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*Issues and
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State and Local Experience with Drug Paraphernalia Laws

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U.S. Department of Justice
National Institute of Justice
Office of Communication and Research Utilization

State and Local Experience with Drug Paraphernalia Laws

by

Kerry Murphy Healey

February 1988

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ACQUISITIONS

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Introduction

In 1980, the Select Committee on Narcotics Abuse and Control charged that the drug paraphernalia industry posed "a severe threat to the educational, social, and emotional development of our youth."¹ Over the past decade, a majority of state and local legislators have supported the proposition that laws controlling the sale of drug paraphernalia are an important component of the nation's campaign against drug abuse. At present, 49 states and the District of Columbia seek to control the sale of drug paraphernalia under state law or local ordinances. Thirty-eight of these states and the District of Columbia have enacted statutes based on the Drug Enforcement Administration's (DEA) Model Drug Paraphernalia Act (the Model Act), 1979 (see Appendix A).

The DEA's Model Act was drafted to provide the basis for more uniform paraphernalia regulation, and to attempt to answer the most difficult question confronted by legislators in this field: What is "drug-paraphernalia"? The Model Act focuses on the intent of those who manufacture, sell, or use paraphernalia. Thus, under the Model Act, a pipe is a legal object when manufactured, sold, and used for legal purposes, but becomes drug paraphernalia when it is designed or intended for use with illegal drugs. Although the Model Act's intent-based definition is not accepted by all, it has become the standard by which all other definitions are measured.

Recently, concern about the continued availability of drug paraphernalia through mail-order companies has sparked a new federal legislative initiative: a law banning the use of the U.S. Postal Service, or any other inter-state conveyance, as a part of a scheme to sell drug paraphernalia was enacted by Congress in October, 1986.² The same law also prohibits the importation and exportation of drug paraphernalia. In response to both the long-standing need

for a systematic study of the efficacy of state and local drug paraphernalia laws, and Congress's current interest in drug paraphernalia policy, the National Institute of Justice of the U.S. Department of Justice has sponsored this study.

The Aims of This Document

This study is intended to provide an overview of state and local experience with anti-paraphernalia legislation. While a lively philosophical debate continues about the constitutionality of any legislation which seeks to control the expression of unpopular opinions and alternative lifestyles,³ the information collected in this document primarily focuses on the practical considerations attending the enforcement of anti-paraphernalia legislation. As a result, constitutional issues will be discussed only insofar as they have served to secure or inhibit the enforcement of anti-paraphernalia laws.

This document seeks to identify legislative trends, provide information about the investigation and prosecution of "head shop" and mail-order drug paraphernalia cases, consider the impact of current drug paraphernalia laws, and assess the adequacy of state and local controls in the context of current mail-order drug paraphernalia industry practices.

The document considers various options which have been proposed to aid the enforcement of state and local anti-paraphernalia laws. Policies to meet the following needs are assessed:

- police and prosecutor's need for more information concerning anti-paraphernalia laws;
- the need for increased enforcement of drug paraphernalia laws; and
- the need for cooperation between federal and state authorities in the investigation and prosecution of drug paraphernalia manufacturers, importers and mail-order businesses.

Research Methodology

The data and information for this report were gathered primarily from the following sources:

- responses to a national survey of criminal justice professionals;
- interviews with representatives of parent and citizen groups opposed to the legal sale of drug paraphernalia;

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- discussions with a legal representative of a national smoking and snuff accessories retailers organization;
 - a review of recent legislation and case law; and
 - an extensive literature review.

Survey information was drawn from interviews with 200 state attorneys general, prosecutors, and law enforcement officers. (See Appendix B for survey instruments.) One deputy or assistant attorney general was selected from each state on the basis of his or her knowledge of the state's drug paraphernalia laws and, if possible, experience with constitutional challenges to the state law. Fifty district attorneys or local prosecutors were selected on the basis of several criteria: the sample includes prosecutors who have had personal experience with the prosecution of "head shops," paraphernalia distributors, or mail-order businesses; prosecutors from jurisdictions in which "head shop" laws have been challenged before the courts (in either facial or applied tests); prosecutors from jurisdictions where the sale of paraphernalia is banned by local ordinance only; and finally, prosecutors from urban jurisdictions. (For a partial listing of prosecutions and constitutional challenges originating in the jurisdictions interviewed, see Appendix C.) Finally, one hundred police and sheriffs specializing in narcotics were chosen from forces which serve populations greater than 25,000. (For the geographical distribution of all respondents, see Appendix D.)

The formal interviews with attorneys general, prosecutors, and law enforcement officers were augmented with less extensive interviews with groups and individuals opposed to the sale of drug paraphernalia. Representatives from Families in Action, the National Federation of Parents for Drug-Free Youth (NFP), Committees of Correspondence, leading members of several state anti-drug lobbies, state legislators, and drug rehabilitation counselors were interviewed.

A legal representative of a national professional organization that opposes the regulation of smoking accessories was also consulted. The respondent, who represents over 700 merchants, was asked to assess the impact of prosecutions on smoking accessory sales, as well as the constitutional strength of the Model Act as applied.

Finally, several automated data-bases were searched for current literature and case law pertaining to the sale of drug paraphernalia and anti-paraphernalia laws.

The Rise of Anti-Paraphernalia Laws

The drug paraphernalia industry is thought to have reached its height during the late 1970s. In 1979, the government estimated that drug paraphernalia sales in the U.S. may have topped three billion dollars.⁴ Paraphernalia industry estimates for the same period were considerably lower, placing gross annual sales between 350 million and one billion dollars.⁵ Regardless of the true volume of sales, by the late 1970s the drug paraphernalia industry had grown affluent enough to form trade associations and to reach beyond urban centers into suburban malls and rural towns.

Until 1977, the sale of drug paraphernalia was virtually unregulated by state laws or local ordinances. Although some states had enacted laws controlling the sale of paraphernalia through pharmacists, or the possession of drug paraphernalia, no laws existed which were specifically designed to ban the sale of drug paraphernalia in "head shops." Throughout the 1970s, "head shops" and a variety of other merchants openly sold drug paraphernalia in most jurisdictions. In addition, a number of publications dedicated to the drug culture and drug paraphernalia emerged. While some of these publications were short-lived, others—such as *High Times*—continue to flourish.

In 1977, the first anti-paraphernalia parent group, Families in Action, was formed in DeKalb, Georgia. The founder was disturbed that "head shops" (that is, stores which sold primarily drug-related products) and drug culture publications were seeking to glamorize, teach the use of, and provide the paraphernalia necessary to use illegal drugs. It was argued that the legal sale of paraphernalia in "head shops" implicitly encouraged drug abuse among young people.⁶ This implicit encouragement to break or disregard drug laws became known as the "head shop message"—that drug abuse is both socially and legally accepted. Citing the paraphernalia merchant's alliance with an illicit industry, Families in Action lobbied for the enactment of local ordinances banning the sale of drug paraphernalia. These efforts met with success, and shortly thereafter similar parent and citizen lobbies were formed in California, New Jersey, and Florida. By 1980, some 77 anti-paraphernalia ordinances had been enacted in 13 states, and state-wide paraphernalia controls had been adopted in three jurisdictions.⁷

The paraphernalia industry did not, however, disband in the face of these new controls. Instead, paraphernalia merchants pooled their resources to fund a number of constitutional challenges to state and local anti-paraphernalia laws. This campaign was initially successful: courts frequently found the new laws to be over-broad or impermissibly vague (see below). However, in 1979, at the request of the White House, the DEA drafted the Model Drug Paraphernalia Act (Appendix A). The purpose of the Model Act was twofold: first,

to correct the constitutional deficiencies of earlier legislation; and second, to provide the basis for a uniform scheme of paraphernalia regulation. Since that time both of these goals have been met—the DEA's Model Act has been enacted by a majority of states and Model Act laws have been upheld by virtually all Circuit courts (see Appendix D and Chapter 1).

Nonetheless, the trend toward banning the sale of drug paraphernalia has been ignored or rejected in nine states. One state permits the unrestricted sale of drug paraphernalia, five states rely on local ordinances to control drug paraphernalia sales, and three others restrict the sale of drug paraphernalia only in reference to minors. Nearly a decade after the introduction of the first anti-paraphernalia laws, the drug paraphernalia industry continues to enjoy the freedom to operate in a number of jurisdictions without the threat of prosecution. This foothold, though limited, is presently a source of concern to some legislators, law enforcers, and citizen groups. These groups argue that so long as no uniform regulation of the drug paraphernalia industry exists at the state level, paraphernalia will continue to be available to the citizens, both minors and adults, of all states via mail-order sales. It is as yet too early to predict what effect the newly enacted Federal anti-paraphernalia law will have on flow of drug paraphernalia between states.

Constitutional Challenges to Anti-Paraphernalia Laws: An Overview

The constitutionality of anti-paraphernalia laws has been challenged on a wide variety of grounds.⁸ However, the majority of early challenges argued that paraphernalia laws were over-broad or too vague to meet with constitutional requirements. According to the U.S. Supreme Court, a law is impermissibly vague if it fails to define clearly what is prohibited. Vagueness is a violation of due process because:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.⁹

Overbreadth challenges frequently involve many of the same issues as those raised in vagueness challenges. However, challenges alleging overbreadth

argue from the standpoint that the restrictions placed on the sale of paraphernalia impinge on constitutionally protected conduct. While challenges alleging overbreadth and vagueness were initially the most successful in defeating drug paraphernalia legislation,¹⁰ the value of these doctrines to those seeking to invalidate "head shop" laws was severely limited following the Supreme Court's decision in *Hoffman Estates v. Flipside* (1982).¹¹ In *Hoffman Estates*, the court upheld an Illinois licensing ordinance which was not patterned on the DEA's Model Act. In rejecting charges of vagueness and overbreadth in relation to a statute which was less precise than the Model Act, the Court indirectly buttressed the facial constitutionality of all Model Act legislation. In 1983, the constitutionality of the Model Act was further strengthened when the Supreme Court directed, without specific discussion, the Sixth Circuit Court of Appeals to reverse its ruling in *Record Revolution, No. 6, Inc. v. Parma*,¹² to uphold the constitutionality of a Model Act ordinance in accordance with *Hoffman Estates*. Because the Supreme Court did not specifically discuss its ruling, it is assumed that the court's discussion of anti-paraphernalia laws in *Hoffman Estates* supports the phrasing of the Model Act. Thus, in *Hoffman Estates*, the Supreme Court established a method for determining the facial constitutionality of all types of drug paraphernalia laws. This model was subsequently adopted by a majority of lower courts. Using *Hoffman Estates* as a guide, many of the early rulings of unconstitutionality were reversed, and today the Model Act has been upheld by eight circuit courts, and is generally presumed to be facially Constitutional.¹³

Although the risk of discriminatory future enforcement is considered insufficient grounds to preclude pre-enforcement validity, the courts have frequently noted that a ruling of facial constitutionality does not guarantee that a law will be constitutional as applied to individual defendants.¹⁴ Thus, the most pressing question concerning the constitutionality of the Model Act has been whether it will be able to withstand applied challenges. The alleged vulnerability of the Model Act to applied constitutional challenges has been a key element in recent arguments for the repeal of existing anti-paraphernalia legislation, and opposition to the mail-order drug paraphernalia bill enacted by Congress.¹⁵ It has been suggested that while the facial Constitutionality of the Model Act is generally accepted, the enforcement of the Model Act or any act patterned after it will frequently result in the violation of Constitutional rights.

Applied challenges to anti-paraphernalia laws

Due to the relative youth of the Model Act, and the small number of applied challenges to reach the appellate courts, the applied constitutionality of the Model Act has not as yet been adequately tested. To date, there have

been only a handful of state-level cases challenging the constitutionality of the Model Act or other anti-paraphernalia statutes. Nonetheless, this limited sample suggests that Model Act legislation may be more resistant to applied challenges than other state anti-paraphernalia laws. The Model Act has been challenged as applied in the following states:

Pennsylvania

Pennsylvania's Model Act statute has been upheld in two applied challenges, one in 1982, shortly after its enactment, and the other in 1986.¹⁶ In the most recent case, *Commonwealth v. Potter* (1986), the defendant argued, *inter alia*, that his customer's intent had been unconstitutionally attributed to him. The appellate court held that testimony relating to the intent of the customers was used only to establish that the defendant would have been aware of the likelihood that the objects sold would be used in conjunction with illegal drugs.¹⁷ The defendant also contended that the circumstantial evidence presented by the Commonwealth failed to prove his guilt beyond a reasonable doubt. In response to this the court cited judicial authority for the proposition that "the intent of the accused [may] be determined from circumstantial evidence alone."¹⁸ Finally, in a motion to suppress the evidence seized from his store, the defendant argued that the search warrant did not adequately show probable cause because the facts given did not establish that he had had a culpable mental state. The court denied this motion, explaining that the magistrate may use the "totality of the circumstances" to guide his or her determination of probable cause. The sentence of the defendant (three months probation) was affirmed. Police and prosecutors in Pennsylvania indicate that the possibility of applied challenges has not deterred or inhibited the continued enforcement of the law in Pennsylvania.

California

In California, active enforcement of the state's Model Act statute in Los Angeles led to a constitutional challenge claiming that the law, as applied, was void for vagueness. In *The People v. Nelson, Wolf and Vitale* (1985),¹⁹ the court upheld the conviction of merchants who had been charged under the statute, stating that the court found "no merit to the defendant's contentions" that the law was constitutionally deficient as applied. The five California jurisdictions surveyed reported no reluctance to prosecute as a result of possible applied challenges.²⁰

Kentucky

In a recent applied challenge to the Model Act, *McKinney v. Commonwealth* (1985)²¹, the Kentucky Court of Appeals reversed and remanded the judgment of the trial court, holding that the state anti-paraphernalia

statute was unconstitutional as applied to the defendant due to selective enforcement of the law. The Court of Appeals found that the statute gave the police "unfettered discretion" to define the parameters of the crime and thus violated the requirements of due process.²² The case was appealed to the State Supreme Court, which declined to review the appellate court decision, but (invoking an unusual Kentucky practice) ordered that the opinion of the Court of Appeals not be published. In Kentucky, an opinion of a lower court may be "depublished" if the Supreme Court agrees with the finding of the court, but is not satisfied with the language of the opinion. As a depublished ruling, the *McKinney* decision can provide no judicial precedent. The result of this process is that while one case of selective enforcement of the law has been tried and substantiated, the Supreme Court has not given support to the appellate court's contention that the state statute is so inherently vague that uniform application is impossible. Although it is too early to conclusively assess the impact of this case, the State Attorney General's Office holds that the law is still in force, and that the *McKinney* case should not impair or discourage the enforcement of the law.²³

Non-Model Act statutes have been challenged as applied in New York and Illinois:

New York

In New York, the state "head shop" statute, Article 39 of the General Business Law (GBL), was challenged as applied in *Franza v. Carey*, 1982, and again on appeal in 1984.²⁴ In *Franza* (1982), the New York State Supreme Court, New York County, held that the state statute was not unconstitutionally vague because it could be constitutionally applied to so-called "single-use" items, that is, items which have no plausible alternative legal use. The court held that to rule on the law's constitutionality vis-a-vis "dual-use" items a hearing would be necessary to fully consider the facts. In light of the circumstances of the plaintiffs, who were then engaged in the sale of exclusively "dual-use" items, the court issued a preliminary injunction blocking the enforcement of the statute. In a 1984 appeal of this ruling, the New York Supreme Court, Appellate Division, affirmed the lower court's ruling that the statute was not impermissibly vague. However, reversing the earlier ruling, the appellate court held that a hearing was not needed to determine the constitutionality of the statute in reference to "dual use" items since the intent of the merchant, rather than the design of the object, was to be the critical issue in determining whether the object being sold was drug paraphernalia. The appellate court went on to uphold the lower court's ruling that the need for probable cause was implicit in the statute's forfeiture provision. However, the appellate court was unable to conclude that the right of the defendant to a post-seizure hearing was similarly implied. Therefore, the court declared that

the forfeiture section of Article 39 of the GBL was in violation of the Due Process Clause of the Constitution, and severed it from the statute. The preliminary injunction, issued by the lower court, was vacated. As a result of the *Franza* (1984) ruling, and separate rulings holding that state law had preempted the field of anti-paraphernalia legislation (see below, Chapter 1), the enforcement of anti-paraphernalia laws in New York was, until recently, seriously crippled. However, as of August, 1986, a concerted effort to encourage the enforcement of drug paraphernalia laws was undertaken by the New York State Attorney General's Office.²⁵ A task force, the Drug Paraphernalia Enforcement Unit, was formed to disseminate information to local prosecutors about the investigation and prosecution of drug paraphernalia sales, and to direct six model "head shop" prosecutions. In addition to Article 39, the Drug Paraphernalia Enforcement Unit drew together a wide range of criminal and civil statutes to aid in the prosecution of the paraphernalia cases.²⁶ The initial prosecutions focused on the illegal sale of prescription pharmaceuticals. Thus, while action is now being taken to curb paraphernalia sales in New York, the "head shop" law, Article 39, is not the primary tool being used. The task force notes that in cases where violations of prescription drug laws are not present, the prosecution of paraphernalia sales exclusively under Article 39 of the GBL would be difficult.²⁷ Although the inadequacy of Article 39 is to some extent attributable to the applied constitutional challenges which severed its forfeiture provisions, the statements of the task force suggest that the main reason for its disuse is the high standard of proof which it requires.

