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Virginia's Drug Paraphernalia Law

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VIRGINIA'S DRUG PARAPHERNALIA LAW

I. INTRODUCTION

With the enactment of sections 18.2-265.1 through -265.4 of the Virginia Code, Virginia has joined a growing number of states attempting to prohibit the sale of drug paraphernalia. Virginia's new drug paraphernalia law is designed to remedy a previously existing anomaly in Virginia: possession and sale of controlled substances were criminal offenses, yet the sale of devices facilitating the use of controlled substances was permissible.

Like drug paraphernalia laws in other states, Virginia's new law has been attacked on constitutional grounds. The parties contesting the new

law have argued principally that the law is violative of due process because it is too vague and that it infringes on the first amendment right of freedom of speech. In July 1981, the United States District Court for the Eastern District of Virginia ruled that the law was constitutional; that decision is now being challenged in the Fourth Circuit Court of Appeals.\textsuperscript{5}

This comment will examine Virginia’s new drug paraphernalia statute and the constitutional questions raised by those challenging the law. In addition, the probable effect which the law will have on controlling drug paraphernalia in Virginia will be examined.

II. VIRGINIA’S DRUG PARAPHERNALIA LAW

Virginia’s new law was created largely from language contained in the Model Drug Paraphernalia Act.\textsuperscript{6} The Model Act was drafted in 1979 by the Federal Drug Enforcement Administration of the United States Department of Justice to serve as a model for state and local governments desiring to enact drug paraphernalia laws.\textsuperscript{7} The Model Act is the source of most state drug paraphernalia laws now in effect.\textsuperscript{8} These laws have been vigorously challenged with mixed results.\textsuperscript{9} While Virginia’s law closely resembles the Model Act, portions of the Model Act found objectionable in other states were omitted from the Virginia version.\textsuperscript{10}

Section 18.2-265.1\textsuperscript{11} defines the term “drug paraphernalia”:

As used in this article, the term “drug paraphernalia” means all equipment, products, and materials of any kind which are intended by a person charged with violating § 18.2-265.3 for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, strength testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana or a controlled

\textsuperscript{5} Id.
\textsuperscript{6} MODEL DRUG PARAPHERNALIA ACT (U.S. Dept. of Justice Aug. 1979) [hereinafter cited as Model Act]. For the complete text of the Model Act, see Appendix.
\textsuperscript{7} The Model Act was originally drafted as a proposed amendment to the Uniform Controlled Substances Act. See MODEL DRUG PARAPHERNALIA ACT, Prefatory Note (U.S. Dept. of Justice Aug. 1979).
\textsuperscript{8} Prior to the Model Act, most efforts to enact constitutional drug paraphernalia laws met with failure. See, e.g., 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); Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297 (D.N.J. 1979).
\textsuperscript{9} See note 3 supra.
\textsuperscript{10} Most significantly, Virginia has not attempted to prohibit the possession of drug paraphernalia or its advertisement.
This definition omits the “designed for use” standard of the Model Act\textsuperscript{12} which was found unconstitutionally vague by the Sixth Circuit Court of Appeals in \textit{Record Revolution No. 6, Inc. v. City of Parma.}\textsuperscript{13} Section 18.2-265.1 also defines drug paraphernalia in terms of the accused’s intent.\textsuperscript{14} The Model Act has been attacked on the ground that it is unclear whose intent is relevant and that the intent of a manufacturer or seller conceivably could be transferred to a buyer or vice-versa.\textsuperscript{15} By clearly stating that it is the accused’s intent which is relevant, Virginia has avoided this problem. Section 18.2-265.1 also provides an extensive list of examples of drug paraphernalia; this list parallels that found in the Model Act.\textsuperscript{16} These ex-

