance vague); Knoedler v. Roxbury Township, 485 F. Supp. 990, 991-92 (D. N.J. 1980) (plaintiff claims ordinance vague and violative of due process); Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297, 1304-06 (D. N.J. 1979) (ordinance overly broad and vague, arbitrary and capricious, contrary to 14th amendment).

13. *See* U.S. CONST. amend. XIV; *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (law must give notice of offending conduct); U.S. v. Harriss, 347 U.S. 612, 617 (1954) (constitutional requirement of definiteness violated if statute fails to give notice).

14. *See, e.g.*, Colautti v. Franklin, 439 U.S. 379, 381 (1979) (state abortion statute subjecting physicians to criminal liability for aborting "viable" fetus vague); Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) (provision condemns no act or omission and therefore vague); Connally v. General Constr. Co., 269 U.S. 385, 395 (1926) (due process cannot rest on equivocal support).

15. *See* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 927 (6th Cir. 1980), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981); *cf.* Broadrick v. Oklahoma, 413 U.S. 601, 612-14 (1973) (overbreadth doctrine prohibits making innocent conduct criminal); Casbah, Inc. v. Thone, 651 F.2d 551, 561 n.14 (8th Cir. 1981) (overbreadth a species of vagueness), *petition for cert. filed*, 50 U.S.L.W. 3157 (U.S. Sept.

nificant case, *Grayned v. City of Rockford*,[16] the Supreme Court determined that adequate notice of criminal conduct and explicit enforcement guidelines were essential to a constitutionally acceptable statute.[17] A statute, therefore, must give notice to a person of ordinary intelligence that his conduct is illegal[18] and be definite enough to encourage fair enforcement.[19] These standards must be strictly complied with when the statute is criminal in nature or may impinge on constitutionally protected conduct.[20] These doctrines insure that the continued enjoyment of liberty or property will not turn on whether one is able to correctly guess the provisions of a particular statute and behave accordingly.[21]

Although non-Model Act statutes and ordinances have been challenged successfully,[22] numerous statutes based on the Model Act have been up-

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15, 1981) (No. 81-415).

16. 408 U.S. 104, 104 (1972).

17. *See id.* at 108.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . . A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09; *see also* Smith v. Goguen, 415 U.S. 566, 572 (1974); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

18. *See* U.S. v. Harriss, 347 U.S. 612, 617 (1954); Jordan v. De George, 341 U.S. 223, 230-32 (1951).

19. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Herndon v. Lowry, 301 U.S. 242, 261-63 (1937).

20. *See* Smith v. Goguen, 415 U.S. 566, 573 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Smith v. California, 361 U.S. 147, 151 (1959).

21. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 242-43 (1932); Cline v. Frink Dairy Co., 274 U.S. 445, 458-59 (1927).

22. *See* Geiger v. City of Eagan, 618 F.2d 26, 28, 29-30 (8th Cir. 1980) (ordinance vague on face preliminary injunction granted); Magnani v. City of Ames, 493 F. Supp. 1003, 1007 (S.D. Iowa 1980) (ordinance vague, permanent injunction granted); High Ol' Times, Inc. v. Busbee, 456 F. Supp. 1035, 1043-44 (N.D. Ga. 1978) (statute vague, permanent injunction granted), *aff'd per curiam*, 621 F.2d 141 (5th Cir. 1980). A recent decision striking a non-Model Act ordinance is Gaffey v. Babb, 624 P.2d 616, 621 (Or. Ct. App.) (en banc), *petition for review denied mem.*, 631 P.2d 341 (Or. 1981). The Oregon Court of Appeals determined that a local paraphernalia ordinance was unconstitutionally vague based on its belief that the definition of paraphernalia, "does not reasonably inform the citizens, police or trier of fact what conduct is prohibited." *Id.* at 621. The vagueness was due to the definition's reliance on the use made of an item in the hands of the consumer. The number of type of items was limited only by the use to which the consumer put the item. The city claimed the general nature of the definition would be cured at trial by expert testimony. The court reasoned, "[e]xpert testimony presented . . . in trial does not provide standards for persons whose conduct is sought to be regulated . . . . " *Id.* at 621-22. *But see* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 50 U.S.L.W. 4267 (U.S. March 2, 1982). The United States Supreme Court in *Hoffman Estates* upheld a non-Model Act paraphernalia licensing ordinance. *Id.* at 4271. Flipside alleged the ordinance was overbroad because it