The New York State Attorney General's Office has drafted a bill amending both the penal law and the General Business Law which would create criminal penalties for the sale of drug paraphernalia and which would bring New York's law closer in line with the DEA's Model Act. Although the bill died in committee during the 1987 legislative session, it is scheduled to be resubmitted by the Governor in 1988.

Illinois

Illinois' non-Model Act legislation has been the subject of a number of applied challenges. The Appellate Court of Illinois (3rd District) recently upheld the state law in two cases, and the State Supreme Court declined to review the lower court's findings. Subsequently, however, lower courts in Cook County ruled that the same statute is unconstitutional as applied.²⁸

On appeal to the Illinois State Supreme Court, these rulings of unconstitutionality, which were consolidated under *People v. Monroe*, were upheld on the ground of vagueness. Thus, Illinois is currently dependant on local ordinances, where they exist, for the control of drug paraphernalia. In order to fill this void, a bill was submitted to the Illinois Senate in October 1987 which would replace the previous drug paraphernalia law, and which would

amend those portions which the court found impermissably vague. It is expected that the new law will enjoy considerable support from the legislature and that the law could be in place by Spring of 1988. However, the absence of laws controlling the paraphernalia trade in Illinois could have both local and national consequences. It should be noted that while the applied constitutionality of the Illinois statute has no direct bearing on the constitutional fitness of the Model Act, the anti-paraphernalia laws in Illinois have been an indirect aid to the enforcement of the Model Act in other states. Anti-paraphernalia laws in Illinois benefited other jurisdictions' paraphernalia control efforts because Illinois had become a center for a number of large paraphernalia manufacturers, distributors, and mail-order businesses which service the Midwest and the East Coast. Until recently, Illinois state and local prosecutors had been notably aggressive in their prosecution of all levels of paraphernalia sales. Without a state statute, their efforts to stem the flow of paraphernalia from Illinois to other jurisdictions are no longer possible.

A few recent lower court rulings have suggested that the application of anti-paraphernalia statutes may be vulnerable to constitutional attack. Two Florida cases raised constitutional questions, or cited enforcement practices which could lead to constitutional violations.²⁹ In Colorado, a trial court found the state's non-Model Act legislation to be in violation of the Sixth Amendment, due process.³⁰ Citing vagueness, and other problems peculiar to the Colorado law, the court charged that the state law should be brought into line with the DEA's Model Act.³¹

The impact of applied challenges

To date, the number of applied challenges to reach the appellate courts has been small. Judging from the dearth of litigation and the few leading cases in the area, it appears that there is little evidence to support the assertion that the Model Act is inherently vulnerable to applied constitutional attack. While it is too early to disregard the issue of applied constitutionality altogether, other factors are currently more important to the effective enforcement of the Model Act (see Chapter 2).

At present, the most serious threat to the constitutional application of the Model Act lies in the potential failure of law enforcement officials to observe the procedural safeguards necessary to insure that a paraphernalia merchant's rights are protected. In most cases, unconstitutional applications of the Model Act could be prevented by providing appropriate training and information to officers involved in drug paraphernalia investigations. With the use of conscientious law enforcement procedures, uniform application of Model Act should be possible. (Enforcement practices and concerns are discussed below, see Chapter 2.)

Organization of the Document

- **Chapter 1** describes state and local laws banning or regulating the sale of drug paraphernalia.
- **Chapter 2** discusses successful strategies for the investigation and prosecution of drug paraphernalia cases, and common difficulties encountered by police and prosecutors.
- **Chapter 3** assesses the impact of state and local laws on the sale and availability of drug paraphernalia.
- **Chapter 4** assesses the need for additional or revised drug paraphernalia controls. The opinions of the state attorneys general, district attorneys, law enforcement officers and parent/citizen groups are discussed.
- **Conclusion and Recommendations** summarizes findings of the study and issues raised by these findings. Recommendations are made concerning the expansion of state anti-paraphernalia laws; the implementation of federal legislation; and the provision of information and training materials to prosecutors and police.

Endnotes

1. **Drug Paraphernalia: A Report of the Select Committee on Narcotics Abuse and Control**, 96th Cong. 2d Sess., (SCNAC-96-1-6), 1980, p. 17.
2. P.L. 99-570 1822 (Anti-Drug Abuse Act of 1986), codified at 21 U.S.C. 857.
3. *See, Criminal Law Bulletin* (1985) 21:4, p. 293.
4. **Hearing before the Select Committee on Narcotics Abuse and Control**, 96 Cong., 2d. Sess., November 1, 1979 (SNAC-96-1-12).
5. *Ibid.*, pp. 55 and 58.
6. *Ibid.*, see Testimony of Sue Rusche, founder, DeKalb Families in Action, p. 4.
7. **HEW Report, Community and Legal Responses to Drug Paraphernalia**, 1980, (DHEW Publication No. (ADM) 80-963), p. 35.
8. 20 *Harv. J. on Legis.* 617, 619 (1983): Florida Businessmen for Free Enterprise v. Hollywood, (11th Cir. 1982) 673 F.2d 1213, 1220 (Fourteenth Amendment: potential for arbitrary enforcement); Kansas Retail Trade Cooperative v. Stephan, (D. Kan. 1981) 522 F. Supp. 632, 637-38 (Fourteenth Amendment: denial of due process—vagueness and lack of warning); Atkins v. Clements, (N.D. Tex. 1981) 529 F. Supp. 735, 744 (Fourteenth Amendment: equal protection); Lady Ann's Oddities, Inc. v. Macy, (W.D. Okla. 1981) 519 F. Supp. 1140 (First and Fourteenth Amendments; overbreadth); Franza v. Carey, (A.D.N.Y. 1981) 518 F. Supp. 324, 330 n.10 (Bill of Attainder: selective enforcement); New Eng. Trade Accessories Assn. v. Tierney, (D. Me. 1981) 528 F. Supp. 404, 412 (Double Jeopardy: violating both state and local laws); Tobacco Rd. v. City of Novi, (E.D. Mich. 1980) 490

- F. Supp. 537, 544-45 (First Amendment: restriction of free speech); *New Eng. Accessories Trade Assn. v. Browne*, (D. Conn. 1980) 502 F. Supp. 1245, 1254 (Fourteenth Amendment: potential for discriminatory treatment), *vacated and remanded*, (2d Cir. 1981) 679 F.2d 873; *World Imports Inc. v. Woodbridge Township*, (D.N.J. 1980) 493 F. Supp. 428, 433 (Fourteenth Amendment: lack of legitimate state interest); *Mid-Atlantic Accessories Trade Assn. v. Maryland*, (D. Md. 1980) 500 F. Supp. 834, 848 (Fifth and Fourteenth Amendments: deprivation of private property); *id.* at 849-50 (Fifth and Ninth Amendments; right to privacy); *Delaware Accessories Trade Assn. v. Gebelein*, (D. Del. 1980) 497 F. Supp. 289, 296 (Fourth and Fourteenth Amendments; illegal search and seizure); *Nova Records v. Sendak*, (S.D. Ind. 1980) 504 F. Supp. 938, 943 (Eighth Amendment: cruel and unusual punishment); *Record Revolution No. 6, Inc. v. City of Parma*, (N.D. Ohio) 492 F. Supp. 1157, 1164 n.2 (Supremacy Clause), *aff'd.*, (6th Cir. 1980) 638 F.2d 916, *vacated and remanded*, 451 U.S. 1013 (1981); *Bambu Sales v. Gibson*, (D.N.J. 1979) 474 F. Supp. 1297, 1299 (Commerce Clause: restriction on interstate commerce); *id.* (Contract Clause: interference with contractual obligations).
9. *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109, 33 L. Ed. 2d 222, 227-228, 92 S. Ct. 2294, footnotes omitted.
 10. 69 **ALR Fed** 15. *See*, for example: *Franza v. Carey* (1981, S.D. N.Y.) 518 F. Supp. 324 (decided prior to *Hoffman Estates*); *Record Museum v. Lawrence Township* (1979, D.C. NJ) 481 F. Supp. 768, 5 Fed. Rules Evid. Serv. 973; *Music Stop v. Ferndales* (1980, E.D. Mich) 488 F. Supp. 390; *Record Head Corp. v. Sachse* (1982, CA7 Wis) 682 F.2d 672; *Indiana Chapter, NORML v. Sendak* (1980, S.D. Ind) No. TH 75-142-C (Feb. 4, 1980); *Back Door Records v. Jacksonville* (1981, E.D. Ark) 515 F. Supp. 857; *Gaffey v. Babb* (1981) 50 Or. App. 617, 624 P. 2d 616, *Bambu Sales, Inc. v. Gibson* (1979, D.C. NJ) 474 F. Supp. 1297.
 11. 455 U.S. 489; 71 L. Ed. 2d 362; 102 S. Ct. 1186; *reh. den.* 456 U.S. 950; 72 L. Ed. 2d 476; 102 S. Ct. 2023. *See, generally*: 20 **Harv. J. on Legis.** 617.
 12. (1980 CA6 Ohio) 638 F.2d 916, *vacated* 451 U.S. 1013, 69 L. Ed. 2d 384, 101 S.Ct. 2998 and *vacated* 456 U.S. 968, 72 L. Ed. 2d 840, 102 S.Ct. 2227.
 13. 69 **ALR Fed** 15, 24. For examples of laws patterned after the Model Act which have withstood facial challenge, *see*: *New England Accessories Trade Assn. v. Tierney* (1982, CA1 Me) 691 F.2d 35; *World Imports, Inc. v. Woodbridge Township* (1980, D.C. NJ) 493 F. Supp. 428; *Delaware Accessories Trade Assn. v. Gebelein* (1980, D.C. Del) 497 F. Supp. 289; *Mid Atlantic Accessories Trade Assn. v. Maryland* (1980, D.C. Md) 500 F. Supp. 834; *Tobacco Accessories and Novelty Craftsmen Merchants Assn. v. Treen* (1982, CA5 La) 681 F. 2d 378; *Atkins v. Clements* (1981, N.D. Tex) 529 F. Supp. 735 (upholding all provisions except advertising provisions); *Levas and Levas v. Antioch* (1982, CA7 Ill) 684 F. 2d 446; *Nova Records, Inc. v. Sendak* (1980, SD Ind) 504 F. Supp. 938, *aff'd.* (CA7 Ind) 706 F. 2d 782; *Casbah, Inc. v. Thone* (1981, CA8 Neb) 651 F. 2d 551, *cert. den.* 455 U.S. 1005, 71 L. Ed. 2d 874, 102 S. Ct. 1642, *reh. den.* 456 U.S. 950, 72 L. Ed. 2d 476, 102 S. Ct. 2023; *General Stores, Inc. v. Bingham* (1982, CA10 NM) 695 F. 2d 502; *Lady Ann's Oddities, Inc. v. Macy* (1981, W.D. Okla) 519 F. Supp. 1142; *Opinion of Justices* (1981) 121 N.H. 531, 431 A. 2d 144 (upholding all but advertising provisions). In two instances the courts have found laws patterned on the Model Act to be unconstitutional in part or as a whole: *Information Management Services, Inc. v. Pleasant Hills* (1981, W.D. Pa) 512 F. Supp. 1066 and *Atkins v. Clements* (1981, N.D. Tex) 529 F. Supp. 735 (advertising provisions held unconstitutional).
 14. 672 F. 2d 1225; 69 **ALR Fed** 1.
 15. Defense briefs examined by this study frequently focus on the danger posed to the defendant's constitutional rights by the application of anti-paraphernalia laws. *See*, for example, statement of Lee Huddleston, before the Subcommittee on Crime, House Committee on the Judiciary, regarding HR 1625, May 8, 1986.

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16. *Cochran v. Commonwealth* (1982) 69 PA Cmwlth. 74, 450 A. 2d 75; *Potter v. Commonwealth* (1986) 504 A. 2d 243.
 17. 504 A. 2d 243, 245.
 18. *Ibid.*, p. 246.
 19. 171 Cal. App. 3d Supp.
 20. Discussions with five California jurisdictions indicated that some 20 merchants had been charged under the state drug paraphernalia laws in these areas, and that most cases were settled before coming to trial.
 21. Depublished by order of the Supreme Court of Kentucky, March 12, 1986 (86-SC-10-D, 84-CA-1172-DG, 83-X-013).
 22. Kentucky Court of Appeals, 84-CA-1172-DG, p. A5 (Dec. 13, 1985).
 23. As of June 1986, the State Attorney General's Office of Kentucky confirmed that the Model Act was still in force in Kentucky. It should be noted that the discriminatory treatment of the defendant in McKinney appears to have been primarily the result of racism, rather than the imprecision of the law.
 24. *Franza v. Carey* (1982) 115 Misc. 2d 882, 454 N.Y.S. 2d 1002 and *Franza v. Carey* (1984) 102 A.D. 2d 780; 478 N.Y.S. 2d 873. The authority of this decision has been brought into question due to the subsequent Court of Appeals decision in *Brache v. County of Westchester* (1981, CA 2 NY) 658 F. 2d 47, cert. den. 455 U.S. 1005, 71 L. Ed. 2d 874, 102 S. Ct. 1643. It should be noted also that although the New York statute superficially resembles the Model Act, key phrases and provisions have been omitted from the text. Cf., Art. 39, New York General Business Law, and Appendix A.
 25. See, "Police Seize Thousands of Pipes in Raids for Drug Paraphernalia," *The New York Times*, August 22, 1986.
 26. New York statutes being used include: Penal Law 220.50, and 220.55; General Business Law, Art. 39; Public Health Law 3387; Public Law 240.45; Education Law 6810, 6811; and Tax Law 1817.
 27. Attorney General Robert Abrams, **Drug Paraphernalia Enforcement Manual**, State of New York, Department of Law, 1986, pp. 19-22.
 28. Cases holding the Illinois statute constitutional as applied: *Illinois v. Crow's Nest, Inc.* (1985) 484 N.E. 2d 907, Ill. App. 3 Dist, 1985; *Illinois v. Ziegler* (Array Distributors, Inc.) (1986) 139 Ill. App. 3d 1088, 94 Ill. Dec. 484. Cases holding the Illinois statute unconstitutional as applied: *People v. Levin*, and *People v. Monroe* (June 1986, No. 85 M14880683) (State Supreme Court, No. 63724). These cases all involve major paraphernalia distributors. The bill submitted to correct the problems cited by the court in *Monroe* is S.B. 1529, October 20, 1987.
 29. *Florida v. Karpf* (Feb., 1984, No. 83-27442, Criminal Circuit Division). The trial court in this case held that the statute deprived the defendant of his right to substantive due process, specifically, that the law was void for vagueness. In doing so, he explicitly encouraged the parties to appeal. The court also cited difficulties in establishing fact, since the content of a conversation between the defendant and an undercover officer, on which the case hinged, was subject to dispute. In a second case, *Florida v. McMahon* (April 1986, Broward County, case no. 85-3320 CF SPEISER) the Court granted a motion to suppress evidence obtained during a search due to the prosecution's failure to establish probable cause. The court asserted that the search warrant had been recklessly or deliberately drawn so as to mislead the court as to the type of items, and the context of the items which were to be seized in evidence.
 30. *Colorado v. Cole* (consolidating *Colorado v. Sampson* and *Colorado v. Lambert*) (April 1983, El Paso County Court, Division A, No. CA 82M3266, No. CA82M4497, No. CA82M4498). Two other applied challenges are currently underway in Denver and Adams Counties.
 31. These revisions have subsequently been made by the Colorado State Legislature, see below, Chapter 1.