\textsuperscript{12.} Model Act, art. I.
\textsuperscript{14.} The original drug paraphernalia bill introduced in the 1981 General Assembly did not clearly specify whose intent was relevant. H.B. 1569, 1981 General Assembly (introduced Jan. 19, 1981).
\textsuperscript{15.} The text of the Model Act does not specifically state whose intent is relevant. However, the comments accompanying the Model Act refer consistently to the potential defendant as the “person in control” of the item.
\textsuperscript{16.} \textit{Va. Code Ann.} § 18.2-265.1 (Cum. Supp. 1981) includes the following as examples of drug paraphernalia:

\begin{enumerate}
  \item Kits intended for use in planting, propagating, cultivating, growing or harvesting of marijuana or any species of plant which is a controlled substance or from which a controlled substance can be derived;
  \item Kits intended for use in manufacturing, compounding, converting, producing, processing, or preparing marijuana or controlled substances;
  \item Isomerization devices intended for use in increasing the potency of marijuana or any species of plant which is a controlled substance;
  \item Testing equipment intended for use in identifying or in analyzing the strength or effectiveness of marijuana or controlled substances;
  \item Scales and balances intended for use in weighing or measuring marijuana or controlled substances;
  \item Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, intended for use in cutting controlled substances;
  \item Separation gins and sifters intended for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;
  \item Blenders, bowls, containers, spoons, and mixing devices intended for use in com-
amples, some of which are phrased in drug culture jargon, also include an intent element.

The Virginia act lists various factors which may serve as evidentiary guidelines in determining whether an object is drug paraphernalia:

In determining whether an object is drug paraphernalia, the court may consider, in addition to all other relevant evidence, the following:

1. Constitutionally admissible statements by the accused concerning the use of the object;
2. The proximity of the object to marijuana or controlled substances; which proximity is actually known to the accused;
3. Instructions, oral or written, provided with the object concerning its use;
4. Descriptive materials accompanying the object which explain or depict its use;
5. National and local advertising within the actual knowledge of the ac-

9. Capsules, balloons, envelopes, and other containers intended for use in packaging small quantities of marijuana or controlled substances;
10. Containers and other objects intended for use in storing or concealing mari-

juana or controlled substances;
11. Hypodermic syringes, needles, and other objects intended for use in parenter-

ally injecting controlled substances into the human body;
12. Objects intended for use in ingesting, inhaling, or otherwise introducing mari-

juana, cocaine, hashish, or hashish oil into the human body; such as:
   a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
   b. Water pipes;
   c. Carburetion tubes and devices;
   d. Smoking and carburetion masks;
   e. Roach clips: meaning objects used to hold burning material, such as a mar-

juana cigarette, that has become too small or too short to be held in the hand;
   f. Miniature cocaine spoons, and cocaine vials;
   g. Chamber pipes;
   h. Carburetor pipes;
   i. Electric pipes;
   j. Air-driven pipes;
   k. Chillums;
   l. Bongs;
   m. Ice pipes or chillers.

17. While the use of jargon may be effective in giving notice to potential offenders, some of the terms used in § 18.2-265.1 are apparently confusing to some police officers and attor-

neys. Memorandum Opinion at 4, Virginia Tobacco Accessories Trade Ass’n & Nat’l Organiza-

tion for the Reform of Marijuana Laws v. Commonwealth, Civ. Nos. 81-0610-A, 81-0611-


18. The corresponding Model Act examples contain the “designed for use” language. Mod-

el Act, art. I.
cused concerning its use;
6. The manner in which the object is displayed for sale;
7. Whether the accused is a legitimate supplier of like or related items to
   the community, such as a licensed distributor or dealer of tobacco products;
8. Evidence of the ratio of sales of the objects defined in § 18.2-265.1 to
   the total sales of the business enterprise;
9. The existence and scope of legitimate uses for the object in the
   community;
10. Expert testimony concerning its use.¹⁹

This section omits several of the evidentiary guidelines included in the
Model Act.²⁰ In addition, a knowledge requirement not found in the
Model Act is added in subsections 2 and 5.²¹