held.[23] In *Florida Businessmen for Free Enterprise v. City of Hollywood*,[24] however, the Fifth Circuit Court of Appeals granted an injunction pending appeal of a district court judgment upholding a city ordinance banning paraphernalia.[25] The Court of Appeals for the Sixth Cir-

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infringed on non-commercial and symbolic speech. The Court determined, however, that the ordinance "simply regulates . . . commercial marketing of items . . . ." *Id.* at 4269. Furthermore, the ordinance only limits commercial activity promoting an illegal act, "which a government may regulate or ban entirely . . . " under the *Central Hudson Gas & Elec.* decision. *Id.* at 4269; 447 U.S. 557, 562-63 (1980). The Court also found the ordinance not vague because Flipside was unable to show that it was "impermissibly vague in all its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 50 U.S.L.W. 4267, 4269 (U.S. March 2, 1982). The Court mentioned that it was more tolerant of vagueness in enactments providing civil penalties. *Id.* at 4270. The Court stated that Flipside's allegation of vagueness with respect to the "designed for use" standard was unfounded. The standard applies to those items whose "objective features" reveal that they are principally used with illegal drugs and that the "business person of ordinary intelligence," would know the standard obviously refers to the manufacturer's design. *Id.* at 4270. Therefore, the standard was clear enough to cover some items Flipside sold, as was the "marketed for use" standard. *Id.* at 4270-71.

23. *See, e.g.*, Casbah, Inc. v. Thone, 651 F.2d 551, 559 (8th Cir. 1981) (statute read as whole not vague as to definition of paraphernalia or intent requirement), *petition for cert. filed*, 50 U.S.L.W. 3157 (U.S. Sept. 15, 1981) (No. 81-415); Atkins v. Clements, No. CA-4-81-459K, slip op. at 17 (N.D. Tex. Sept. 24, 1981) (statute gives fair notice); Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834, 842-43 (D. Md. 1980) (statute based on Model Act upheld in entirety). The Model Act statutes have been upheld after either deleting objectionable portions or merely construing challenged portions as constitutionally acceptable. *See* Hejira Corp. v. McFarlane, 660 F.2d 1356, 1368-69 (10th Cir. 1981) (no vagueness regarding intent or definition of paraphernalia); Nova Records, Inc. v. Sendak, 504 F. Supp. 938, 945 (S.D. Ind. 1980) (not vague, intent to use item for illegal purpose is essence of statutory offense); Record Revolution No. 6, Inc. v. City of Parma, 492 F. Supp. 1157, 1181 (N.D. Ohio) (ordinances based on Model Act not vague after deleting and construing certain phrases), *rev'd*, 638 F.2d 916, 938 (6th Cir. 1980) (plaintiffs entitled to injunction due to vagueness of ordinance), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981). Many challenges to paraphernalia ordinances and statutes have been heard in federal district courts. *See, e.g.*, New England Accessories Trade Ass'n v. Browne, 502 F. Supp. 1245, 1252 (D. Conn. 1980) (not vague after constructive knowledge standard excised; standard vitiated specific intent requirement); Tobacco Accessories & Novelty Craftsmen Merchants Ass'n v. Treen, 501 F. Supp. 168, 169-70 (E.D. La. 1980) (held not vague where definition of drug paraphernalia clearly requires criminal intent on part of person charged with violating statute); Delaware Accessories Trade Ass'n v. Gebelein, 497 F. Supp. 289, 291-95 (D. Del. 1980) (statute containing "designed for use" upheld as not vague). In most litigation to date, statutes and ordinances based on the Model Act have survived due to the inclusion of an intent requirement. *Compare* Record Museum v. Lawrence Township, 481 F. Supp. 768, 773 (D. N.J. 1979) (pre-Model Act ordinance held vague and overbroad) *with* World Imports, Inc. v. Woodbridge Township, 493 F. Supp. 428, 432 (D. N.J. 1980) (ordinance based on Model Act constitutional because of intent requirement).