1 State and Local Anti-Paraphernalia Laws

State Laws Pertaining to the Sale of Drug Paraphernalia

As of December 1987, forty-four states and the District of Columbia had passed laws to control the sale of drug paraphernalia (see Appendix E). The majority of these laws were patterned on the DEA's Model Act: with the addition of Alabama in April 1986, a total of thirty-eight states and the District of Columbia have adopted Model Act legislation. Six other states — Colorado, New York, Ohio, Oregon, Tennessee, and West Virginia — have anti-paraphernalia legislation not patterned on the Model Act. The remaining six states — Alaska, Hawaii, Illinois, Iowa, Michigan and Wisconsin currently impose no state-level sanctions on the sale of drug paraphernalia. (It should be noted, however, that until it was overturned in September 1987, Illinois had a non-Model Act law prohibiting the sale of drug paraphernalia, and the sale of these items is to some degree restricted in Alaska, Iowa, Illinois, Michigan, and Wisconsin by local or county ordinances, see below.)

In those states with non-Model Act laws, a wide variety of legislation is in force. In Colorado and New York, state statutes were intended to resemble the Model Act in most features, while in Ohio, Oregon and West Virginia, laws prohibit the sale of drug paraphernalia to minors only. West Virginia requires licensing for drug paraphernalia dealers, and in Ohio the law only pertains to the sale of marijuana paraphernalia. By comparison, other non-Model Act statutes impose heavy sanctions on the sale of paraphernalia. For example, in Tennessee the sale of paraphernalia to adults or minors is a felony on the first offense.

As the Model Act suggests no specific penalties for paraphernalia offenses, there is a great variance between state laws. The majority of paraphernalia offenses are punishable as misdemeanors. However, it is common that more severe penalties are imposed for repeated violations and violations involving minors. Only seven states have made the sale of drug paraphernalia a felony or its equivalent on the first offense. This number includes Indiana, which amended its paraphernalia laws in 1986 to increase the penalty (see below). Thus, while the sale of drug paraphernalia is prohibited by state law in most jurisdictions, the penalties provided under these laws are often civil and rarely include mandatory prison time or fines (see Appendix E).

Recent legislative activity

The bulk of state-level legislative activity pertaining to the sale of drug paraphernalia occurred between 1980 and 1984, during which time 38 states enacted anti-paraphernalia laws (see Appendix E). Since 1984, only one state, Alabama, has enacted new legislation.¹ New anti-paraphernalia laws have been proposed in five other non-regulated or non-Model Act states; however, these proposals have not as yet gained the support of their legislatures. Recent proposals for new anti-paraphernalia laws have been made in the following states:

Hawaii

In Hawaii, Model Act legislation has been frequently proposed and allowed to die in committee. The most recent proposal, H.B. No. 1254 (1985), failed following testimony from the American Civil Liberties Union of Hawaii, and a private attorney who argued that the bill would be unconstitutional and that the control of paraphernalia sales would not aid efforts to reduce drug abuse.² It is expected that an anti-paraphernalia bill will be reintroduced in the 1987 legislative session; however, it is difficult to predict what sort of support it will receive, because major elections will intervene. A wide range of factors were named by attorneys and anti-drug activists as contributing to the failure of anti-paraphernalia laws in Hawaii. In recent years, the primary difficulty has been that key committee positions have been held by legislators who, for either philosophical or political reasons, oppose the introduction of paraphernalia controls. Secondary and more speculative explanations include: the presence of a well-developed marijuana trade in Hawaii, which not only supports lobbying efforts against paraphernalia regulation but also enjoys a degree of popular acceptance; the legislature's concern that the measure would violate constitutional rights; and finally, the hesitance of Hawaiians who oppose the state sale of drug paraphernalia to become politically active.

Michigan

In 1986, the Michigan Senate passed S.B. 858, banning the sale of drug paraphernalia. The bill was unable, however, to gain the support of the House Judiciary Committee. Leading members of the House Judiciary Committee have blocked other anti-paraphernalia proposals in the past and are on record as opposing such measures in principle. Opposition in the House stems from the view that anti-paraphernalia laws seek to legislate morality and prohibit the expression of non-majoritarian ideas and lifestyles. They also assert that since no correlation between the availability of paraphernalia and increased drug use has been established, anti-paraphernalia legislation is not related to any rational state interest. While the defense of individual freedoms is ordinarily strongly supported by the Michigan electorate, there is at present a growing popular movement to ban the sale of drug paraphernalia. In part due to the advent of "crack" and the increased sale of "crack" related paraphernalia, some 180 community anti-drug coalitions have begun to lobby for anti-paraphernalia laws. A proliferation of local anti-paraphernalia ordinances is currently underway, and Detroit has enacted a new ban on paraphernalia sales.³ Given the mood of the electorate, opposition to state-level anti-paraphernalia legislation in the House may soften. However, it is likely that anti-paraphernalia legislation will continue to face strong opposition.

Ohio

In the 1985-1986 session of the general assembly of the State of Ohio, H.B. 170 was introduced to permit boards of township trustees to prohibit the sale of drug paraphernalia. No further action was taken on the proposal. This session, a more comprehensive bill—S.B. 135—has been introduced to define and ban the use, sale, and manufacture of drug paraphernalia. Nonetheless, politicians and anti-drug activists contacted by this study did not expect that anti-paraphernalia legislation would be adopted by Ohio in the near future. According to one legislator, the protracted legal battle which eventually upheld the constitutionality of a Parma, Ohio "head shop" ordinance in 1983 exhausted the public's interest and confidence in anti-paraphernalia legislation. Since that time, there has been little or no attempt to enforce the state's limited ban on the sale of marijuana paraphernalia to minors. In addition, the state appears to have become a haven for the drug paraphernalia industry. Aside from the industry's own strong pro-paraphernalia lobby, the American Civil Liberties Union (ACLU), and the National Organization for the Reform of Marijuana Laws (NORML) also actively oppose the creation of a comprehensive state-level ban on the sale of drug paraphernalia in Ohio. In the absence of strong public concern about paraphernalia sales, it is likely that these lobbies will succeed in blocking the enactment of the current proposal.

Oregon

Like Ohio, Oregon currently prohibits the sale of drug paraphernalia to minors only (see Appendix E). In 1985, Senate Bill 598, fashioned on the DEA's Model Act, was introduced to create a more general ban on the sale of drug paraphernalia. The proposal, however, died in committee. Since it is expected that the bill will be reintroduced in 1987 (the Oregon legislature meets bi-annually), the Senate asked the State Attorney General's Office to respond to questions concerning the constitutionality of the proposed legislation. In reply, the Attorney General's Office suggested that the law, though facially valid, might not succeed in accomplishing the apparent legislative aim. In support of this conclusion, the Attorney General's Office cited the difficulty of satisfying the law's "complex culpable mental state requirements."⁴ Oregon's reluctance to enact anti-paraphernalia laws stems from both practical and philosophical considerations. First, some legislators worry that, despite the judicial support given to the Model Act in other jurisdictions, the anti-paraphernalia proposal would be found unconstitutionally vague under Oregon law. Second, the enactment of paraphernalia laws would be a departure from well-established legislative policy. Oregon has a strong tradition of support for minimal government and the preservation of individual liberty. In those areas where Oregonians do accept the regulation of personal freedoms, they generally favor liberalized laws. For example, marijuana has been decriminalized in Oregon since 1970, and there is currently a movement to legalize the drug for personal cultivation and use.⁵ In this context, the legal sale of drug paraphernalia is not an anomaly—the use of marijuana is, in fact, socially and legally tolerated in Oregon; thus, the sale of marijuana-related paraphernalia is a natural concomitant of this policy. The use of other drugs, and the sale of paraphernalia for use with those substances, is not currently a key issue to the majority of the electorate in this jurisdiction.

Wisconsin

In 1985, the Wisconsin legislature rejected S.B. 87 which sought to control the sale and use of drug paraphernalia, and which contained special provisions relating to minors. Respondents suggest that opposition to paraphernalia controls in Wisconsin arose from strong popular and legislative support for civil liberties. In addition, paraphernalia merchants were reported to have formed an effective lobby. It is not expected that anti-paraphernalia measures will receive the approval of the Wisconsin legislature in the near future, nor is there currently a popular movement supporting the enactment of such laws.

In addition to proposals for new legislation, a number of amendments have been proposed to existing state statutes. Between 1985 and 1986, two such amendments were signed into law. The first, mentioned above, was an

amendment to the Indiana statute, increasing the penalties for the sale of paraphernalia.⁶ The second recent revision was a rewording of the Colorado statute to bring it more closely into line with the language of the Model Act (this revision was made to avoid possible constitutional violations, see Introduction). As mentioned above, in response to the rejection of the Illinois anti-paraphernalia statute by the Illinois Supreme Court in September 1987, a bill has been introduced to the State Senate which would correct the language of the law which the court found impermissably vague, and thus reinstate paraphernalia controls. In the past two years, six other state legislatures have considered, but not passed, various amendments to their current legislation.⁷ These amendments addressed a wide range of issues: the preemption of local paraphernalia laws; forfeiture of monies connected with controlled paraphernalia; the redefinition of "drug paraphernalia"; and the provision of warning labels on rolling papers stating the penalties for use with a controlled substance.

States without comprehensive state-level anti-paraphernalia laws

Respondents in non-regulated states listed an array of reasons for the rejection of anti-paraphernalia laws which ranged from population density to economic considerations. Most explanations, however, share one or both of the following elements: first, the sale of drug paraphernalia arouses no public concern; and second, a ban on paraphernalia sales would conflict with a basic value of the state government—for example, dedication to limited government, progressive laws, or the maximization of personal liberty.

In the non-regulated states discussed above (Hawaii, Illinois, Michigan, Ohio, Oregon, and Wisconsin) there has been sufficient public concern about the sale of drug paraphernalia to generate proposals for legislation, but not enough to override the philosophical reservations of key legislators, or the opposition of influential lobbies. In the remaining three non-regulated states, no popular or legislative initiatives to enact anti-paraphernalia laws have been undertaken. In these states, lack of community pressure to stop drug paraphernalia sales appears to be the key factor determining their policy:

West Virginia

West Virginia, like Oregon and Ohio, prohibits the sale of drug paraphernalia to minors only. The sale of paraphernalia to adults is regulated by a licensing statute which requires drug paraphernalia merchants to register with the state and pay a small fee. The control of drug paraphernalia sales is not a high priority for either legislators or citizen groups in West Virginia. Legislators attribute the low level of concern about drug paraphernalia to several factors: first, drug paraphernalia sales are not occurring in most areas; and second, drug abuse, in general, is not the primary problem facing the state—rather, economic development demands first priority.

Alaska

Alaska, by virtue of its sparse population, reports little need or desire for state-level paraphernalia laws. Where the population is large enough to support commerce in drug paraphernalia, such businesses are regulated by local ordinances.

Iowa

Although law enforcers report that the sale of drug paraphernalia is common in Iowa, legislators, parent groups, and prosecutors consider the enactment of anti-paraphernalia laws to be a very low priority. Due to a successful facial challenge of an Ames, Iowa ordinance in 1980, prosecutors and the Attorney General's Office are generally skeptical of the constitutionality of anti-paraphernalia laws. Local ordinances are in effect in some areas; however, their impact on paraphernalia sales is thought to be minimal. At present, no anti-paraphernalia lobby exists in Iowa, and anti-drug activists contacted by this survey have no plans to undertake such a campaign.

County and Municipal Ordinances Pertaining to the Sale of Drug Paraphernalia

As discussed in the Introduction, the first laws banning the sale of drug paraphernalia in "head shops" were local ordinances introduced by parent and citizen groups in the late 1970s. The success of the grass roots anti-paraphernalia movement is indicated in a 1979 publication, issued by the U.S. Department of Health, Education and Welfare, which reported that in the first two years of the movement, 77 anti-paraphernalia ordinances were enacted in 13 states.⁸ This study found local ordinances in nineteen states, and 31 percent of the police and sheriffs interviewed had access to anti-paraphernalia ordinances.

Despite the large number of ordinances in force, respondents indicated that prosecutions under local laws are becoming rare. In addition, few communities reported recently enacted anti-paraphernalia ordinances. Several factors were reported to discourage the use of local ordinances. First, most police and prosecutors now have access to state-level anti-paraphernalia laws—97 percent of the police officers who reported local ordinances in this study also had access to state-level laws. Since a majority of state laws are patterned on the Model Act, many prosecutors and police believe that prosecutions under state law are preferable because they are less vulnerable to facial challenges than those under less precise local laws. Second, prosecutions under state law may have access to greater resources and may carry higher penalties. Finally,

the use of local ordinances has been halted in a few areas by state laws which preempt the field of anti-paraphernalia legislation.

In areas with no state-level anti-paraphernalia laws, however, local ordinances continue to play an active role in the control of drug paraphernalia.⁹ As mentioned above, virtually all states which are currently without state-level anti-paraphernalia laws rely on ordinances to curb paraphernalia sales in some jurisdictions. Most recently, a drive to enact anti-paraphernalia ordinances in Michigan has found strong support from community anti-drug coalitions. One Michigan county reported the enactment of nine new anti-paraphernalia ordinances in 1986. Nonetheless, ordinances in non-regulated states are frequently regarded by their sponsors as only temporary measures. Ultimately, Michigan activists hope to obtain a state-level Model Act law.

Types of local ordinances

Several types of local ordinances were reported by respondents: zoning ordinances, licensing ordinances, and Model Act ordinances:

- **Zoning** is a means by which local jurisdictions may restrict legal activities to designated areas. It has been suggested by some commentators that zoning could be a useful option for those jurisdictions where no state-level anti-paraphernalia laws are in force. Only ten percent of the respondents had had experience with this sort of anti-paraphernalia legislation (some of these ordinances had been preempted by the enactment of stronger state sanctions). These respondents reported that zoning restrictions were an unsatisfactory method of drug paraphernalia control. Furthermore, the majority of respondents did not believe that zoning ordinances could be effective in eliminating paraphernalia sales because of the problems involved in defining a "head shop" for zoning purposes, and the fact that zoning laws may not attempt to exclude a legal activity entirely without the risk of violating First Amendment, free speech requirements.
- **Licensing ordinances** are sometimes used in jurisdictions with no state-level anti-paraphernalia laws. Licensing ordinances usually allow merchants to sell drug paraphernalia for a fee, while requiring them to maintain records concerning the sale of specific items. Frequently, licensing laws place restrictions on the sale of paraphernalia to minors. As noted in the Introduction, the constitutionality of this type of ordinance was confirmed in the landmark "head shop" case *Hoffman Estates v. Flipside* (1982)¹¹. Licensing ordinances were traditionally favored by urban jurisdictions where paraphernalia was a low priority;

however, the new wave of concern about the sale of "crack" paraphernalia may motivate urban jurisdictions to adopt more stringent sanctions.

- **Model Act ordinances** were the type most frequently reported by respondents. These ordinances were reported not only in jurisdictions with no state anti-paraphernalia laws, but also in jurisdictions where state law had not preempted the field of legislation.

The enforcement of local ordinances

Although many localities adopted anti-paraphernalia laws in the late 1970s, prosecutions did not follow because many of these ordinances were initially struck down.¹² As mentioned above, this trend was reversed, following the Supreme Court's decision in *Hoffman Estates*. Shortly after *Hoffman Estates*, the first prosecution using a law patterned after the DEA's Model Act was upheld in a test of a local ordinance in Missouri.¹³ Today the highest number of prosecutions under local ordinances occur in jurisdictions with no state-level anti-paraphernalia statutes. Some local attorneys expressed the opinion that, even in those localities where no prosecutions have been brought under anti-paraphernalia ordinances, the simple existence of the local ordinance is often enough to close down "head shops" or discourage them from opening.