Virginia's drug paraphernalia law makes only the sale of drug para-
phernalia and the possession of drug paraphernalia with intent to sell
criminal offenses.²² The mere possession of drug paraphernalia without
the requisite intent to sell is not punishable under the law. This differs
substantially from the Model Act which makes possession, manufacture
with intent to deliver, and advertisement of drug paraphernalia criminal
offenses.²³ By criminalizing only the sale of drug paraphernalia and pos-
session with the intent to sell, Virginia avoided subjecting its drug para-
phernalia law to some of the attacks faced by states adopting a broader
version of the Model Act.²⁴

III. CHALLENGES TO THE CONSTITUTIONALITY OF VIRGINIA'S DRUG
PARAPHERNALIA LAW

Virginia's drug paraphernalia law has been challenged by two organiza-
tions, the Virginia Tobacco Accessories Trade Association (VTATA) and

²⁰. See Model Act, art. I.
²¹. Compare § 18.2-265.2(2) & (5) with Model Act, art. I. Section 18.2-265.2(5) does not
   indicate whether the advertising must promote or depict an illegal use of an item. However,
   it would seem that if such advertising is to be relevant it must in some way connect the item
   in question with a prohibited use.
²². VA. CODE ANN. § 18.2-265.3 (Cum. Supp. 1981) provides that:
   A. Any person who sells or possesses with intent to sell drug paraphernalia shall be
      guilty of a Class 1 misdemeanor.
   B. Any person eighteen years of age or older who violates paragraph A. hereof by
      selling drug paraphernalia to a minor who is at least three years junior to the accused
      in age shall be guilty of a Class 6 felony.
   C. Any person eighteen years of age or older who distributes drug paraphernalia to
      a minor shall be guilty of a Class 1 misdemeanor.
²³. Model Act, art. II.
²⁴. See note 10 supra.
the National Organization for the Reform of Marijuana Laws (NORML). VTATA attacked the constitutionality of the law on the following grounds: (1) the law is overbroad and vague in violation of the due process clauses of the fifth and fourteenth amendments; (2) it impermissibly provides for summary seizure and forfeiture of inventory, in violation of the due process clauses; (3) it impermissibly infringes upon freedom of speech and expression in violation of the first amendment; (4) it is not rationally related to any legitimate governmental interest, in violation of the fourteenth amendment; (5) it impermissibly burdens interstate commerce in violation of article I, section 8 of the Constitution; and (6) it violates the supremacy clause of the Constitution.

VTATA's primary argument is that Virginia's drug paraphernalia law is unconstitutionally vague. It is a basic principle of constitutional law that, in order to avoid being void for vagueness, a law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." In addition, a law must provide "explicit standards for those who apply them" in order to avoid arbitrary and discriminatory

25. VTATA is an association of Virginia businesses which either manufacture, distribute or sell smoking accessories and other items which may fall into the category of items proscribed by Virginia's drug paraphernalia law. NORML is a non-profit organization which lobbies for the decriminalization of marijuana.

26. The fourteenth amendment provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The due process clause of the fifth amendment has been applied to the states through the fourteenth amendment. U.S. CONST. amend. V. A law is so vague as to violate due process if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). A law may also violate due process if its language is so broad that it encompasses both constitutionally protected and unprotected conduct. For a discussion of the relationship between the vagueness and overbreadth doctrines, see L.H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-28 (1978).

27. The first amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. This provision was made applicable to the states by the fourteenth amendment. See Gitlow v. New York, 268 U.S. 652, 666 (1925).

28. U.S. CONST. art. I, § 8 provides, in pertinent part, that "Congress shall have the Power To . . . regulate Commerce . . . among the several States . . . ."

29. "This Constitution, and the Laws of the United States . . . made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. CONST. art. VI.