24. 648 F.2d 956, 956 (5th Cir. 1981).

25. *See id.* at 959.

cuit in *Record Revolution No. 6, Inc. v. City of Parma*,[26] held a "designed for use" standard was impermissibly vague and overbroad.[27] The court also found that the ordinance's ban on advertising reached beyond the city limits and, therefore, violated the first amendment.[28]

Prior to the enactment of the 1981 amendment to the Controlled Substances Act, Texas law was practically silent in the area of drug paraphernalia.[29] Although the Uniform Narcotic Drug Act took effect in Texas in 1937,[30] the prohibition against paraphernalia was not added until 1955,[31] and then only in a limited fashion.[32] The act was repealed when Texas adopted the Uniform Controlled Substances Act.[33] Prosecutions under the provisions of the Uniform Narcotic Drug Act and the Uniform Controlled Substances Act were rare; there are only a few reported cases dealing with unlawful possession of narcotic paraphernalia.[34]

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26. 638 F.2d 916, 938 (6th Cir. 1980).

27. *See id.* at 931.

28. *See id.* at 937. The ordinance in *Parma* failed due to the circuit court's difficulty in applying the severability clause found in section one to the objectionable portion of the statute in section two. *Id.* at 932. The circuit court criticized the district court for exceeding the scope of its powers and stated that it should have declared the ordinances vague and unconstitutional because a federal court, absent a limiting construction from a state court, must take the statute or ordinance as written. *Id.* at 927-28. The district court had rejected the challenger's contention that the definitional portion of the ordinance was vague and that the ban on advertising infringed on the first amendment right of free speech. Record Revolution No. 6, Inc. v. City of Parma, 492 F. Supp. 1157, 1178-81 (N.D. Ohio) (district court held ordinances based on Model Act not vague after deleting and construing certain phrases), *rev'd*, 638 F.2d 916, 938 (6th Cir. 1980) (plaintiffs entitled to injunction due to vagueness of ordinance), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981).

29. *See, e.g.*, 1973 Tex. Gen. Laws, ch. 429, § 4.07, at 1155 (prohibits possession of, "a hypodermic syringe, needle, or other instrument . . . with intent to use it for . . . subcutaneous injection" of a controlled substance); 1955 Tex. Gen. Laws, ch. 386, § 2(b), (c), at 1027 (prohibits possession of, "an opium pipe, instrument, or contrivance used in smoking a narcotic drug" or a "hypodermic syringe . . . or any instrument . . . for subcutaneous injection" unless under direction of physician); 1937 Tex. Gen. Laws, ch. 169, § 2, at 336 (no prohibition of paraphernalia possession).

30. *See* 1937 Tex. Gen. Laws, ch. 169, § 1-2, at 333-47.

31. *See* 1955 Tex. Gen. Laws, ch. 386, § 1, at 1027.

32. *See id.* § 1, at 1027. The statute prohibited, in pertinent part, possession of, "an opium pipe, instrument, or contrivance used in smoking a narcotic drug . . . [or] a hypodermic syringe or needle or any instrument adapted for the use of narcotic drugs by subcutaneous injection . . . . " *Id.* at 1027-28.

33. *See* 1973 Tex. Gen. Laws, ch. 429, §§ 1-6, at 1132-73.

34. *See, e.g.*, Rodriguez v. State, 449 S.W.2d 470, 471 (Tex. Crim. App. 1970) (conviction for possession of narcotic paraphernalia under 1925 Penal Code § 725b); Dagley v. State, 394 S.W.2d 179, 180 (Tex. Crim. App. 1965) (conviction for possession of narcotic paraphernalia); Richardson v. State, 294 S.W.2d 844, 845 (Tex. Crim. App. 1956) (conviction for possession of narcotic paraphernalia).