Preemption of local ordinances by state law

In some areas, state statutes patterns after the Model Act have either formally or informally preempted earlier local legislation. For example, in California survey respondents reported that despite success in California courts, ordinances have fallen into disuse in favor of state law patterned after the Model Act.¹⁵ According to California district attorneys, it is customary in California to favor the use of state statutes over local ordinances whenever possible. In New York State, preemption of local ordinances was established by the courts rather than by custom or practice. In *Gless v. City of New York* (1985)¹⁶, reversing an earlier decision, the court found Local Law No. 23, based upon the Model Act, invalid as entering into an area preempted by Article 39 of the General Business Law. The court ruled that the intent of the legislature in drafting its drug paraphernalia laws was to occupy the entire field of drug paraphernalia legislation to the exclusion of municipal law.¹⁷

The future of anti-paraphernalia ordinances

For the majority of jurisdictions, local ordinances have become obsolete in comparison to more carefully drawn and thoroughly tested state-level anti-paraphernalia laws. However, in jurisdictions without state-level sanctions on

the sale of drug paraphernalia, the role of local ordinances continues to be significant. Recent legislative activity in Michigan would suggest that local anti-paraphernalia ordinances still provide an effective means for individual communities to regulate or ban paraphernalia sales where state-level support for such controls does not exist. Finally, it is likely that the majority of local ordinances enacted in the future will be patterned on the Model Act, in order to avoid the facial constitutional challenges which crippled many early anti-paraphernalia ordinances.

The Impact of Special Interest Groups on the Enactment of State and Local Paraphernalia Laws

The work of special interest groups has had a significant impact on the enactment of paraphernalia statutes. As noted above, the anti-paraphernalia movement began at a grass roots level and worked its way up from local to state-level government. In doing so, the anti-paraphernalia lobby developed a strong national network of parents and citizens concerned with drug laws and drug abuse. Over the course of the last ten years, anti-paraphernalia lobbies have continued to grow and have expanded their interests. Similarly, over the past decade, the various groups that oppose controls on the sale of paraphernalia have become more organized and have sought the broadest possible base of support for their position. At present, regional and national professional organizations for paraphernalia and smoking accessories merchants, some tobacconists, and some civil liberties groups have joined forces to urge legislators to reject, and courts to overturn, paraphernalia laws.

Anti-paraphernalia lobbies

Fifty-five percent of the survey respondents cited pressure from parent and citizen groups as a factor contributing to the enactment of drug paraphernalia laws in their jurisdiction. Twenty percent of the respondents claimed that parent and citizen groups had been very active in securing state anti-paraphernalia legislation. However, public concern about drug paraphernalia was reported to decline following the enactment of the law. As most paraphernalia laws were enacted in the early 1980s (see Appendix E), the level of public interest in paraphernalia laws now is reported to be quite low: only 3 percent of the law enforcement officers interviewed were aware of parent or citizen groups currently concerned about drug paraphernalia sales. To some extent, the decline in public interest in drug paraphernalia controls may be illusory. Recently, public interest in drug paraphernalia has been subsumed in the general concern about cocaine and the drug problem as a whole. Nonetheless, it is true that parent and citizen groups have moved away from drug paraphernalia as a primary issue. While members of these groups strongly support all efforts to ban the manufacture and sale of drug paraphernalia, the focus

of their concern and lobbying efforts has broadened to include the whole field of drug abuse. This shift in concern is, to some extent, indicative of the success of the Model Act in controlling the open sale of drug paraphernalia (see Chapter 3). One activist noted that if "head shops" were still prevalent in his area, they would be a primary concern; however, since the effective implementation of the Model Act in this jurisdiction, his efforts have been directed toward the problem of drug abuse in general. The activist's appraisal of the situation is cogent; parent and citizen concern has continued in most jurisdictions where no drug paraphernalia controls have been enacted,¹⁸ and has declined where anti-paraphernalia laws are in place.

Parent and citizen groups are not the only supporters of anti-paraphernalia laws. In ten states, the efforts of the police and other law enforcement agencies were cited by prosecutors and Attorneys General as the primary impetus to the successful introduction and enactment of anti-paraphernalia legislation. In one state, the successful enactment of a state anti-paraphernalia statute was attributed to the enthusiasm of an individual legislator, rather than any organized lobby.¹⁹

Pro-paraphernalia lobbies

The pro-paraphernalia lobby is of necessity more frequently concerned with the repeal of present paraphernalia laws than with opposition to new measures. Nonetheless, efforts are made not only to overturn existing laws, but also to prevent the enactment of further sanctions. Historically, the pro-paraphernalia lobby primarily consisted of national and regional professional associations for paraphernalia or smoking and snuff accessory dealers. In the early 1980s regional professional organizations pooled resources to fund a number of facial challenges to new state-level anti-paraphernalia laws.²⁰ Today the role of the regional lobbies is not so prominent. To some extent, national professional associations have continued to provide support for constitutional challenges and lobbying against federal and state anti-paraphernalia laws. Paraphernalia dealers also continue to receive support from NORML's legal advisors and lobbyists. In general, these organizations provide members with information regarding recent constitutional challenges to paraphernalia laws throughout the country, and share defense strategies, lawyers, briefs, and access to expert defense witnesses (prominent tobacconists or pipe experts).

At present, the major aim of the pro-paraphernalia lobby is to draw attention to the constitutional difficulties arising from the application of the Model Act's complex intent requirements. A major element of this attack is an effort to highlight the ambiguity inherent in the definition of some items as "dual-use" items (e.g., pipes and rolling papers) and others as "drug paraphernalia." By arguing that all items are potentially "dual-use" items (and thus that no object is intrinsically drug paraphernalia), pro-paraphernalia activists seek to render the "dual-use" distinction legally meaningless.

Other groups opposing anti-paraphernalia legislation

In addition to the paraphernalia merchants themselves, other groups may lend support to the pro-paraphernalia lobby. For example, in some areas respondents report that drug paraphernalia dealers have succeeded in gaining the sympathy of the legitimate business community. While they do not advocate the sale of drug paraphernalia, tobacco retailers are sometimes obliged to oppose anti-paraphernalia laws out of concern that such laws would adversely affect the sale of smoking accessories. Other retailers are thought to support the deregulation of paraphernalia simply because they oppose restrictions on free enterprise as a rule.

"Head shop" cases also attract the attention of groups concerned with the protection of civil liberties, such as the ACLU, due to the First Amendment issues which are frequently involved. For example, the sale of drug paraphernalia can be viewed as an expression of dissent from majoritarian values. Since many items which are sold in "head shops" possess both legal and illegal uses, civil rights activists argue that what is prohibited is not the specific object, but rather the unpopular idea which the object represents when packaged or presented in a given manner. As such, it is argued that the drug paraphernalia merchant's behavior falls under the constitutionally protected rubric of "symbolic speech," and that anti-paraphernalia laws attempt nothing less than the censorship of dissenting views about drug policy, by the repression of drug culture. More conventional free-speech arguments are sometimes employed against provisions of anti-paraphernalia legislation prohibiting the advertisement of drug paraphernalia. Such arguments have, at least in one case, succeeded in severing an advertising clause from a state drug paraphernalia statute.²¹

Endnotes

1. Alabama enacted legislation patterned after the Model Act in April 1986, see Appendix E.
2. Slip Opinion (OR) April 11, 1986, No. 8176. (Available on *Lexis*.)
3. Report of the Committee on Judiciary, to the Honorable Henry Haalilio Peters, Speaker, House of Representatives, Thirteenth State Legislature, Hawaii, March 8, 1985 (Stand. Com. Rep. No. 436).
4. See, e.g., "State panel passes bill to ban sale of drug aids," *Detroit Free Press*, September 12, 1986; "Drug paraphernalia sales stir protests," *Detroit News*, July 14, 1986; "Crack increase sparks fight on paraphernalia," *Lansing State Journal*, August 2, 1986; "You can help fight sale of drug gear," *Detroit Free Press*, July 21, 1986; "Pipe distributor holding his peace," *Detroit Free Press*, July 30, 1986; and "A stand on drugs that gives one hope," *Detroit Free Press*, July 16, 1986.

5. The Oregon Marijuana Initiative (OMI). This Portland-based group lobbies for the legalization of the private possession and cultivation of marijuana for personal use. They also publish a monthly newspaper, *The Marijuana Report*.
6. Amendment enacted March 5, 1986. See, Indiana Code 35-48-4-8.2.
7. See, N.Y. S.345 (same as A.4841), 1986; MD H.B. No. 1627, 1986; PA S.B. 1458, 1986; PA S.B. 1160, 1985; PA S.B. 803, 1985; SC S.B. No. 248; MA S.B. No. 143; TN S.B. No. 969 (same as H.B. No. 993), 1985.
8. U.S. Department of Health, Education and Welfare, **Community and Legal Responses to Drug Paraphernalia**, DHEW Publication No. (ADM) 80-963 (1980).
9. States without state level anti-paraphernalia statutes which report local anti-paraphernalia ordinances are: Alaska, Illinois, Iowa, Michigan, Ohio, and Wisconsin. Local ordinances are also reported in Oregon, where state law prohibits the sale of drug paraphernalia to minors only. See also, note #7 above.
10. See, "Crack increase sparks fight on paraphernalia," *Lansing State Journal*, August 2, 1986; See also, note #4, above.
11. [1982 Supreme Court] 455 U.S. 489, 71 L.Ed. 2d 362, 102 S. Ct. 1186, reh. den. 456 U.S. 950, 72 L.Ed. 2d 4761, 102 S.Ct. 2023 and on remand [CA 7] 688 F. 2d 842.
12. Some early attempts at legislation that were rejected by the courts include: *Knoedler v. Roxbury Township*, (D.N.J. 1980) 485 F. Supp. 990; *Magnani v. City of Ames*, (S.D. Iowa 1980) 493 F. Supp. 1003; *Music Stop, Inc. v. City of Ferndale*, (E.D. Mi. 1980) 488 F. Supp. 390; *Indiana Chapter, NORML v. Sendak*, No. TH-75-142-C (S.D. Ind. Feb. 4, 1980), vacated, 631 F. 2d 734 (7th Cir. 1980); *Record Museum v. Lawrence Township*, (D.N.J. 1979) 481 F. Supp. 768; *Housworth v. Glisson*, (N.D. Ga. 1978) 485 F. Supp. 29, aff'd. 614 F. 2d 1295 (5th Cir. 1980); *Riddle v. Clack*, (N.D. Tex. Aug. 25, 1977) No. CA-3-77-0525-D; *Gaffy v. Babb* (1981) 50 Or. App. 617, 624 P. 2d 616; *Back Door Records v. Jacksonville* (1981 E.D. Ark.) 515 F. Supp. 857; *Geiger v. Eagan* (1980 CA8 Minn.) 618 F. 2d 26; *Information Management Services, Inc. v. Pleasant Hills* (1981 W.D. Pa.) 512 F. Supp. 1066 (ordinance based on Model Act struck down); *Atkins v. Clements* (1981 N.D. Tex.) 529 F. Supp. 735 (advertising provision of ordinance based on the Model Act held unconstitutional). See, 69 *ALR Fed* 15; 20 *Harv. J. on Legis.* 617, 623.
13. *Webster Groves v. Spectrum Smoke Shop*, unpublished, 1983.
14. Some local anti-paraphernalia ordinances held constitutional following the Flipside decision include those at issue in: *Levas & Levas v. Antioch* (1982 CA7 Ill) 684 F. 2d 446; *New England Accessories Trade Assn. v. Nashua* (1982, CA1 N.H.) 679 F. 2d 1; *Florida Businessmen for Free Enterprise v. Hollywood* (1982, CA11 Fla.) 673 F. 2d 1213; *Camille Corp. v. Phares* (1983 CA7 Ill) 705 F. 2d 223. For anti-paraphernalia ordinances restored following the Flipside decision, see: *Record Revolution No. 6, Inc. v. City of Parma* (1980, CA6 Ohio) 638 F. 2d 916, vacated 451 U.S. 1013, 69 L. Ed. 2d 384; 101 S. Ct. 2998 and vacated 456 U.S. 968, 72 L. Ed. 2d 840, 102 S. Ct. 2227; *Weiler v. Carpenter* (1982 CA10 NM) 695 F. 2d 1348; *Kansas Retail Trade Cooperative v. Stephan* (1982, CA 10 Kan) 695 F. 2d 1343; See, 69 *ALR Fed* 15; 20 *Harv. J. on Legis.* 617, 623.
15. Some anti-paraphernalia ordinances upheld by California courts are: *Bamboo Bros. v. Carpenter*, 133 Cal. App. 3d 116, 183 Cal. Rptr. 748; *Music Plus v. Baker*, 125 Cal. App. 3d 819; *Music Four Plus v. Los Angeles*, 125 Cal. App. 3d. 829; *Licorice Pizza Records v. Los Angeles*, 125 Cal. App. 3d 825.
16. 107 A.D. 2d 607.
17. The final decision on *Gless* was preceded by two other pertinent New York cases: in *Dougal v. County of Suffolk* (1985) 63 NY 2d 668, 481 N.E. 2d 254, 491 N.Y.S. 2d 622, the court found that two local ordinances, also based upon the Model Act, were preempted due to "irreconcilable" differences between state and local law, and in *Hoetzes v. County of Erie* (1980) (W.D. NY) 497 F. Supp. 1207,

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- the court found that the state legislature had preempted the field of drug paraphernalia regulation, even though it found that the local law (based upon the Model Act) did not conflict with the state scheme.
18. See, e.g., "Parents organize to fight drug use," *The Oregonian*, (Jan. 16, 1986), p. D6. Also note the recent interest in drug paraphernalia ordinances shown in Michigan, another jurisdiction where no state-level restrictions exist, see "Crack increase sparks fight on paraphernalia," *Lansing State Journal* (Aug. 2, 1986), p. 113.
 19. According to local observers, the recent success of the Model Act in Alabama is attributable to the work of State Rep. Mary Zoghby.
 20. See, e.g., *Mid-Atlantic Accessories Trade Assn. v. Maryland* (1980, D.C. MD) 500 F. Supp. 834; *Tobacco Accessories and Novelty Craftsmen Merchants Assn. v. Treen* (1982, CA5 LA) 681 F. 2d 35; *Delaware Accessories Trade Assn. v. Gebelein* (1980 DC Del) 497 F. Supp. 289; *Indiana Chapter, NORML, Inc. v. Sendak* (1980 SD Ind) No. 28715-142C (decided February 4, 1980, slip opinion available on *LEXIS* Gen. Fed. Library); *Kansas Retail Trade Cooperative v. Stephan* (1982 CA1 NH) 679 F. 2d 1; *Florida Businessmen for Free Enterprise v. Hollywood* (1982 CA11 Fla) 673 F. 2d 1213; and *Pennsylvania Accessories Trade Assn., Inc. v. Thornburgh* (1983 MD PA) 565 F. Supp. 1568.
 21. *Atkins v. Clements* (1981 ND Tex) 529 F. Supp. 735.

2 The Investigation and Prosecution of Drug Paraphernalia Cases

Factors Affecting The Enforcement Of Anti-Paraphernalia Laws

For the majority of jurisdictions, the investigation and prosecution of drug paraphernalia violations is a low priority. Many police and prosecutors have never had experience with “head shop” cases or any case where a paraphernalia charge was the primary issue. This study’s survey of law enforcement officers suggests that approximately 57 percent of those jurisdictions which have access to anti-paraphernalia laws have never used them; and that an additional 14 percent of those jurisdictions have used them only once. As a result, police and prosecutors’ familiarity with anti-paraphernalia laws is understandably limited.

The infrequent use of drug paraphernalia laws not only diminishes awareness of these laws, but also denies many police and prosecutors the experience necessary to effectively enforce them. The difficulty of acquiring information about enforcement and prosecution procedures, combined with the considerable complexity of most drug paraphernalia cases has resulted in a continuing cycle of non-enforcement in many jurisdictions. Nevertheless, in jurisdictions where anti-paraphernalia laws are being enforced, police and prosecutors have developed a number of procedures and techniques which enhance the likelihood of obtaining drug paraphernalia convictions.