30. Memorandum Opinion at 2 n.2.

31. Id. at 2.


33. Id. While a statute must provide standards for those charged with enforcing the law, it is not required that all law enforcement officers reach the same conclusion when applying
VTATA alleged that Virginia's drug paraphernalia law fails to meet these requirements because the definition of drug paraphernalia is too imprecise to allow merchants to know what is prohibited and that the law lacked sufficient standards for fair enforcement.

The difficulty in defining drug paraphernalia lies in the fact that the term itself can encompass an infinite number of items. Any item which could be used to facilitate the manufacture or use of controlled substances is an item of drug paraphernalia. It would be impossible to include in a statute every item which could, in appropriate circumstances, be considered drug paraphernalia. However, such specificity is not required to avoid the charge of vagueness. Only fair warning of what conduct is prohibited by a statute is necessary. Virginia's drug paraphernalia statute provides that only items which are "intended by a person . . . for use" with controlled substances are drug paraphernalia. No item is per se made illegal by the statute—the sale of an item becomes illegal only when it is sold with the intent that it be used with controlled substances. The statute requires that the intent be that of the person charged with the offense. In order to charge a merchant with selling drug paraphernalia, the statute requires that the merchant himself possess the necessary intent. By focusing on the intent of the person charged with a violation, the statute avoids the infirmity of some drug paraphernalia laws which do not clearly state whose intent, if anyone's, is relevant.

The United States District Court for the Eastern District of Virginia


34. The problem of vagueness lurks in many statutes primarily because "most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions." Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).

35. Memorandum Opinion at 5-6.

36. The number of items contained in the definition of drug paraphernalia is limited only by the creativity of drug users. See, e.g., definition contained in the HIGH TIMES ENCYCLOPEDIA OF RECREATIONAL DRUGS 266 (1978).

37. See notes 32-34 supra and accompanying text.


40. Id.

41. See note 15 supra. The language of § 18.2-265.1 which requires that the intent of the accused be shown is, undoubtedly, the most important language in the statute. It is somewhat puzzling that a number of states have left it to the courts to read this language into their drug paraphernalia statutes.
ruled that Virginia’s drug paraphernalia statute was not unconstitution-
ally vague. The court found that “[i]nclusion of specific intent on the
part of the seller as an element of the crime is adequate to provide notice
to the ordinary person of what is prohibited.” Further, the court found
that the examples of drug paraphernalia contained in the Virginia law,
together with the intent requirement, “provide sufficient standards to law
enforcement officials to prevent arbitrary and discriminatory enforce-
ment.” The court’s ruling on the vagueness question is consistent with a
number of other drug paraphernalia decisions which have held that the
inclusion of an intent requirement saves a statute from unconstitutional
vagueness. The decision is also consistent with cases dealing with other
types of paraphernalia statutes which have included an element of
intent.

VTATA’s other constitutional claims were rejected as well. VTATA al-
leged that section 18.2-265.4 would permit unconstitutional seizures and
forfeitures of inventory. In rejecting this claim, the court held that “[n]othing in the statute purports to eliminate the requirement of proba-
ble cause or a search warrant for the seizure of any object, and any forfei-
ture must be carried out in accordance with Va. Code § 18.2-253, the pro-
cedures of which have not been questioned.” Forfeiture, in general, and
in particular forfeiture aimed at making criminal activity unpopular have
long been recognized as valid exercises of the state’s police power.

The court found VTATA’s contention that Virginia’s drug parapherna-
lia law is not rationally related to any legitimate governmental interest
“tenuous at best.” The police power authorizes a government to enact
laws designed to protect the health, safety and morals of its citizens.