In 1981, the 67th Texas Legislature substantially expanded the state's prohibition against drug paraphernalia.[35] The amendment to the Texas Controlled Substances Act defines drug paraphernalia as, "equipment, a product, or a material of any kind that is used or intended for use in planting, . . . growing, . . . harvesting, . . . compounding, . . . testing, . . . [or] repackaging" a controlled substance.[36] The words "or drug paraphernalia" have been added to the definition of delivery.[37] The new statute also provides an exhaustive, though not exclusive, listing of possible examples of paraphernalia, including kits, testing, equipment, weighing equipment, dilutants, capsules, hypodermic syringes, and "object[s] used or intended for use in . . . introducing marihuana, cocaine, hashish, or hashish oil into the human body . . . . "[38] This section is followed by a list of the more common smoking devices.[39] Section 4.07 sets out penalties for possession or delivery of paraphernalia.[40] Delivery to a minor who is three years younger than an adult actor constitutes a special offense under the new Act.[41]

The bill authorizes forfeiture, by individuals convicted under the Act, of all controlled substances or raw materials.[42] In addition, the amendment lists eleven evidentiary factors to be considered in ascertaining whether an item is drug paraphernalia.[43] They include statements of the owner or person in control of the item concerning its use, residue of a controlled substance, direct or circumstantial evidence of the intent of

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35. *See* 1981 Tex. Sess. Law Serv., ch. 277, §§ 1-7, at 742-46 (Vernon) (codified in Tex. Rev. Civ. Stat. Ann. art. 4476-15, §§ 1.02(8) & (29), 4.07, 5.03, 5.15 (Vernon Supp. 1982)).

36. *See* TEX. REV. CIV. STAT. ANN. art. 4476-15, § 1.02(29) (Vernon Supp. 1982).

37. *See id.* § 1.02(8). "Delivery is the actual or constructive transfer . . . [or] offer to sell a controlled substance or drug paraphernalia." *Id.* § 1.02(8).

38. *See id.* § 1.02(20(A)-(L).

39. *See id.* § 1.02(29)(L)(i)-(xi).

40. *Id.* § 4.07. A first offense under possession is a class C misdemeanor. *Id.* § 4.07(d). Subsequent convictions are enhanced to a class B misdemeanor. *Id.* § 4.07(d) Delivery, manufacture, or possession with intent to deliver is made a class A misdemeanor under the Act. *Id.* § 4.07(e). If the defendant has a previous conviction under the act, then delivery, manufacture or possession with intent to deliver becomes a third degree felony. *Id.* § 4.07(e). In all cases, delivery to a minor by one who is over eighteen and more than 3 years older is a felony of the third degree. *Id.* § 4.07(f).

41. *Id.* § 4.07(f).

42. *See id.* § 5.03. This section authorizes forfeiture of all controlled substances and raw materials used to manufacture controlled substances in violation of the Act. *Id.* § 5.03(1), (2). All property used to conceal controlled substances and raw materials is also subject to forfeiture. *Id.* § 5.03(3). Additionally, all books, formulas, and other like data are included. *Id.* § 5.03(4). Finally, all conveyances used to transport or facilitate transport of controlled substances, raw materials, or property used to conceal them, and all money and paraphernalia derived or used in violation of the act, may be forfeited. *Id.* § 5.03(5),(6).

43. *See id.* § 5.15.

the owner, or one in control, to deliver it to persons who he knows, or reasonably should know, intends to violate the Act.[44] Other factors which may be considered in determining intent are oral or written instructions and descriptive materials concerning an object's use, how the object is displayed, whether the owner or one in control is a supplier of similar items, evidence of the ratio of sales of the object to total sales of a business, existence of uses for the object, physical design characteristics, and expert testimony.[45]