The priority given anti-paraphernalia laws by police and prosecutors

Police and prosecutors reported that the enforcement of anti-paraphernalia laws generally receives less emphasis than other drug enforcement priorities. Sixty-two percent of the respondents claimed that the enforcement of the ban on drug paraphernalia was among their lowest drug enforcement concerns. Only 6 percent of the respondents named drug paraphernalia as one of their higher drug enforcement priorities. The low priority assigned to drug paraphernalia violations is frequently attributed to two factors: limited prosecutorial and enforcement resources; and declining public concern about paraphernalia sales.

- **Limited resources.** Because all police and prosecutors must fulfill their duties with a limited amount of resources, prioritization of tasks is necessary. According to police and prosecutors, the serious nature of the drug problem in general often precludes their expending time and other resources on the investigation and prosecution of low-priority crimes, such as the sale drug paraphernalia. Many urban jurisdictions list trafficking, international sales, or drug wars as concerns too pressing to allow funds to be given to the enforcement of anti-paraphernalia laws. Prosecutors emphasized that the priority given to the sale of drug paraphernalia is commensurate with the penalties imposed on it by law. To illustrate, prosecutors point out that the enforcement of drug paraphernalia offenses is generally given the same priority as other misdemeanors, or the possession of small amounts of marijuana.

While, in theory, drug paraphernalia offenses hold the same priority as several other drug enforcement tasks, in practice, even those low-level tasks are likely to be placed ahead of drug paraphernalia enforcement. One reason for this is that the commitment of resources commonly required to investigate and prosecute a "head shop" violation is much greater than that required for other minor crimes. A second reason is the perception, shared by 50 percent of the police who had experience with drug paraphernalia cases, that the prosecution of drug paraphernalia sales is unlikely to deter the merchant from further commerce in drug paraphernalia. (Both police and prosecutors blame lenient sentencing practices for the ineffectiveness of the law, see below.) Since the cost of drug paraphernalia cases is high, and the effect of the convictions unsure, some jurisdictions consider the investigation and prosecution of drug paraphernalia violations an inefficient use of law enforcement and prosecutorial resources.

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- **Community pressure.** Forty-six percent of those law enforcement officers who had been involved in drug paraphernalia investigations named community pressure as the most important factor contributing to their decision to enforce drug paraphernalia laws. The public's level of interest in drug paraphernalia sales can either raise the priority given to paraphernalia investigations or tacitly affirm a policy of non-enforcement. Furthermore, prosecutors and police frequently rely on parent, church, and citizen groups to bring drug paraphernalia infractions to their attention—in most jurisdictions no routine effort is made to investigate stores which might be engaged in paraphernalia sales. Even in cases where police and prosecutors are aware of "head shops" operating in their jurisdiction, prosecutors report that it is unlikely that action will be taken against them in the absence of community concern.

Awareness of the drug paraphernalia industry

The study found that most attorneys and law enforcement officers have little firsthand knowledge of the scope of the drug paraphernalia problem, or the drug paraphernalia industry. Because the enforcement of drug paraphernalia laws occupies a low priority in most jurisdictions, it is not surprising that little research is done to discover the sources of paraphernalia in a community.

Law enforcement officers reported a higher level of concern about mail-order sale of drug paraphernalia than either prosecutors or attorneys general, and had a significantly higher degree of firsthand knowledge of that industry. Twenty-two percent of the police characterized the mail-order sale of drug paraphernalia as a very serious problem, while only 8 percent of the attorneys polled thought it was that severe. As a basis for their concern, respondents noted that, even in areas where drug paraphernalia laws were being actively and successfully enforced, paraphernalia was routinely found in the course of drug arrests. It was assumed by most police and prosecutors that these items were obtained through mail-order catalogs. Nonetheless, 80 percent of the police and 90 percent of the attorneys reported that no evidence of mail-order paraphernalia sales had ever come to their attention.

Information provided by survey respondents concerning the manufacture of drug paraphernalia was similarly speculative. Only 6 percent of the prosecutors and police had been involved in cases concerning the manufacture of drug paraphernalia. Drug paraphernalia manufacturers had been prosecuted in a total of five states. Prosecutors reported that these cases were often accidental to another prosecution. For example, a narcotics investigation might uncover that, in addition to drugs, paraphernalia was being manufactured, and those arrested would be charged with both offenses. The few cases which

were discussed by the respondents had not been successful: one had failed due to a faulty search warrant, another was unable to prosecute the manufacturers because they were operating from outside the country, and finally, an attorney general reported that he was unable to persuade a prosecutor to proceed with a manufacturing case due to the strict requirements of proof imposed by law. At present, over 90 percent of police and prosecutors stated that they were not aware of any paraphernalia manufacturers in their jurisdiction. Police, prosecutors, and anti-paraphernalia activists asserted that a large percentage of common paraphernalia items are manufactured outside the United States, and that the majority of other items are manufactured in jurisdictions without anti-paraphernalia laws, or where laws are weak or not enforced. Items which are reported to be manufactured outside the country include "crack" vials with various colored stoppers,¹ glass "crack" pipes, bongos and other exotic pipes, mannite or mannitol, and extra-width rolling papers.

General Characteristics of "Head Shop" Investigations and Prosecutions

While many jurisdictions prosecute over 100 cases of possession of drug paraphernalia a year (usually in conjunction with drug-related charges), most prosecutors and district attorneys handle only one or two "head shop" cases in their whole career. Because these cases are rare, the outcome of the first "head shop" case tried in a jurisdiction often affects the success or failure of anti-paraphernalia laws in that area. If the first case convicts the merchant and stops paraphernalia sales at that site, then the need for further prosecutions may be significantly reduced by voluntary compliance with the law. However, if the first case fails to either convict the merchant or deter him from further paraphernalia sales, then law enforcement officers and prosecutors may be discouraged from devoting any further resources to anti-paraphernalia enforcement, and paraphernalia sales will not be deterred. After a successful prosecution, most jurisdictions pursue no further cases unless the prosecutor or police receive complaints concerning continued or renewed violations. Prosecutors indicate that a majority of "head shop" cases are prosecuted immediately after anti-paraphernalia legislation is enacted. However, six percent of the prosecutors reported recent "head shop" prosecutions, and 27 percent of the police officers reported an ongoing effort to implement the law. Many prosecutors reported having success with head shop cases: 46 percent of those prosecutors who had access to drug paraphernalia laws stated that they always or frequently obtained convictions under their jurisdictions' anti-paraphernalia laws, while only 8 percent reported that they seldom or

never obtained convictions.² (Some cases discussed by prosecutors are still pending or in progress; others were dropped or disposed of before they came to trial. For a select list of cases discussed, see Appendix C.)

Police interviewed estimated that an average “head shop” investigation requires 38 officer hours. Investigations in urban areas or dangerous jurisdictions were reported to require as many as six officers to effectively and safely investigate a “head shop” site.³ In addition to personnel, police reported that access to a number of other resources is necessary. For example, money is needed to purchase the paraphernalia which is to be used in evidence, vehicles are needed both for the undercover investigation and also to transport the seized paraphernalia, video and photography equipment is required to document the context in which the paraphernalia was being sold, and—where allowed—electronic eavesdropping or surveillance equipment is used to document verbal exchanges between undercover agents and the paraphernalia merchant. In addition, a significant commitment of resources from the prosecutor is often needed. “Head shop” cases frequently go to trial. Prosecutors with little experience in this field may face experienced paraphernalia defense lawyers and professional expert witnesses. Above all, the prosecutor must meet a formidable standard of proof: he must establish that the seller had a culpable mental state—that he or she intended the products to be used with illegal drugs.

Key elements of successful “head shop” investigations and prosecutions

The following information has been drawn primarily from discussions with prosecutors who are familiar with approximately 50 “head shop” cases. Although each “head shop” case presents police and prosecutors with a unique set of considerations, there are a number of procedural safeguards which are commonly exercised to avoid the violation of the defendant’s constitutional rights, while facilitating effective prosecutions. These include a thorough and well-documented undercover investigation and surveillance, a carefully drawn search warrant, a detailed inventory of evidence, the use of expert witnesses and, more generally, the allotment of ample resources:

Undercover investigation

Undercover investigation and surveillance, including purchases, discussions, and general background research on the company and its operations, was reported to be the most crucial aspect of “head shop” prosecutions. Undercover investigation and surveillance is commonly used to gather evidence establishing the intent of the merchant. Officers involved in such investigations often had a wide knowledge of drug paraphernalia, its unique characteristics, and its uses. This knowledge was important not only to

insure that all paraphernalia items were seized, but also to insure that the officer would be able to give an accurate and complete description of the drug-related characteristics of the paraphernalia seized in evidence, and that the officer would be an effective witness if the case came to trial. The use of experienced, well-informed officers in drug paraphernalia investigations was also reported to guard against inadvertent selective enforcement of the law.

When possible, investigators sought activity at the core of the prohibition, that is, the sale of "hard core" drug paraphernalia. However, "dual-use" items were not ignored in most investigations and prosecutions because no item is immune to disputes as to its use. Prosecutors argued that "soft core" items contributed to the circumstantial evidence suggesting criminal intent, and that the prosecutor's case against "hard core" items of drug paraphernalia was thus buttressed by their presence. One respondent reported that undercover investigators in his jurisdiction made an effort to discover when shipments of new stock were scheduled to arrive so that the arrest might be timed to maximize the volume of "hard core" paraphernalia seized in evidence.

In most jurisdictions, however, the undercover officer was called on to perform only four basic duties—confirm that drug paraphernalia was sold, observe which items were for sale, purchase various paraphernalia, and engage the owner or manager in incriminating conversation:

- **Confirmation.** Following reports of drug paraphernalia sales, undercover officers were usually sent to confirm that the items being sold were probably drug paraphernalia, and that the volume of sales was sufficient to warrant prosecution. At this stage, some jurisdictions conducted research to determine the owner of the business, and what licenses had been issued to it. This information was used then to target the most effective defendant. When possible, the owner was targeted as the defendant. However, this approach was not always possible if the business was run exclusively by employees (see below).
- **Observation.** On the second visit to the targeted "head shop" undercover officers examined the products being sold in detail in order to be able to provide a full list of products to be seized.

The "observation" stage was reported to be crucial to the drafting of a comprehensive search warrant. In addition to examining the paraphernalia, officers also were instructed to note any storage areas or "back rooms" which might also conceal paraphernalia.

- **Purchase.** On the undercover investigators' second visit to the suspected "head shop," a number of purchases of drug paraphernalia were also commonly made. Police and prosecutors reported

that investigators were encouraged to purchase as many items as the department's resources allowed in order to increase the evidence of sale. The purchase of these items was also considered to be important to the drafting of the search warrant (see below).

- **Incriminating discussion.** During the course of the purchases, investigators usually attempted to engage the seller in incriminating discussions concerning the use of each item of suspected drug paraphernalia. These discussions were designed to establish that the seller had knowledge of the buyer's intent to use the items with illegal drugs and to discover whether the seller intended to provide paraphernalia for that market. Often undercover agents worked in pairs, staging arguments about the use of various paraphernalia in the hope of drawing the seller into the discussion. To record these conversations, agents sometimes wore concealed electronic recording devices. In other jurisdictions, agents simply transcribed conversations as soon as possible following the buy. Some officers reported that undercover agents were also instructed to request prescription drugs or other chemical paraphernalia which are not commonly displayed, such as mannitol or manitol, inositol, lidocaine, procaine, or similar cutting agents.

A carefully drawn search warrant

Search warrants used in "head shop" prosecutions are frequently long and detailed. Prosecutors stated that search warrants are usually framed by someone who has a strong knowledge of drug paraphernalia and its uses, the requirements of the jurisdiction's anti-paraphernalia laws, and a first-hand knowledge of the items discovered in the undercover investigation. Circumstantial factors, as well as statements from the owner, manager, or salesperson, were usually noted in the warrant in order to avoid any constitutional errors. Search warrants commonly include a description of the site to be searched (both exterior and interior features), a list of the paraphernalia items purchased by undercover agents, and—if prescription or illegal drugs were purchased—a laboratory analysis of the substances. In some jurisdictions, provision was made in the warrant for a prompt post-seizure hearing. Prosecutors emphasized that the authors of the warrant must be careful to note the context of the items to be seized. For example, if "disclaimers" are posted or made in some other manner, the fact must be noted, and efforts to refute the disclaimers must be made. Prosecutors noted that detailed explanations of why the objects to be seized are drug paraphernalia, rather than the legitimate object suggested by the disclaimers, should also be included in order to establish probable cause. Most often such explanations are included in appendices to the warrant. These documents commonly describe the design of

the products and the implications of the design features, as well as the context in which they were marketed. Other testimony in support of the warrant is sometimes attached, including statements of paraphernalia experts, or transcripts of incriminating conversations between investigators and the defendants.

Detailed inventory of evidence

Some prosecutions may entail the seizure of thousands of items of suspected drug paraphernalia. A few jurisdictions noted that care was taken to catalog each item and document its display in the store. Other jurisdictions merely labelled each box of paraphernalia seized. At the time of the search warrant's execution some jurisdictions either photographed or videotaped the interior of the alleged "head shop" to document the context in which the paraphernalia was being sold. The amount of administrative time consumed by documenting and storing evidence was, in some cases, large. In the prosecution of a drug paraphernalia distributor or major "head shop", the transportation, storage, documentation, and effective presentation of evidence was reported to require considerable planning and resources.

Expert prosecution witnesses

A majority of respondents agreed that a successful "head shop" prosecution must have knowledgeable witnesses to explain the use and characteristics of the drug paraphernalia presented in evidence. Ninety-seven percent of those prosecutors who had brought a drug paraphernalia case to trial had used police, narcotics experts, or other law enforcement officers as expert witnesses. Eighty-eight percent of the police and prosecutors who had had experience with drug paraphernalia cases reported having no difficulty in obtaining effective expert witnesses. Prosecutors explained that the use of local narcotics experts had, in virtually every case, been sufficient. In some jurisdictions, prosecutors supplemented the testimony of in-house narcotics experts with that of tobaccoconists, informants, or rehabilitation staff. Police reported that a combination of narcotics experts and lab technicians were used in cases involving chemical drug paraphernalia. Nonetheless, in rural areas with no local narcotics and paraphernalia experts, obtaining effective expert witnesses sometimes required extra effort on the part of the prosecutor. In these areas, arrangements were often made with federal agents or police officers from a neighboring city to act as expert witnesses. In a few jurisdictions, where defendants were being aided by national or regional professional organizations, expert defense witnesses were brought in from other parts of the country. Many prosecutors reported that they do not have the resources to hire professional witnesses. It does not, however, appear that professional witnesses are necessary to obtain convictions. Aside from narcotics experts

and laboratory technicians, prosecutors reported that local tobacconists occasionally volunteer to act as witnesses as a community service.

Ample resources

The prosecution of "head shop" cases is both time-consuming and expensive. First, the agencies involved must commit personnel and equipment for careful investigation and surveillance. "Buy money" is needed, as well as a range of other items, including vans, video cameras, and recording devices. The preparation of the search warrant and supporting documents, which may be anywhere from 20 to 200 pages in length, is also a major resource commitment. In addition, administrative time is needed to catalog and document the evidence. Prosecutors note that paraphernalia cases frequently go to trial, and that the standard of proof which they must meet is high. Because defense attorneys often draw on the research of their colleagues, the prosecutor may be confronted with a wide range of well-developed legal arguments. Discussions with respondents suggest that a successful "head shop" prosecution requires a significant commitment of time and resources, by both the police and the prosecutor.

Common Problems with "Head Shop" Investigations and Prosecutions

Police and prosecutors reported a wide range of difficulties with the investigation and prosecution of "head shop" cases; however, no one problem was named by a majority of the respondents. The most frequently named problems related to the requirements and wording of the law itself: 39 percent of the prosecutors found it difficult to meet the law's intent requirements and 23 percent of the police and prosecutors felt that the law's definition of drug paraphernalia was too vague to enforce with confidence. As a reaction to these difficulties, prosecutors in some jurisdictions had instructed the police not to file drug paraphernalia charges except where evidence of drug use could be established. In other areas, prosecutors had been advised by their attorney general's office to focus on the sale of prescription drugs, and other chemicals known to be associated with drug preparation, in lieu of more controversial, non-chemical paraphernalia. While these approaches save prosecutorial resources and increase the likelihood of paraphernalia convictions, they also severely restrict the context in which drug paraphernalia sales can be prosecuted and decrease the effectiveness of the law by precluding the prosecution of many traditional "head shops."