42. Memorandum Opinion at 6.
43. Id.
45. Memorandum Opinion at 6.
46. See The Casbah, Inc. v. Thone, Civ. No. 80-1925 (8th Cir. June 8, 1981); Heijira Corp.
v. MacFarlane, Civ. No. 80-2062 (10th Cir. May 5, 1981). The statutes involved in these
cases refer specifically to the intent of the seller.
47. While drug paraphernalia statutes are of recent origin, other types of paraphernalia
statutes are not. See, e.g., 26 U.S.C. § 5686(a) (1976) (federal liquor law), which provides: “It
shall be unlawful to have or possess any liquor or property intended for use in violating any
provisions of this chapter . . . .”
also been approved as a valid means of rendering criminal activity unprofitable. See Calera-
50. Memorandum Opinion at 7.
and it can hardly be argued that a state does not have an interest in eliminating the abuse of drugs by its citizens. Due process requires that a law designed to curb drug abuse have a real and substantial relation to the achievement of this purpose.\textsuperscript{52} The court recognized, as other courts have,\textsuperscript{53} that a law aimed at those intentionally facilitating the use of drugs is rationally related to the state's legitimate interest in curbing drug abuse.\textsuperscript{64}

The court rejected VTATA's allegation that Virginia's drug paraphernalia law placed an impermissible burden on interstate commerce and found that no evidence to support the claim had been introduced.\textsuperscript{55} Certainly, any law which prohibits the sale of a particular class of items can have an effect upon interstate commerce. However, the mere fact that a law may have an effect on interstate commerce does not render it unconstitutional. In \textit{Pike v. Bruce Church, Inc.},\textsuperscript{56} the United States Supreme Court held that where a statute "regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."\textsuperscript{57} Since interstate commerce is not singled out by the law and all commerce is treated evenhandedly, Virginia's drug paraphernalia law meets the \textit{Pike} requirements. The law is designed to promote a legitimate state interest and, since the law's intended purpose is to curb the use of controlled substance by prohibiting the sale of items only when they are intended to be used with illegal drugs, any impact it may have on interstate commerce is only incidental.\textsuperscript{68} This would not appear to be an excessive burden in relation to the law's benefit.

The claim that Virginia's drug paraphernalia law violates VTATA's

\textsuperscript{52.} Nebbia v. New York, 291 U.S. 502, 525 (1934). It is not required that a law guarantee achievement of its purpose. Where a legitimate purpose exists, legislatures are afforded great discretion in selecting the means by which to pursue that purpose. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975); Day-Bright Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).
\textsuperscript{53.} See, e.g., Geiger v. City of Eagan, 618 F.2d 26, 28 (8th Cir. 1980).
\textsuperscript{54.} Judge Bryan stated that: "It cannot be seriously argued that, so long as there are laws, not here in question, making unlawful the use of marijuana or controlled substances, the state has a legitimate interest in controlling those who cater to or intentionally facilitate that use." Memorandum Opinion at 7.
\textsuperscript{55.} Id.
\textsuperscript{56.} 397 U.S. 137 (1970).
\textsuperscript{57.} Id. at 142 (citation omitted).
\textsuperscript{58.} See Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834, 849 (D. Md. 1980) which found the state's drug paraphernalia law would be no more of a burden on interstate commerce than laws prohibiting the sale and use of illegal drugs themselves.
This claim rested upon the argument that since advertising could be used as evidence in determining whether an item is drug paraphernalia, the law has a chilling effect upon their right to advertise products. The court did not find this argument persuasive, stating that the law "contains no prohibition against advertising, and VTATA has shown no chilling effect on its expression of ideas and information."

The advertisement of products is commercial speech and, as such, is afforded only a limited amount of first amendment protection. Where commercial speech promotes or solicits an illegal transaction, such speech is not protected by the first amendment. Virginia's drug paraphernalia law would permit the use of product advertising as evidence that an item is, in fact, drug paraphernalia. Since no right exists to promote an illegal transaction, it follows that no right is violated by permitting the state to use this type of advertisement as evidence that a particular product is drug paraphernalia.