Supporters of Texas' anti-drug paraphernalia bill claim it will give law enforcement officers a statewide tool with which to uniformly reduce the glamorization of drug use by the paraphernalia industry.[46] They believe it to be a narrowly and precisely drawn statute, omitting those provisions which were found objectionable by the court in *Parma*.[47] Legislators who backed the bill admit the difficulty of proving intent beyond a reasonable doubt.[48] They claim, however, that the purpose of the bill is not to close down "headshops", but merely to force a change in marketing so as to make drug use less glamorous.[49] Nevertheless, Representative Charles Evans, the bill's sponsor, has publicly stated the purpose of the bill, in fact, "is to put headshops out of business."[50] Representative Evans argues it is ludicruous to prohibit controlled substances yet allow the sale of the "tools of the trade."[51]

Opponents of the bill claim the wording is so vague that police could apply it arbitrarily, and that, without clear enforcement standards, it is unconstitutional.[52] They believe the concept of the bill is "flawed," making an analogy to illegal shot glasses during Prohibition.[53] Further, those who oppose the bill point out the absence of a definition of "headshop" will create unfair application of the statute by prohibiting the sale of paraphernalia in certain stores, while allowing its sale in others.[54] They identify the actual thrust of the bill as an attempt to restrict a non-con-

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44. *Id.* § 5.15(1)-(3).

45. *Id.* § 5.15(4)-(11).

46. *See* Texas House Study Group Bill Analysis, H.B. 733, at 25 (April 13, 1981).

47. *See id.* at 26. The *Parma* court determined the "designed for use" standard was impermissibly vague and the prohibition of advertising was overbroad. Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 932, 937 (6th Cir. 1980), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L.Ed. 2d 384 (1981).

48. *See* Texas House Study Group Bill Analysis, H.B. 733, at 27 (April 13, 1981).

49. *See id.* at 27.

50. Dallas Morning News, April 18, 1981, at 33A, col. 1-2.

51. *See id.* at 33A, col. 1-2.

52. *See* Texas House Study Group Bill Analysis, H.B. 733, at 27 (April 13, 1981).

53. *See id.* at 27.

54. *See id.* at 27.

forming lifestyle.[55] It is further claimed that the bill will only drive the business underground, and if the legislature is concerned about drug use among the young, they should consider restricting the sale of specific items to minors.[56] Although the legislature may have intended that no innocent merchant be prosecuted, this does not mean the bill will be fairly enforced.[57]

In light of the recent decisions by federal courts upholding the constitutionality of the Model Act,[58] there is little doubt that the Texas version will also be upheld.[59] The 67th legislature obviously took notice of decisions identifying objectionable provisions in other paraphernalia legislation.[60] The most significant deviation from the Model Act in the Texas amendment was the exclusion of the suspect phrase "designed for use."[61] In *Parma*, the court found that this term in the definitional portion of the statute was inconsistent with the specific intent requirement.[62] The difficulty with including design as part of the definition is the lack of precise standards by which one may take notice of prohibited conduct.[63] For example, the seller may be held liable for the manufacturer's intent.[64] A

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55. *See id.* at 27.

56. *See id.* at 28.

57. *See id.* at 28; Financial Indem. Co. v. Cargile, 288 N.E.2d 861, 863 (Ohio Ct. C.P. 1972). Legislative intent, however, is not always controlling. "We believe that the meaning of the act must be determined from the words of the statute itself. The court cannot consider what an individual legislator, even the author of the bill, states he understood them to mean." *Id.* at 863.

58. *See, e.g.*, Casbah, Inc. v. Thone, 651 F.2d 551, 559 (8th Cir. 1981) (statute read as whole not vague as to definition of paraphernalia or intent requirement), *petition for cert. filed*, 50 U.S.L.W. 3157 (U.S. Sept. 15, 1981) (No. 81-415); Atkins v. Clements, No. CA-4-81-459K, slip op. at 17 (N.D. Tex. Oct. 29, 1981) (no facial, constitutional infirmity, statute gives fair notice); Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834, 842-43 (D. Md. 1980) (statute based on Model Act upheld in entirety).

59. *See* TEX. ATT'Y GEN. OP. No. MW-326, at 1051 (1981).

60. *See id.* at 1051.