Thirty-three percent of the police named the growing sophistication of drug paraphernalia merchants as a major problem for investigators (see,

Chapter 3). For example, as more "head shops" are prosecuted, it becomes more difficult for investigators to induce a merchant to verbally acknowledge that he or she is aware of the illegal use of an object being offered for sale. In an effort to further insulate themselves from their business, some owners have hired clerks or managers. Thus, even if the investigating officer obtains an admission from an employee that the objects sold are drug paraphernalia, the owner is often able to claim that he did not intend to sell the objects for illegal use. In such a case, it may be impossible for the prosecutor to indict the owner. Thus, in cases indicting or convicting only a clerk or manager, operation of the "head shop" is not necessarily affected.

Due to the difficulty of establishing verbal intent, a greater need has arisen for carefully-documented circumstantial evidence. However, this vehicle for establishing merchant intent has also become more difficult due to merchant sophistication. As will be discussed below in Chapter 3, businesses now routinely post "disclaimers", or require statements from clients asserting that they intend to use the object purchased for solely legal purposes, or expand their inventory to include legal items likely to provide a legitimate context for the alleged drug paraphernalia.

To add credibility to their charges, prosecutors also sometimes attempt to establish the manufacturer's intended use for the alleged items of drug paraphernalia. Expert witnesses are commonly used to testify that specific design features of an object make it more suitable for use with illegal drugs than for any legal use. This approach to the identification of drug paraphernalia is also considered difficult by some prosecutors: twenty percent of the prosecutors reported having difficulty establishing that so-called "dual-use" items were essentially drug paraphernalia.

In addition to these problems, 14 percent of police and prosecutors named a lack of resources as a major barrier to the effective investigation and prosecution of "head shop" cases. As discussed above, in urban areas where little or no effort is being made to enforce anti-paraphernalia legislation, the scarcity of resources and the need to give priority to violent crime, drug trafficking, and offenses which carry mandatory or more serious penalties, were cited as the primary impediments to successful prosecutions. A small percentage of prosecutors attributed the difficulty of obtaining drug paraphernalia convictions to inadequate knowledge concerning the law and its implementation; constitutional challenges; and the varying standards of proof demanded by judges.

The Prosecution of Mail-Order Drug Paraphernalia Sales

Respondents reported no attempts to prosecute the sale of drug paraphernalia by mail-order firms. One respondent had prosecuted a local "head shop" which also operated a major mail-order drug paraphernalia supplier. However, the charges filed in the case related exclusively to the retail, rather than the mail-order, sale of drug paraphernalia. A case law search revealed no other prosecutions of mail-order drug paraphernalia businesses.⁴

The respondent who had prosecuted a mail-order business had not been aware of the mail-order aspect of the operation until moves were made to prosecute its retail branch. (It is not uncommon that police and prosecutors would be unaware of a mail-order businesses or distributors until some unrelated incident, commonly a burglary, brings them to the attention of the police.) Since no extradition, or actual mail-order sale was involved in this case, the approach used and difficulties encountered by the prosecutor were similar to those mentioned above for "head shops." The primary difference lay in the amount of items seized and the amount of funds available to the defense. The respondent reported that a task force of three persons worked full time on the prosecution for a total of three weeks. In addition, the respondent cited difficulties acquiring expert witnesses of the caliber required to counter the professional witnesses used by the defense. It should be noted, however, that although resources available to the prosecution allowed for the use of narcotics officers and unpaid tabacconists only, the case was successful. It should also be noted that although the case was successful, the penalty imposed by the court was relatively lenient: the mail-order business was enjoined from further sales of drug paraphernalia and ordered to forfeit the confiscated items which were valued at approximately \$10,000. Under the Illinois law (which has subsequently been struck down for vagueness), the merchant could have been fined \$1,000 for each item of drug paraphernalia seized (see Appendix E). Since thousands of paraphernalia items were involved in this case, the court could have imposed a fine high enough to close the business altogether. However, the penalty actually imposed does not appear to have been sufficient to deter the company from continuing to sell a number of "dual use" smoking and snuff accessories via mail-order catalog.⁵

The Use of Forfeiture in Conjunction with Anti-Paraphernalia Legislation

Forfeiture practices varied widely among the jurisdictions surveyed. No standard procedures emerged from the discussions with prosecutors and police. In 38 percent of the jurisdictions with anti-paraphernalia laws, police reported that forfeiture had been used in conjunction with paraphernalia prosecutions. Approximately half of the respondents who had not used forfeiture had access to forfeiture procedures under their anti-paraphernalia laws. The largest seizures reported under these provisions ranged from \$30,000 to \$500,000, and resulted from the seizure of paraphernalia and related assets from drug paraphernalia wholesalers and distributors. However, the majority of forfeitures exclusively involves seized paraphernalia, and—since paraphernalia often cannot be resold—the true value of most paraphernalia forfeitures is small.

Forty-two percent of the prosecutors who had been involved in drug paraphernalia cases had not used forfeiture. A variety of explanations were given: some jurisdictions, as a matter of general policy, did not use forfeiture with misdemeanors; in other areas, prosecutors and police preferred to rely on informal agreements with merchants to restrict sales. In a few areas, forfeiture was not used because the respondents felt that the procedure was too difficult to implement.

In jurisdictions where forfeiture was used, several approaches were reported. Current forfeiture practices include: the seizure of goods to be forfeited in advance of the prosecution (as a deterrent to further commerce); the forfeiture of goods upon conviction; the destruction of the goods as contraband on conviction; and the forfeiture of goods subject to recovery. In one case, goods were recovered following a conviction on the condition that they should be transported out of state. The market value of the goods and related assets seized in these cases was generally so small that the primary effect of the forfeiture was the temporary or permanent cessation of paraphernalia sales. Since paraphernalia often cannot be resold, forfeitures were not reported to generate any significant income to off-set the cost of paraphernalia prosecutions. One problematic effect of forfeiture can be seen in relation to the prosecution of small "head shops." It was noted by one respondent that, to a small business, the financial burden caused by the forfeiture (or temporary seizure) of merchandise, may force the merchant to close regardless of the outcome of the case.

Endnotes

1. Various colored stoppers on "crack" vials have two uses in the drug community. First, the stopper color can be used by the drug buyer to identify a product or dealer he knows or prefers. Second, the color of "crack" vial stoppers can be used by a dealer to distinguish between his higher and lower quality products. By packaging the drugs under different color stoppers, dealers can easily sell the less desirable drugs to new customers or transient buyers, and reserve the better drugs for local or regular customers.
2. It should be noted that these figures cannot be used to derive an approximate conviction rate. The figures given are not weighted to reflect the number of cases handled by each prosecutor. It should also be noted that the remainder of the prosecutors who had access to drug paraphernalia laws were either unaware of any prosecutions (23%) or did not know if prosecutions had been successful (23%).
3. This estimate assumes that two undercover officers would work inside the "head shop," and that four additional officers would be stationed around the exterior of the building to provide security for the undercover officers and to observe where the seller goes if he leaves the store to obtain a product.
4. The mail-order business, Crow's Nest, Inc., was successfully prosecuted in *Illinois v. Crow's Nest, Inc.* (d/b/a, Crow's Nest/Simple Pleasures) (1985) 137 Ill. App. 3d 461; 484 N.E. 2d 907. It should be noted that although *Illinois v. Ziegler* (1986) 139 Ill. App. 3d 1088, 488 N.E. 2d 310, is listed as a mail-order business in the text of the appellate court opinion, both prosecution and defense sources state that this is an error. The business involved, Array Distributors, is reputed to be a distributor to retail outlets only, not individual customers. While a catalog of items offered for sale by Array existed, it was intended for distribution to merchants only, and was not available to the public. The law under which these distributors were prosecuted was struck down by the State Supreme Court of Illinois in *People v. Monroe* (State Supreme Court, No. 63724, September, 1987).
5. A catalog which was distributed by Crow's Nest Enterprises following its prosecution was examined by this study. It contained disclaimers stating that all products sold are for use with tobacco products. Items offered included glass pipes, snuff inhalers, snuff preparation kits, snuff "sealing" papers, small scales, extra-width rolling papers as well as a full line of traditional smoking accessories.

3 The Impact of State and Local Laws on the Sale and Availability of Drug Paraphernalia

Scope of the Problem Before Anti-Paraphernalia Laws

Fifty-five percent of the police and sheriffs reported that "head shops" had been operating in their jurisdiction before the enactment of anti-paraphernalia laws.¹ The presence of "head shops" was perceived to be a more pressing problem in some jurisdictions than in others. For example, 25 percent of the law enforcement officers considered the drug paraphernalia problem in their jurisdiction to have been very serious, while another 29 percent characterized the problem in their community as having been only "somewhat serious." The businesses complained of by law enforcement officers and prosecutors ranged from "combination shops" (such as tobacco stores, record stores, convenience stores, and flea markets) that primarily sold legal products, to stores geared exclusively toward the sale of drug paraphernalia. In other communities, the sale of drug paraphernalia had not been a source of concern—20 percent of the police and prosecutors interviewed stated that the presence of "head shops" or other drug paraphernalia outlets had not been a serious problem in their jurisdiction.² In this category, the presence of "head shops" in the community was not always the controlling factor. Some respondents argued that while "head shops" may have been operating, they had not aroused enough concern in the community to be termed a "problem."

In addition to "head shops," drug paraphernalia also was reported to have been available through mail-order firms advertised in drug culture

publications.³ Although Congress has now recognized the mail-order sale of drug paraphernalia as a source of concern, mail-order sales were not named by respondents as an original factor contributing to the need for anti-paraphernalia laws.

The Impact of Anti-Paraphernalia Laws on "Head Shops"

State and local authorities agree that anti-paraphernalia legislation has had a significant impact on the availability of drug paraphernalia in "head shops." Forty-five percent of those police and sheriffs who reported "head shops" operating in their community before the enactment of anti-paraphernalia laws reported no "head shops" operating today. In those jurisdictions with anti-paraphernalia laws in force, 46 percent of the police and 41 percent of the prosecutors claimed that anti-paraphernalia legislation had been very effective in eliminating the open sale and promotion of drug paraphernalia in "head shops" in their area. These respondents emphasized that many "head shops" had been closed, and that the remaining paraphernalia merchants stocked primarily "dual-use" items (see below). Another 15 percent of the police and 38 percent of the prosecutors felt that the laws had been at least somewhat effective in curbing the open sale of drug paraphernalia. In general, police and prosecutors were less likely to characterize the laws as "very effective," than were the state attorneys general.

Thirty-one percent of the police and prosecutors were critical of the efficacy of anti-paraphernalia laws in their area.⁴ Many of these respondents argued that drug paraphernalia laws have been unsuccessful because paraphernalia continues to be available from a number of sources. Police data provided some support for this view: 31 percent of the officers reported the continued operation of "head shops" in their jurisdictions; 24 percent reported the sale of drug paraphernalia in convenience or variety stores; and 20 percent reported the sale of drug paraphernalia by tobacconists. However, the source of drug paraphernalia named most frequently by police was mail-order catalogs—35 percent of the police interviewed stated that mail-order sales were thought to account for much of the drug paraphernalia found in their jurisdictions. Some respondents attributed the emergence of the mail-order drug paraphernalia industry as a primary supplier of drug paraphernalia to the success of the Model Act in decreasing the number of over-the-counter outlets for these products. Thus, although it was agreed that the enactment of anti-paraphernalia laws had succeeded in reducing the number of "head shops," some respondents were not satisfied with the law since the closings had not reduced the amount of drug paraphernalia found in the course of drug arrests.

According to the respondents, the primary beneficial effects of the enactment of anti-paraphernalia laws have been the closing of many "head shops," a significant degree of voluntary compliance with the law, a sharp decline in the sale of "hard core" drug paraphernalia (i.e., cocaine free-basing kits, "crack" kits, devices to enhance drug potency or test drug purity, or chemicals to cut controlled substances) in "head shops," and the creation of an effective deterrent to the sale of drug paraphernalia by legitimate retailers.

Voluntary compliance

Many anti-paraphernalia laws have decreased paraphernalia sales without any enforcement cost. Sixty-seven percent of the police and prosecutors in jurisdictions with anti-paraphernalia laws in force reported some degree of voluntary compliance with the law. In 28 percent of the jurisdictions, most or all of the "head shops" closed without prosecution. In some areas, however, stores awaited the result of facial challenges and closed only when the constitutionality of law was upheld. In other jurisdictions, paraphernalia merchants resisted compliance with the law until action had been taken to prosecute a local "head shop," and then voluntarily closed.⁵

A final 26 percent of police and prosecutors reported that the existence of anti-paraphernalia laws had had no effect on the operation of "head shops" in their jurisdiction. In some of these areas, merchants had aggressively fought the ban and were indifferent to repeated warnings or even prosecutions. As discussed below, the relatively minor sentences imposed for "head shop" violations sometimes allowed a determined merchant to continue to operate profitably even after a successful prosecution.

The decrease in "hard core" drug paraphernalia

Sixty-seven percent of police and prosecutors in jurisdictions with anti-paraphernalia laws in force reported that these laws had been "very effective" (33 percent) or "somewhat effective" (34 percent) in eliminating the more blatant or "hard core" drug paraphernalia items from the shelves of the remaining "head shops." Merchants who continued to sell drug paraphernalia were now reported to stock primarily "soft core" drug paraphernalia (i.e., dual-use items such as pipes, rolling papers, and under some definitions, water pipes and "snuff" accessories). As mentioned above, despite the success of anti-paraphernalia laws in closing many "head shops" and removing "hard core" paraphernalia from most of the remaining stores, "hard core" paraphernalia continues to be available. Although the source of "hard core" drug paraphernalia sales is now more difficult to determine, a number of respondents thought that mail-order catalogs were the current primary source of "hard core" items such as bongs, glass "crack" pipes, cocaine storage and preparation equipment, inhalants, and chemical cutting agents, such as

pro-caine, pseudocaine, mannite, mannitol, and inositol. This study examined eight catalogs, and confirmed that such items were available by mail. It should be noted, however, that these items were not being explicitly promoted as drug paraphernalia, and that "hard core" items which have no plausible alternative legal use—such as drug identification/potency testing kits, devices to enhance to potency of drugs, or pre-assembled cocaine free-basing kits—were not offered by these companies.

The deterrent impact on legitimate retailers

Stores with "mixed" merchandise were reported to be most likely to comply with anti-paraphernalia legislation. The threat of prosecution effectively motivated most merchants who had other lines of goods to eliminate potential drug paraphernalia from their stock. In addition, several respondents cited the importance of the law in deterring the opening of new "head shops" and the expansion of old ones. The deterrent value of anti-paraphernalia laws was generally considered to be highest following a successful prosecution. Nonetheless, any effort to enforce the law was reported to increase compliance among legitimate retailers.

Criticisms of the Law's Effectiveness

The majority of the police and prosecutors who were not satisfied with the effectiveness of anti-paraphernalia laws cited one or more of the following difficulties: the lenience of the sentences received by paraphernalia merchants; a reluctance to enforce laws currently or recently mired in constitutional challenges; the increasing sophistication of paraphernalia merchants; or the failure of police to enforce, or district attorneys to prosecute drug paraphernalia violations.

Lenient sentencing practices

Of these factors, the lenience of the sentences given for paraphernalia violations was the most frequently cited deterrent to the effective enforcement of the law. According to the respondents, the sentences received by most paraphernalia merchants were not sufficient to discourage them from continuing to conduct trade in drug paraphernalia. As a result, many police and prosecutors have concluded that it is not efficient for them to expend the considerable resources necessary to obtain a "head shop" conviction. Some police and prosecutors blame lenient sentencing practices on the fact that the sale of drug paraphernalia is frequently classified as a misdemeanor (see Appendix E). Prosecutors and police both suggested that reforms should be made to raise paraphernalia offenses to the level of a felony. While the sanctions

presently prescribed under state laws are probably a proper reflection of the seriousness of the crime, the respondents' call for more stringent penalties indicates a high degree of frustration with the sentences actually received by paraphernalia merchants in their jurisdictions. It should be noted also that there is no evidence that the enactment of stronger sanctions would significantly affect current sentencing practices — even in areas where stringent penalties are currently available to judges, such sanctions are rarely used (see, for example, the Illinois case discussed above in Chapter 2).