As with other claims by VTATA, the argument that Virginia's drug paraphernalia statutes which include a provision making advertisement of drug paraphernalia a criminal offense. Where this provision is found in statutes enacted by localities, it has generally been found unconstitutional. See, e.g., Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 936-37 (6th Cir. 1980). Generally, the stumbling block for such a provision is that it exceeds the legitimate scope of the locality's interest by attempting to regulate the information heard or read by its citizens about the availability of drug paraphernalia legal in other locales. Id. at 937, citing Bigelow v. Virginia, 421 U.S. 809, 827 (1975).


60. Apparently, VTATA's argument is that this chilling effect would occur if police seized advertising material as evidence under VA. CODE ANN. § 18.2-265.2 (Cum. Supp. 1981).


62. Commercial speech has been defined as "business advertising that does no more than solicit a commercial transaction and state factual information relevant thereto." See Note, supra note 38, at 191 n.67.

63. The amount of first amendment protection afforded commercial speech has been linked to a state's legitimate interest in regulating the underlying commercial transaction. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).


66. See note 64 supra and accompanying text.

67. For advertising to be used as evidence under § 18.2-265.2 it must concern the use of an item and such advertising must be within the actual knowledge of the accused.
paraphernalia law violates the supremacy clause was found to be without merit. The decision cited the following section of the federal Drug Abuse Control and Prevention Act for support:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

NORML also attacked Virginia’s drug paraphernalia law as being unconstitutionally vague. In addition, NORML argued that the law violated the organization’s first amendment rights. NORML is a non-profit corporation which disseminates information concerning marijuana and lobbies for the repeal of laws criminalizing the use of marijuana. Pursuant to these objectives, NORML distributes literature and, in an effort to fund its activities, seeks contributions through coin canisters and the sale of items such as tee shirts. The district court found that NORML will be limited in its dissemination of literature, distribution of products and collection of funds because store owners may fear that these items could be used as evidence against the store owners or their employees in a prosecution under Virginia’s drug paraphernalia law. NORML’s distribution of literature and solicitation of funds through the use of coin canisters and sale of products are forms of free speech protected by the first amendment, and, because store owners will be reluctant to allow NORML’s materials in their stores, NORML argued that Virginia’s drug paraphernalia law impermissibly infringes upon its first amendment freedom.

69. 21 U.S.C.A. § 903 (1981). As the language of the statute clearly states, Congress through the enactment of drug control laws has not precluded state involvement in this area.
70. Memorandum Opinion at 2.
71. Id. Unlike VTATA’s first amendment claim which involved commercial speech, NORML’s claim involved the organization’s right of political expression. This right has generally been recognized as being entitled to virtually absolute first amendment protection. See Note, supra note 38, at 191.
72. Memorandum Opinion at 7-8.
73. Id. at 4, 8.
74. Id. at 7-8.
75. Id. at 8. This is the first drug paraphernalia case in which this argument has been asserted.
It is significant to note that no part of Virginia's drug paraphernalia law directly bans NORML's activities. The law's affect upon NORML is merely incidental to the law's intended purpose. Where there is an incidental impact upon first amendment freedoms, a law will be upheld only if it can pass the four part test found in United States v. O'Brien. The O'Brien test states:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The district court found that Virginia's drug paraphernalia law met the O'Brien test as the enactment of a law prohibiting the sale of drug paraphernalia is a valid exercise of the state's police power. The statute also furthers Virginia's important interest in curbing drug abuse. This interest is unrelated to the suppression of any first amendment right enjoyed by NORML.

The question of whether the incidental restriction the law may place on NORML is no greater than is necessary for the accomplishment of the law's purpose is more troublesome. The court held that the Virginia law met this element of the O'Brien test. It supported this finding by pointing out that the intent element is essential to the constitutionality of the law and that "[r]elevant evidence bearing on that intent is necessary therefore to accomplish the Act's purpose." However, the court further stated that "[n]o less restrictive alternative has been suggested." This statement can be read as implying that the burden of establishing a less restrictive alternative was on NORML. This would be improper, since the party attempting to uphold the law has the burden of establishing that the law is the least restrictive alternative available. It is also unclear from the district court's decision whether any modifications to the law