61. *See id.* at 1051 (House bill omits "designed for use"). The court in *Parma* stated that many items "lack . . . any design characteristics that distinguish lawful purposes from unlawful purposes." Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 930 (6th Cir. 1980), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981).

62. *See id.* at 930-31; TEX. ATT'Y GEN. OP. No. MW-326, at 1052 (1981). One may infer from the *Parma* court's reasoning that a conviction based solely on "design evidence" may not stand. *See* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 928-29 (6th Cir. 1980), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981).

63. *See* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 930 (6th Cir. 1980), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981); *cf.* Colautti v. Franklin, 439 U.S. 379, 390-91 (1979) (statute must give fair notice of proscribed conduct).

64. *See* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 928 (6th Cir.

seller must determine whether the object was, in fact, "designed for use" with a controlled substance.[65] In light of the many innocuous items that may be used as paraphernalia, requiring the merchant to make a determination as to another's intent should be impermissible.[66] Nevertheless, the "designed for use" provision may force the merchant to forego the sale of an otherwise lawful item,[67] although the merchant's intent in selling the item is other than the proscribed use.[68] In the face of these arguments, the Texas Attorney General believes the legislature's decision not to enact this provision of the Model Act will ensure its constitutionality.[69] The Texas act, however, allows the consideration of design characteristics as a factor in determining whether an item is paraphernalia.[70]

The Texas Legislature also chose not to include two categories of drug paraphernalia found in the Model Act:[71] "roach clip" and "cocaine spoon."[72] The problem with such terms is similar to that of the "designed for use" standard—a conviction may be based on the possession, delivery

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1980), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981). Under the Texas version, intent, for the purposes of convicting an individual, is that of the person on trial. *See Proposed Amendments to the Texas Controlled Substances Act: Hearings on H.B. 733 Before the House Jurisprudence Committee* 67th Legislature (Feb. 18, 1981) (tape recorded testimony of Attorney General Mark White).

65. *See* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 933 (6th Cir. 1980), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981).

66. *See id.* at 928, 930 (quoting NORML v. Sendak, No. TH-75-142-c (S.D. Ind. February 4, 1980)). The court described items such as, "paper clip[s], tie bar[s], hand mirror[s] . . . [or] aluminum foil" as those types of innocent items that under the "designed for use" standard would render the merchant liable. *Id.* at 930.

67. *See* Texas House Study Group Bill Analysis H.B. 733, at 28 (April 13, 1981) (bill so vague that "double use" problem will not be cured simply by removing "designed for use"). *But see id.* at 26 (supporters of bill claim arrest of "legitimate" businessman for selling "double use" item would not stand).

68. *See id.* at 26. As far as the vendor is concerned, he may intend the elaborate brass waterpipe he retails for three hundred dollars to used as an objét d'art.

69. *See* TEX. ATT'Y GEN. OP. No. MW-326, at 1053 (1981).

70. *See* TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.15 (10) (Vernon Supp. 1982). This is the only portion of the bill Attorney General Mark White found to be weak. *See* TEX. ATT'Y GEN. OP. No. MW-326, at 1053 (1981).

71. *See* TEX. ATT'Y GEN. OP. No. MW-326, at 1052 (1981); *cf.* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 932-33 (6th Cir. 1980) ("roach clip" and "cocaine spoon" not precise terms), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981).

72. *See* MODEL DRUG PARAPHERNALIA ACT art. I, § 12(e)-(f) (Drug Enforcement Administration 1979). Specific attempts to define paraphernalia were found in pre-Model Act statutes. *See, e.g.*, Music Stop, Inc. v. City of Ferndale, 488 F. Supp. 390, 391 (E.D. Mich. 1980) (paraphernalia includes capsule, syringe, cocaine spoon and marihuana pipe); Knoedler v. Roxbury Township, 485 F. Supp. 990, 991 (D.N.J. 1980) (listing of items such as needles, eyedroppers, spoon); Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297, 1298 (D.N.J. 1979) (ordinance listed, *inter alia*, cigarette rolling papers as paraphernalia).