Uncertainty about the law's status

Other respondents expressed frustration with what they perceived to be the uncertain status of the law. As a result of prolonged appeals, some police, prosecutors and attorneys general were unaware of the current status of paraphernalia laws in their jurisdiction. The police and sheriff's survey showed that law enforcement officers in particular were not adequately informed about the anti-paraphernalia laws in force in their jurisdiction. In 16 percent of the jurisdictions surveyed, laws had fallen into disuse due to misinformation. The low level of awareness of drug paraphernalia laws must be attributed in part to the fact that drug paraphernalia cases are rare, and in part to the low priority of the crime itself. The uncertainties complained of by these respondents were not the result of the court's rulings so much as the lack of information about the status of the laws during and after test cases.

Merchant sophistication

Another area of concern cited by the respondents was the growing sophistication of paraphernalia merchants. According to the prosecutors, this sophistication is displayed not only in defense strategies, but also in the way paraphernalia are marketed.⁶ An acute awareness of the law and its requirements has led most remaining paraphernalia merchants to take various precautions to insure the legality of the items offered. The most common method is the use of "disclaimers." "Disclaimers" can be signs posted in the store disavowing any connection between the merchandise and drug use, stamps stating the same on receipts, or notices on the items themselves. Some merchants require signed statements from clients stating that the equipment is not being purchased for use with illegal drugs. Mail-order companies routinely incorporate disclaimers in their order forms and require the customer's signature verifying that the items ordered are being purchased for legal uses. Although some courts have accepted "disclaimers" as proof of the merchant's intent,⁷ prosecutors worry that the law can be too easily circumvented if these claims are readily accepted.

Prosecutors also charged that the law is becoming less effective because "head shop" owners are now unlikely to engage in self-incriminating conversations with undercover agents explaining how an item is used with illegal drugs, and further, are careful to avoid calling items by drug-related names. Police and prosecutors note that while a jurisdiction's first prosecutions may be simplified by self-incriminating statements from the merchant, the likelihood that other merchants in the same community will make similar statements is small. Most merchants have already taken the additional precaution of expanding their product lines to include innocuous items which provide a legitimate context for dual-use items. For example, merchants may carry a full line of tobacco and snuff along with their accessories for smoking and inhaling substances. This approach can be extended to disguise a wide range of potential drug paraphernalia. For example, some merchants carry a full range of laxatives to provide a legal context for one product, mannitol, which is used as a cutting agent for cocaine. Other merchants are reported to carry a wide selection of lighters to surround the small hand-held torches used for cocaine free-basing. This method of establishing a legitimate context for paraphernalia items is reported to be most effective in relation to the sale of pipes and other smoking accessories which have commonly recognized legal uses.

While the use of "disclaimers" and more cautious marketing techniques is not reported to have significantly affected the ability of prosecutors to obtain convictions, it has to some extent deterred prosecutions. The use of "disclaimers" makes the process of prosecution a much more exacting, and thus expensive, venture. As mentioned above in Chapter 2, the search warrant used in such cases must clearly explain why the items to be seized are thought to be drug paraphernalia, rather than the legitimate items claimed by the merchant. Similarly, should the case be brought to trial, expert witnesses would be needed to substantiate the claims of the prosecutor. Thus, jurisdictions with limited resources or experience may be justifiably hesitant to embark on a "head shop" prosecution where the merchant expressly states that the products are for legal use only (unlike many other defendants, drug paraphernalia merchants rarely plead guilty).

Non-enforcement

The last, and most complex reason given for the failure of "head shop" laws in some jurisdictions was the refusal of the police to enforce the law or the refusal of district attorneys (or other local prosecutors) to accept drug paraphernalia cases for prosecution. In most jurisdictions, non-enforcement results from the low priority of the crime and the constraints placed on police and prosecutors by limited resources (see Chapter 2). Drug paraphernalia violations are most frequently tolerated in urban areas. One reason for this is that

drug enforcement responsibilities in urban areas are often too pressing and severe to allow police and prosecutors to devote a large or even adequate amount of resources to the prosecution of drug paraphernalia violations. As a result, even in states where the Model Act is effectively and diligently enforced in rural and suburban areas, the same degree of attention is not given to the enforcement of the law in urban areas. While no explicit policy decision is made to ignore drug paraphernalia violations in urban areas, it is commonly accepted by police and prosecutors that in comparison to large-scale trafficking in narcotics, the control of "drug wars," and other serious drug problems named by urban offices, the enforcement of anti-paraphernalia legislation is a low priority. Nonetheless, most urban prosecutors expressed a willingness to pursue drug paraphernalia violations if sufficient public concern was demonstrated.⁸ It should be noted that a few urban jurisdictions have undertaken a continuing campaign to prosecute "head shops" and that these efforts have been largely successful. Recently, public concern about the sale of "crack" paraphernalia has resulted in an additional wave of urban paraphernalia enforcement. Thus, while the enforcement of anti-paraphernalia laws in urban jurisdictions is generally low, paraphernalia laws are currently receiving more attention in these areas than in the past.

Outside urban areas, the decision to prosecute drug paraphernalia merchants also frequently hinges on the resources available to the jurisdiction. As mentioned above, one district attorney estimated that the prosecution of a large mail-order drug paraphernalia business attached to a "head shop" had required a task force of three people who worked exclusively on the case for three weeks. In addition to the cost of personnel, the respondent cited the cost of witnesses, administrators, and the use of various equipment, as necessary expenses incurred by a "head shop" prosecution. Most suburban or rural jurisdictions do not have sufficient resources to undertake such an effort more than once, if at all. As a result, smaller jurisdictions must carefully weigh the probability that the merchant will be convicted, and that he will receive a sentence strong enough to insure that he or she will stop operation, against the certain cost of a drug paraphernalia prosecution. In jurisdictions where there is not strong public pressure to enforce anti-paraphernalia laws, it is likely that police and prosecutors will consider the costs and risks involved in drug paraphernalia cases to be too high.

Changes in the Drug Paraphernalia Industry

While opinions expressed concerning any semi-covert industry are necessarily speculative and circumstantial, respondents stated that certain changes in the drug paraphernalia industry can be discerned as a result of anti-paraphernalia laws.⁹ The most fundamental effect of anti-paraphernalia laws on the drug paraphernalia industry appears to be a shift in advertising and marketing strategies, specifically a new emphasis on "dual-use" items and mail-order sales. In addition, product design may have been affected in some cases. Respondents with experience in dealing with paraphernalia distributors and mail-order businesses also cite a consolidation of market share by the larger firms. It is thought that the manufacture, distribution and mail-order sale of drug paraphernalia is no longer a cottage industry. Rather, respondents suggest that those paraphernalia dealers who remain now operate a relatively small number of mid- to large-sized firms. Materials examined by this study would tend to support the conclusion that the mail-order sale of drug paraphernalia has become a lucrative and fairly sophisticated industry, dominated by fewer than 20 firms.

Advertising and marketing practices

Anti-paraphernalia laws have not curtailed the sale of paraphernalia, but they have had a significant impact on the way these items are advertised and marketed. It could be argued that much of the "pro-drug message" conveyed by the explicit advertising of the late 1970s and early 1980s has been stopped. Most advertisements for drug paraphernalia in both catalogs and drug culture publications now rely on the fact that the buyer is aware of an illegal use for the item which is not explicitly suggested by the advertising copy. For example, in 1979, an advertisement which was carried by drug culture periodicals read: "The Chemist, Free Base System, the 'Ultimate High', in Columbia, the natives call their Snow Vapor-Base. For over 100 years, in every village, it's been the Toke of the Town!"¹⁰ At present no cocaine free-basing kits are advertised in the leading drug culture periodical, *High Times*, or in catalogs examined by this study.¹¹ Few advertisements which are published by drug culture periodicals now make any reference to cocaine paraphernalia at all. In catalogs, advertisements for cocaine-related paraphernalia carry captions like: "Executive Snuff Kit," "Standard Snuff Vial," or "Original Deering Snuff, Tea, and Spice Grinder." The tone of all drug paraphernalia advertisements has been similarly altered to imply that the "dual-use" items described are being offered for legal purposes only.

As shown in Appendix F, advertisements for pipes, bonges, and cocaine paraphernalia and paraphernalia catalogs have now virtually disappeared from the leading drug culture magazine, *High Times*. Instead, advertisements for

marijuana-oriented horticultural aids—grow lamps, irrigation systems, and natural pest controls—comprise the bulk of paraphernalia advertising. While these items may be drug paraphernalia under the Model Act (if they are intended for use in the cultivation of a controlled substance), the horticultural advertisements are far less explicitly drug-related than the advertisements for the more traditional drug paraphernalia advertised in the late 1970s and early 1980s. In addition, the majority of the horticultural aids offered would be too large, complex and expensive to be popular products with youthful or inexperienced customers, a group frequently targeted in earlier advertising schemes.

As mentioned above, advertisements for mail-order drug paraphernalia catalogs are now rarely carried in *High Times*. The decline in such advertisements, however, is not necessarily an indication that these companies have stopped operation or reduced their sales. It is thought by some citizen groups that instead of advertising in drug culture magazines, mail-order drug paraphernalia companies simply purchase the magazine's subscription list and send unsolicited catalogs to all subscribers. One mail-order paraphernalia business encourages its readership to organize private "paraphernalia parties" and offers a commission to the organizer; others encourage their readership to provide the names and addresses of others who would be interested in receiving their catalog. Thus, the decline in advertising for mail-order drug paraphernalia catalogs in drug culture publications provides no accurate measure of the availability of these catalogs. The mail-order drug paraphernalia industry appears to be becoming more covert and is adapting its retailing techniques to avoid prosecution, while seeking new avenues to contact potential clientele.

Advertising for drug paraphernalia in mail-order catalogs is generally as restrained as that found in periodicals.¹² As mentioned above, virtually all drug paraphernalia now offered for sale through the mails purports to be offered for legal uses (i.e., tobacco or herb smoking, snuff storage or use, horticulture). Even in catalogs which supply the components needed to free-base cocaine or produce "crack," no indication is given what combination of these products should be used. Mail-order catalogs no longer educate subscribers about the illegal uses of their products. In addition to less explicit advertising, some mail-order catalogs now feature a mixture of paraphernalia and other novelty items such as T-shirts, jewelry, lingerie, sex aids, and curios. A few former mail-order paraphernalia businesses have now eliminated all paraphernalia from their offerings and have begun selling items ranging from "heavy metal" or "punk" clothes and jewelry to personalized coffee mugs.

A small percent of less sophisticated businesses continue to send more explicit advertisements for drug paraphernalia through the mail. One small operation contacted by this study offers mail-order incense at \$150 per ounce.

It is likely that such "incense" is composed of chemicals commonly known as procaine or pseudo-caine. This substance, which has been a popular cutting agent for cocaine, is now thought to pose a more serious problem since it can be refined to resemble "crack," or be used to extend cocaine in the production of "crack." Firms such as this one appear to be very small, possibly operating out of a private residence, and their "catalogs" are simply flyers offering a single product.

Relocation

Aside from changes in marketing and advertising, in some instances mail-order drug paraphernalia companies and major manufacturers and distributors of paraphernalia have chosen to relocate. Usually, businesses have moved in order to operate out of states which have no drug paraphernalia controls, or jurisdictions where drug paraphernalia prosecutions are uncommon. For example, survey respondents report that drug paraphernalia firms prosecuted in Illinois sometimes choose to relocate over the Iowa line to avoid further legal disputes.

The concentration of drug paraphernalia suppliers in unregulated states presents a double challenge to anti-paraphernalia laws. First, these businesses are, for all practical purposes, beyond the control of other states' laws, although their products may well reach the citizens of those states. Second, drug paraphernalia businesses clustered in unregulated states are well-positioned to lobby against the adoption of the Model Act in those areas. While the new federal anti-paraphernalia legislation may help to stop the flow of paraphernalia into regulated states from unregulated areas, the lobbying efforts of the paraphernalia industry are only likely to intensify as anti-paraphernalia laws receive more attention.

Endnotes

1. The number of prosecutors reporting the existence of "head shops" was over 90 percent; however, since many prosecutors were selected on the basis of their experience with "head shop" cases, this study assumes that the figures supplied by the randomly selected police and sheriffs' sample are more representative of the true prevalence of "head shops" before the enactment of anti-paraphernalia laws.
2. Sixteen percent of the prosecutors and 10 percent of the police did not know how serious the drug paraphernalia problem had been in their jurisdiction before the enactment of anti-paraphernalia laws.
3. See, Department of Health, Education, and Welfare Report, **Legal and Community Responses to Drug Paraphernalia 1980** (DHEW Pub. No. (ADM) 80-963) and Appendix F.
4. Seventeen percent of police and prosecutors claimed that drug paraphernalia laws had been "not too effective," and another 14 percent stated that the laws had been "not effective at all."

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5. The state attorneys general surveyed rated voluntary compliance with the law significantly higher than did the prosecutors. Forty-five percent of attorneys general thought that most or all of the head shops had voluntarily closed. The prosecutors and police estimate is favored here because it is thought that their awareness of the activities of "head shops" in their jurisdictions would be more accurate than the attorneys general's awareness of the behavior of businesses in the state as a whole.
 6. For a discussion of the difficulties experienced in one jurisdiction, see "Drug Gear Ban Almost Useless," *New Hampshire Sunday News* (Manchester, NH), April 20, 1986, pp. 1A, 14A.
 7. See, *Florida v. McMahon* (1986), Case No. 85-320 CF Broward County Criminal Division, returning seized drug paraphernalia to merchant due, *inter alia*, to police failure to note in affidavit seeking a search warrant that disclaimers were both posted and printed on receipts.
 8. See, for example, New York City's recent attempt to curb the sale of "crack" pipes, "Police Seize Thousands of Pipes In Raids for Drug Paraphernalia" *New York Times* August 22, 1986, pp. A1, B4.
 9. Thirty-nine percent of the prosecutors in jurisdictions with drug paraphernalia laws in force thought that anti-paraphernalia legislation had significantly reduced or deterred the covert sale of drug paraphernalia, while 43 percent found the law ineffective in discouraging the continued sale of these items outside "head shops" in their area.
 10. This advertisement, used by Select Industries, Walnut Creek, California, was discussed in the **Hearing before the Select Committee on Narcotics Abuse and Control** House of Representatives, 96th Cong., 1st Sess., Nov. 1, 1979 (SCNAC-96-1-12), p. 63.
 11. While free-basing equipment is no longer sold as a "kit", all the necessary implements and chemicals are still being sold separately. The items, taken separately, more convincingly retain the protection offered by the "dual-use" classification.
 12. This study is aware of eight major retail paraphernalia catalogs currently being published; seven have been examined in the course of the study.

4 The Perceived Need for Additional or Revised Paraphernalia Laws

The Need for Revised Model Legislation

Prosecutors and attorneys general were asked if the effectiveness of the Model Act would be improved by the drafting of a new Model Act with a more narrow definition of drug paraphernalia. It was proposed that the most common "dual-use" items (such as rolling papers and pipes) could be eliminated from the Model Act, in the hope of providing a more objective standard for the prosecutors to meet. Only 27 percent of the prosecutors and attorneys general favored the drafting of such model legislation, while 63 percent strongly opposed any effort to limit the items prohibited by the Model Act. The prosecutors preferred the current broad law because it allowed them to establish a general criminal context for the more "hard core" items of paraphernalia given in evidence.

The most commonly requested revision of current law was an increase in the penalties attached to certain paraphernalia offenses. Prosecutors hoped that by increasing the penalties attached to the sale of "hard core" paraphernalia, judges would be more likely to give strong sentences to paraphernalia merchants. To facilitate the enactment of more stringent penalties, some prosecutors suggested that a revision of the definition section of the Model Act, dividing commonly accepted "dual-use" items from more "hard core" items, would be useful. An alternative to this approach might be the creation of a separate offense dealing exclusively with the sale of hard-core drug paraphernalia. It was hoped that such revisions would enhance the deterrent

value of anti-paraphernalia laws and equip prosecutors and judges with penalties strong enough to make the sale of drug paraphernalia unprofitable for large companies.