76. Id. There is no contention that NORML's products or publications are themselves drug paraphernalia.
77. 391 U.S. 367 (1968).
78. Id. at 377.
79. Memorandum Opinion at 8, 9.
80. See note 51 supra and accompanying text.
81. See notes 52-54 supra and accompanying text.
82. Memorandum Opinion at 8, 9.
83. Id. at 9.
which could accommodate both the state's legitimate interest and the protected interests of NORML were considered. The fact that the restriction on NORML is only a "time and place" restriction and that NORML has other forums available to it should not relieve the court of its responsibility to consider whether a less restrictive alternative exists. The court may have made the correct determination on this question but the opinion is vague on the point. The Fourth Circuit Court of Appeals is currently considering a request by NORML that the case be remanded to the district court for further findings on this question.\textsuperscript{85}

IV. ENFORCEMENT AND EFFECTIVENESS OF VIRGINIA'S DRUG PARAPHERNALIA LAW

As the court recognized, "this Act may present difficult problems of proof in seeking a conviction."\textsuperscript{86} The problems result from the fact that most items susceptible to being used as drug paraphernalia have legitimate uses as well. Consider the example of a razor blade. It is, of course, used for shaving. With a chain attached, it can be worn as jewelry. A razor blade may also be used to cut a number of things, including cocaine. If a merchant sells a razor blade intending that it be used to cut cocaine, he is guilty of selling drug paraphernalia. But where an item has numerous uses how can this intent be proven? If the razor blade is packaged and displayed in such a manner as to suggest an illegal use, it may be relatively easy to determine the seller's intent. Otherwise, proving the seller's intent becomes difficult.\textsuperscript{87}

Because of the difficulty of proving intent, Virginia's drug paraphernalia law will be more effective in reducing the visibility of drug paraphernalia than in banishing it from the state.\textsuperscript{88} Undoubtedly, merchants will remove from stores items which by their labeling or packaging advise of their illegal uses. Other items, however, which have both legitimate and illegitimate uses will likely be merchandised in a manner which will negate any illegal intent by the merchant.\textsuperscript{89} An example of this is the various types of pipes which may be used for smoking marijuana or hashish.

\textsuperscript{85.} NORML v. Commonwealth, motion to remand, No. 81-1737 (4th Cir. Aug. 10, 1981). The lack of clarity on this question by the district court may be a result of the brevity of the court's opinion.
\textsuperscript{86.} Memorandum Opinion at 6.
\textsuperscript{87.} The first arrests under the new law involved the alleged sale of a "marijuana cleaning kit." Washington Post, Aug. 6, 1981, § B, at 10. Intent may also be shown where a seller advises a buyer that an item can be used illegally.
\textsuperscript{88.} Reducing the visibility of drug paraphernalia should also reduce profits which may, ultimately, prove more effective than arrests in stopping the sale of drug paraphernalia.
\textsuperscript{89.} Disguising drug paraphernalia may also prove unprofitable.
If a merchant chooses to continue selling these items, he will likely display them alongside pipe tobacco and other tobacco products.

That the law will likely reduce only the visibility of drug paraphernalia should not be interpreted as meaning that the law will be ineffective. Merchants will no longer be able to display items in such a way as to glamorize drug use. The Virginia General Assembly could have passed a much more extensive drug paraphernalia law. However, by limiting the law to the sale of drug paraphernalia and requiring that the specific intent of a person charged under the law be proven, Virginia has succeeded where other states have failed—the state enacted a drug paraphernalia law which is in all probability both constitutional and effective.\(^60\)