or manufacture of items which are considered illegal solely because of the defendant's illicit intent or state of mind.[73] In addition, in many instances, such as with "cocaine spoon", these items were defined in relation to their size, which also is regarded as a vague standard.[74]

Significantly, the legislature also chose not to adopt a provision banning advertising of paraphernalia.[75] The court in *Parma* found this aspect of the city ordinance highly objectionable and declared the provision an unconstitutional infringement of the first amendment right of free speech.[76] The necessity for such a ban is questionable, since most legitimate newspapers don't carry such advertisements.[77] These advertisements are usually found in music publications and periodicals which are usually found in record stores frequented by the young.[78]

Constitutionality, however, does not necessarily render a statute enforceable. A conviction under the act requires proof of intent. Evidence which the Act encourages the state to rely on for the purpose of such proof, however, may be easily circumvented.[79] A defendant, for example, rarely will admit to having used the item in question for an illicit purpose.[80] Residue on the item may provide circumstantial evidence, but all one need do is carefully clean the apparatus after each use.[81] The Act also

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73. *See* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 932 (6th Cir. 1980), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981).

74. *See* Brief for Appellee at 19, Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 50 U.S.L.W. 4267 (U.S. Mar. 2, 1982). The question of how small is small may be answered many ways; reasonable minds may differ. In her testimony before the court, the village president stated that if a pipe were the kind she had never seen used for ordinary tobacco, or "if the bowl did not appear to be the kind that her husband's pipes [had], then they [were] . . . paraphernalia." *Id.* at 19.

75. *See* MODEL DRUG PARAPHERNALIA ACT art. II, § D (Drug Enforcement Administration 1979).

76. *See* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 937 (6th Cir. 1980), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981).

77. Telephone interview with Betty Robinson, Classified Advertising Manager, San Antonio Light, in San Antonio (Feb. 2, 1982).

78. *See Proposed Amendments to the Texas Controlled Substances Act, Hearings on H.B. 733 Before the House Jurisprudence Committee*, 67th Legislature (February 18, 1981) (tape recorded testimony of Sue Rusche of Families in Action, Inc.).

79. *See generally* 1 H.C. UNDERHILL, CRIMINAL EVIDENCE § 51 (P. Herrick 1973 6th ed.); H. Cargill, Jr., Paraphernalia Laws-Panacea or Threat to Civil Liberties? 4 (July 1, 1981) (unpublished paper by city attorney of Abilene, Texas).

80. TEX. REV. CIV. STAT. ANN. art. 4476-15 § 5.15(1) (Vernon Supp. 1982) (the statute allows for such evidence); *see also* H. Cargill, Jr. Paraphernalia Laws-Panacea or Threat to Civil Liberties? 4 (July 1, 1981) (unpublished paper) (some defendants make incriminating statements).

81. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.15(2) (Vernon Supp. 1982). ("[T]he existance of any residue of controlled substances on the object") Residue is defined by Webster's as "something that remains after a part is taken . . . . " WEBSTER'S THIRD INTERNA-

allows for use of evidence of the intent of the owner, or "one in control of the object to deliver it to persons whom he knows or should reasonably know will use the object to" violate the Act.[82] The individual who intends to deliver paraphernalia could refrain from asking questions about the intended use of the item and avoid circumstances from which he reasonably could ascertain the proposed use.[83] Other provisions of the amendment relate to instructional or descriptive materials.[84] If manufacturers eliminated blatantly descriptive instructions, illicit intent could not be proven.[85] Furthermore, because the manner of display may be used to prove illicit intent,[86] the clever owner would simply insure that his pipes or other like items are not displayed near any obvious pro-marihuana literature.[87]

Subsection 7 is troublesome in that it implies that if one is a licensed tobacconist he may sell items that would be considered paraphernalia in a "headshop."[88] For example, a tobacconist's inventory will usually include a variety of pipes of various shapes and sizes.[89] Because the items are in a "legitimate" tobacco shop, however, there is little danger of the police enforcing the statute in such an establishment.[90] For example, one very legitimate supplier, Alfred Dunhill, markets an Austrian crystal brandy pipe, a form of chamber pipe.[91] A Dunhill's pipe shop would probably not be considered a "head shop" by any stretch of the imagination, even though chamber pipes are specifically prohibited by the statute as a form

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TIONAL DICTIONARY 1932 (1961).

82. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.15(4) (Vernon Supp. 1982).

83. *See* H. Cargill, Jr., Paraphernalia Laws-Panacea or Threat to Civil Liberties? 5 (July 1, 1981) (unpublished paper).

84. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.15(4),(5) (Vernon Supp. 1982).

85. *See* H. Cargill, Jr., Paraphernalia Laws-Panacea or Threat to Civil Liberties? 5 (July 1, 1981) (unpublished paper).

86. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.15(6) (Vernon Supp. 1982).

87. *See* H. Cargill, Jr., Paraphernalia Laws-Panacea or Threat to Civil Liberties? 5 (July 1, 1981) (unpublished paper).

88. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.15(7) (Vernon Supp. 1982) (". . . whether the owner or anyone in control of the object is a . . . licensed distributor or dealer of tobacco products . . . "). It seems that this factor means a licensed tobacconist is given a presumption in his favor.

89. *Cf.* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 921 (6th Cir. 1980) (testimony of pipe maker), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981).

90. *See* Dallas Morning News, April 18, 1981, at 33A, col. 1-2; *see also Proposed Amendments to the Texas Controlled Substances Act, Hearings on H.B. 733 Before the House Jurisprudence Committee*, 67th Legislature (February 18, 1981) (tape recorded testimony of Attorney General Mark White that legitimate businesses need not worry; purpose of bill to close headshops).

91. *See* Brief for Plaintiff at 4, High Ol' Times, Inc. v. Busbee, 449 F. Supp. 364, 364 (N.D. Ga. 1978).

of paraphernalia.[92] A similar pipe in a "headshop" would be considered paraphernalia.[93]

The Act further aggravates the possibility for uneven enforcement by implying that intent is a function of "the ratio of sales of the object to total sales of the business enterprise."[94] Returning to the Alfred Dunhill example, even though the Austrian crystal brandy pipe in a "headshop" would probably be considered paraphernalia, a Dunhill shop could show that it sells only two or three per year to escape enforcement of the statute.[95] The low volume would negate illicit intent and, therefore, the pipe would not be considered paraphernalia.[96]

The Texas version of the Model Act lacks the objectionable "designed for use" standard, thereby rendering conviction more difficult by requiring proof of a defendant's intent to use an item with a controlled substance.[97] Absent illicit intent, one cannot be convicted of violating a paraphernalia statute.[98] In the face of such an onerous burden, one must question the practicality of the statute, especially since the suggested evidentiary factors seem relatively easy to circumvent. Paraphernalia is by no means necessary to the use or abuse of controlled substances. Until the statute can be shown to have a discernable effect on the use and trafficking of controlled substances, the utility of closing headshops will remain questionable.[99]

John B. Milano, Jr.

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92. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 1.02(29)(L)(V) (Vernon Supp. 1982).

93. *Id.* § 5.15(7).

94. *Id.* § 5.15(8).

95. *See id.* § 5.15(8). By implication, section 5.15(8) means that if the ratio of sales of the item to the remainder of the business' sales is low, then it may not be paraphernalia. *See id.* § 5.15(8).

96. *See id.* § 5.15(8).

97. *See* H. Cargill, Jr., Paraphernalia Laws-Panacea or Threat to Civil Liberties? 2, 5 (July 1, 1981) (unpublished paper).

98. To exemplify his contention that absent illicit intent one cannot be convicted of violating a statute, the administrator of the DEA keeps a "bong" on his desk for use as a pencil holder. *See* H. Cargill, Jr., Paraphernalia Laws-Panacea or Threat to Civil Liberties? 2 (July 1, 1982) (unpublished paper).

99. *See* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 919 (6th Cir. 1980), *vacated and remanded mem.*, ___U.S.___, 101 S. Ct. 2998, 69 L. Ed. 2d 384 (1981).