*Michael J. Barbour*

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60. As this comment went to press, the United States Supreme Court rendered two decisions involving drug paraphernalia laws. In Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d 373 (7th Cir. 1981), *reversed*, 50 U.S.L.W. 4267 (U.S. Mar. 2, 1982) (80-1681), the Court upheld the constitutionality of a municipal ordinance requiring shops selling items "designed or marketed for use with" illegal drugs to obtain licenses and make all sales records, including customer names and addresses available for police inspection. Sales to minors are completely banned by the ordinance. The Court found that on its face the ordinance was not unconstitutionally vague or overbroad. Shortly after its *Hoffman Estates* decision, the Court affirmed without comment an 8th Circuit decision, *The Casbah*, Inc. v. Thone, Cir. No. 80-1925 (8th Cir. June 8, 1981), upholding the constitutionality of Nebraska's drug paraphernalia statute. See Richmond Times-Dispatch, March 9, 1982, at A-2, col. 2. Based upon the *MODEL ACT*, the Nebraska statute prohibits the manufacture, possession, sale and advertisement of drug paraphernalia. See NEB. REV. STAT. §§ 28-439 to -444 (Cum. Supp. 1980).

While the *Hoffman Estates* decision is of limited importance since its involves only the regulation of drug paraphernalia, the Court's approval of the *MODEL ACT* in *The Casbah* may well be the deathblow for opponents of drug paraphernalia laws who have argued that the laws are facially unconstitutional. It appears likely that a number of other states will join those which have already adopted drug paraphernalia statutes based on the *MODEL ACT*. And while neither the *Hoffman Estates* nor *The Casbah* decisions would seem to affect NORML's argument that Virginia's drug paraphernalia statute impermissibly burdens its first amendment rights, the decisions may well encourage the Virginia General Assembly to adopt an even more restrictive drug paraphernalia statute in the near future.
APPENDIX

THE MODEL DRUG PARAPHERNALIA ACT

ARTICLE I
(Definitions)

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

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

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;
(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;
(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;
(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;
(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;
(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;
(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;
(8) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;
(9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;
(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;
Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana [sic], cocaine, hashish or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
(b) Water pipes;
(c) Carburetion tubes and devices;
(d) Smoking and carburetion masks;
(e) Roach clips: meaning objects used to hold burning material, such as a marihuana [sic] cigarette, that has become too small or too short to be held in the hand;
(f) Miniature cocaine spoons, and cocaine vials;
(g) Chamber pipes;
(h) Carburetor pipes;
(i) Electric pipes;
(j) Air-driven pipes;
(k) Chillums;
(l) Bongs;
(m) Ice pipes or chillers;

"In determining whether an object is Drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;
(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;
(3) The proximity of the object, in time and space, to a direct violation of this Act;
(4) The proximity of the object to controlled substances;
(5) The existence of any residue of controlled substances on the object;
(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia;
(7) Instructions, oral or written, provided with the object concerning its use;
(8) Descriptive materials accompanying the object which explain or depict its use;
(9) National and local advertising concerning its use;
(10) The manner in which the object is displayed for sale;
(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
(12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;
(13) The existence and scope of legitimate uses for the object in the community;
(14) Expert testimony concerning its use.”

ARTICLE II
(Offenses and Penalties)

SECTION (designation of offenses and penalties section) of the Controlled Substances Act of this State is amended by adding the following after (designation of last substantive offense):
“SECTION (A) (Possession of Drug Paraphernalia)

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both.”

“SECTION (B) (Manufacture or Delivery of Drug Paraphernalia)

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both.”

“SECTION (C) (Delivery of Drug Paraphernalia to a Minor)

Any person 18 years of age or over who violates Section (B) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both.”

“SECTION (D) (Advertisement of Drug Paraphernalia)

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circum-
stances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both.”

**ARTICLE III**
(Civil Forfeiture)

SECTION (insert designation of civil forfeiture section) of the Controlled Substances Act of this State is amended to provide for the civil seizure and forfeiture of drug paraphernalia by adding the following after paragraph (insert designation of last category of forfeitable property):

“( ) all drug paraphernalia as defined by Section ( ) of this Act.”

**ARTICLE IV**
(Severability)

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.