The Perceived Need for Federal Laws Controlling Various Aspects of the Drug Paraphernalia Industry

Mail-order drug paraphernalia sales

As noted in the Introduction, Congress has recently enacted a new law which bans the mail-order sale and interstate transport of drug paraphernalia. A high percent of all respondents in this study expressed support for federal laws in this field. In particular, respondents hoped that federal law would succeed in stemming the flow of drug paraphernalia from unregulated states into states where drug paraphernalia laws were being enforced. In this way, it was hoped that the ban on drug paraphernalia would begin to affect not only the "image" projected by drug paraphernalia sales, but also the actual supply of drug paraphernalia.

However, the respondents' endorsement of federal mail-order prohibitions was not unqualified. Most respondents withdrew their support, unless adequate funding was to be provided to ensure that federal anti-paraphernalia laws—unlike many state laws—are properly enforced. In addition, some respondents expressed concern that the responsibilities already shouldered by federal drug enforcement agencies are such that it would be difficult for them to assume this additional responsibility—even if additional resources were provided. Finally, a majority of respondents expressed concern that the enforcement of these laws might result in less active border interdiction, and other federal efforts to control the supply of drugs. Respondents emphasized that efforts to control drug supply should be given priority over the enforcement of anti-paraphernalia laws.

The need for federal law banning the manufacture of drug paraphernalia

Respondents were asked if federal laws were also needed to control the manufacture of drug paraphernalia. A clear division emerged between the respondent groups: 83 percent of the police and 76 percent of the prosecutors supported the enactment of federal manufacturing controls, while only 42 percent of the state attorneys general supported such federal legislation. All

of these groups, however, withdrew their support for such a federal law if the cost of its enforcement would necessitate a decrease in federal drug interdiction efforts. It was generally agreed that the interception of drugs, or the prosecution of the manufacture of drugs should have a higher priority among federal drug enforcement responsibilities than the manufacture of drug paraphernalia.

Conclusions and Recommendations

Conclusion #1: The enactment of the DEA's Model Drug Paraphernalia Act by a majority of states has significantly reduced the number of "head shops" in operation as well as the ready availability of "hard core" drug paraphernalia. The Model Act has succeeded in contradicting the "head shop message" that drug abuse is socially and legally tolerated. However, state and local bans on the sale of drug paraphernalia may have created a larger market for mail-order drug paraphernalia sales.

The open sale of "hard core" drug paraphernalia — that is, items for which there is no plausible alternative legal use — has been significantly reduced in states with anti-paraphernalia laws. In jurisdictions where the Model Act is being enforced, most "head shops" have either closed or re-oriented their business toward the sale of "dual-use" paraphernalia items such as pipes, rolling papers, and snuff accessories. The advertising provision of the Model Act has also contributed to the decline in the availability of "hard core" drug paraphernalia by discouraging the sale of such items through drug culture periodicals and mail-order catalogs. Where "hard core" items continue to be sold, merchants no longer supply explicit information concerning the use of such paraphernalia with illegal drugs. In most urban jurisdictions "hard core" drug paraphernalia is still readily available. (However, urban areas appear to be giving greater priority to paraphernalia violations than in the past.) Simply by reducing the number of "head shops" openly selling drug paraphernalia, one of the primary aims of the Model Act has been achieved

— to eliminate the “head shop message” that drug abuse is socially acceptable and legally tolerated. One side-effect of the recent decline in the number of “head shops” may be an increase in the mail-order sale of drug paraphernalia. Although this relationship is difficult to gauge, while the number of “head shops” has been declining, the number of major mail-order firms appears to have remained stable. Furthermore, many of these mail-order firms are actively expanding their client base and product lines.

Conclusion #2: State laws are currently the most effective means of controlling the sale of drug paraphernalia. To date, applied challenges to the constitutionality of the Model Act have neither deterred nor prevented the effective enforcement of the law. Nonetheless, non-enforcement, the absence of comprehensive anti-paraphernalia laws in eight states, and lenient sentencing practices all significantly detract from the effectiveness of the Model Act.

Although local ordinances continue to play an important role in the regulation of paraphernalia sales in areas where no state anti-paraphernalia laws exist, most jurisdictions now rely on state-level Model Act statutes to ban paraphernalia sales. Prosecutors prefer to charge drug paraphernalia offenses under state law, where possible, because the facial constitutionality of the Model Act has been thoroughly tested and upheld by a majority of appellate courts. Although the number of applied constitutional challenges to the Model Act has been comparatively small, recent appellate decisions suggest that states with Model Act legislation experience fewer problems with applied challenges than those with non-Model Act statutes.

Despite its success before the courts, the efficacy of the Model Act is currently impaired by several factors. First, most police and prosecutors place a low priority on the enforcement of paraphernalia laws. As a result, in areas with insufficient resources, drug paraphernalia laws are frequently not enforced. (Resources are discussed more fully in Conclusion #3.) Second, eight states allow the sale of drug paraphernalia to adults or to all citizens. The inconsistent approach taken by the states to the regulation of drug paraphernalia has created drug paraphernalia “ghettos” in unregulated states and those with non-Model Act laws. The concentration of drug paraphernalia businesses in the five states without anti-paraphernalia laws (Alaska, Hawaii, Iowa, Michigan, and Wisconsin) and in those states with non-Model Act laws (Colorado, Illinois, New York, Ohio, Oregon, Tennessee, and West Virginia) not

only affects the citizens of those states but also undermines the effectiveness of the ban on paraphernalia in other jurisdictions. While paraphernalia manufacturers, distributors, and mail-order businesses operating in unregulated states are, as a practical matter, beyond the reach of anti-paraphernalia laws in other states, the paraphernalia market in Model Act states is not beyond the reach of mail-order sales. Evidence that mailings and distributions of paraphernalia from unregulated states continue to reach jurisdictions where such products are illegal can be drawn from police and prosecutor reports that commercially manufactured paraphernalia is seized with virtually all drug arrests. Thus, as long as state laws are not unified on this issue, the "ban" on drug paraphernalia must be regarded as a primarily cosmetic policy. (It should be noted that this situation may be affected by the recently enacted federal anti-paraphernalia legislation.) Finally, the majority of convictions for the sale of drug paraphernalia result in lenient sentences — probation, small fines, or agreements (formal or informal) to stop paraphernalia sales. Although such penalties are an acceptable interpretation of the law, they are frequently insufficient to deter the successful merchant from further commerce in drug paraphernalia. In view of the expense associated with drug paraphernalia prosecutions, police and prosecutors are likely to consider the enforcement of drug paraphernalia laws an inefficient use of resources unless strong sentences are given to offenders.

Conclusion #3: The availability of adequate resources is a prerequisite for the effective enforcement of anti-paraphernalia laws. Because the ban on drug paraphernalia is a low drug enforcement priority, a shortage of police and prosecutorial resources may restrict or preclude the enforcement of anti-paraphernalia laws. The lack of prosecutorial and investigative resources is currently the primary factor contributing to the non-enforcement of anti-paraphernalia laws.

Police and prosecutors naturally give precedence to the enforcement of those drug laws which have been assigned the highest penalties by legislators. Because most paraphernalia violations are classified as misdemeanors, the majority of drug-related crimes have a stronger claim on police and prosecutorial resources. The sale of drug paraphernalia commonly receives the same amount of police and prosecutors' attention as cases involving the possession of small amounts of marijuana. However, the investigation and prosecution of the sale of drug paraphernalia requires much more planning and resource commitment than cases involving the possession of marijuana or other drug-related misdemeanors. On average, police devote 38 hours to a drug paraphernalia investigation. In addition, other resources, such as administrative time, storage space, vans, "buy money," chemical analyses, video

cameras, and electronic surveillance equipment is sometimes needed to execute a thorough investigation. Prosecutorial resources are often similarly strained. Prosecutors face a difficult task in establishing the intent of the merchant and may also be called on to address complex constitutional issues. As a result, the investigation and prosecution of the sale of drug paraphernalia creates a significant drain on both law enforcement and prosecutorial resources. In the absence of ample resources, police and prosecutors frequently consider it less efficient to pursue drug paraphernalia violations than other drug-related misdemeanors.

In a few jurisdictions, the sale of drug paraphernalia receives a higher priority — and thus, a greater share — of drug enforcement resources due to heightened public interest in drug abuse or public complaints from the community about a particular merchant. For example, recent public concern aroused by the sale of “crack” and “crack”-related paraphernalia has revived the enforcement of anti-paraphernalia laws in some urban jurisdictions. In other jurisdictions, paraphernalia has been given a higher enforcement priority due to a merchant’s proximity to a school or some other gathering place for young people. Nonetheless, in the majority of jurisdictions, resources for the enforcement of drug paraphernalia laws remain scarce.

Conclusion #4: The drug paraphernalia industry has evolved in response to anti-paraphernalia legislation by placing new emphasis on “dual-use” items and mail-order sales. The explicit advertisement and sale of paraphernalia has been virtually halted. Today, drug paraphernalia is manufactured, advertised and sold primarily in the guise of legal objects, such as tobacco and snuff accessories, incense, kitchen implements, and horticultural aids.

Drug paraphernalia businesses have adapted to the parameters placed on them by the law: most paraphernalia for which it is difficult to establish a legal alternative use is now sold by mail-order firms, and most distributors and mail-order businesses operate in jurisdictions where prosecution is less likely—that is, states with weak anti-paraphernalia laws, with no state-wide anti-paraphernalia laws, or in urban jurisdictions where anti-paraphernalia laws are not being enforced. The retail sale of drug paraphernalia has also adapted to meet the requirements of the law: owners commonly post notices that the objects sold are for use with legal substances only, and in some shops, customers are required to sign statements that they do not intend to use the object with illegal drugs. Most businesses which had sold drug paraphernalia as a sideline—such as record stores, convenience stores, or tobacco shops—have now eliminated the sale of these items. In addition, the advertising

practices of the drug paraphernalia industry have been significantly altered. Today virtually all advertisements for paraphernalia, in both catalogs and periodicals, attempt to establish a legal use for each item offered. Items of "hard core" drug paraphernalia for which it would be difficult to establish a legal alternative use are no longer readily available (i.e., products such as cocaine free-basing kits, drug identification and testing kits, and devices to enhance drug potency).

Recommendation #1: Prosecutors and law enforcement officers should be provided with information to enhance their awareness of anti-paraphernalia laws, and to aid in drug paraphernalia investigations and prosecutions.

An enforcement manual to assist in the investigation and prosecution of drug paraphernalia cases was requested by 50 percent of the respondents. Respondents suggested that the following topics should be covered: descriptions of common items of drug paraphernalia accompanied by discussions of the design elements that make them appropriate for use with illegal drugs; descriptions of common investigative techniques; sample search warrants and other relevant documents; a review of drug paraphernalia case law; and sample briefs. Other information which would benefit the enforcement of anti-paraphernalia laws includes a listing of all federal and state statutes pertaining to drug paraphernalia, and a regional list of expert prosecution witnesses.

An enforcement manual would enhance the effectiveness of anti-paraphernalia laws by increasing police and prosecutor awareness of the existence of the statutes and by providing a guide for early investigations and prosecutions. Since drug paraphernalia cases are rare, often no local expert on the investigation and prosecution of these cases can be found. Due to the complexity and expense of drug paraphernalia cases, many police and prosecutors may be hesitant to enforce anti-paraphernalia laws in the absence of such information. An enforcement manual could be designed to give police and prosecutors the practical information necessary to assess whether a successful prosecution would be possible, and the confidence to undertake an anti-paraphernalia case without prior experience. In addition to encouraging more aggressive enforcement of the laws, a manual could alert police and prosecutors to the constitutional issues implicit in the application of anti-paraphernalia laws, and thus help them to avoid applied constitutional challenges.

Recommendation #2: To facilitate the enforcement of the new federal anti-paraphernalia laws, all states should enact statutes based on the DEA's Model Drug Paraphernalia Act.

Currently unregulated states and states with non-Model Act laws act as "safe harbors" for the manufacture, distribution, and mail-order sale of drug paraphernalia. There is sufficient evidence to conclude that the operation of these businesses in unregulated states significantly detracts from the effectiveness of drug paraphernalia bans in other jurisdictions. Since the courts, including the Supreme Court in *Hoffman Estates v. Flipside* (1982), have overwhelmingly rejected challenges alleging the unconstitutionality of anti-paraphernalia laws, unregulated states have no compelling argument for continuing to protect the operation of the drug paraphernalia industry under state law. Federal agents and U.S. Attorneys cannot hope to effectively and efficiently investigate and prosecute interstate drug paraphernalia sales without the cooperation of state authorities. Because the majority of mail-order and other interstate drug paraphernalia sales are thought to originate in unregulated or non-Model Act states, the enforcement of the new federal anti-paraphernalia law may be extremely difficult unless these states pass Model Act laws and actively support federal enforcement efforts within their jurisdiction.

Recommendation #3: The appropriation of sufficient funds is necessary to ensure aggressive enforcement of new federal anti-paraphernalia laws.

In the absence of supplemental resources, it is unclear whether the new federal anti-paraphernalia law can or will be enforced at a level that will significantly affect the problem of mail-order distribution. Parents groups might argue that even if the legislation proves to be largely cosmetic, it nonetheless conveys a strong federal message that may change the nature or visibility of the industry. In this view, just as state enactment of the Model Act successfully eliminated the "head shop message" — often without enforcement action — the mere fact of the federal law may have deterrent value. To all appearances, however, the mail-order drug paraphernalia industry is now composed of a number of fairly large, legally sophisticated distributors who are unlikely to change their operations unless they are prosecuted vigorously and persistently.

In view of the range of cases that compete for investigative and prosecutorial attention, vigorous and persistent attention to drug paraphernalia

cases is an unlikely outcome of unfunded federal legislation. Just as state and local prosecutors rank the issue close to the bottom of their drug enforcement priorities, federal prosecutors are likely to place a low priority on drug paraphernalia cases. Faced with finite budgets and increasing numbers of cases more directly linked to the availability and use of illegal drugs, drug paraphernalia prosecutions may be readily and justifiably declined or allowed to languish under the supervision of new, inexperienced attorneys. Under these circumstances, the new law will carry little force, and its "message" may be counterproductive.

In short, unless resources are specifically appropriated to support the investigation of paraphernalia cases by a specific federal drug enforcement agency and their prosecution by U.S. Attorneys, the newly enacted federal anti-paraphernalia laws may produce negligible results, and thus threaten the credibility of federal drug enforcement efforts.

Recommendation #4: A task force approach should be taken to the investigation and prosecution of federal drug paraphernalia violations.

Federal and state authorities should cooperate in the investigation and prosecution of interstate and mail-order drug paraphernalia sales. Where possible, ad hoc task forces should be formed, and prosecutions should be initiated under both state and federal laws. A cooperative effort is preferred because the pooling of federal and state resources should result in a more thorough and efficient approach to the prosecutions. The observations of the respondents and the materials examined by this study indicate that there is a relatively small number (perhaps less than twenty) of major paraphernalia distributors and mail-order firms. A concerted effort by federal and state authorities to investigate and prosecute these businesses could significantly affect the supply of commercially-produced drug paraphernalia, and compel the drug paraphernalia industry to either disband or restructure.

Appendix A

Text of the Model Drug Paraphernalia Act (1979)

The Uniform Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Laws, has been enacted by all but a handful of states. The Uniform Act does not control the manufacture, advertisement, sale or use of so-called "drug paraphernalia." Other state laws aimed at controlling drug paraphernalia are often too vaguely worded and too limited in coverage to withstand constitutional attack or to be very effective. As a result, the availability of drug paraphernalia has reached epidemic levels. An entire industry has developed which promotes, even glamorizes, the illegal use of drugs by adults and children alike. Sales of drug paraphernalia are reported to be more than a billion dollars a year. What was a small phenomenon at the time the Uniform Act was drafted has now mushroomed into an industry so well entrenched that it has its own trade magazines and associations.

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. The Uniform Act is extremely well organized. It contains a definitional section, an offenses and penalties section, a civil forfeiture section, as well as miscellaneous sections on administration and enforcement. Instead of creating separate, independent paraphernalia laws, it seems desirable to control drug paraphernalia by amending existing sections of the Uniform Controlled Substances Act.

Article I provides a comprehensive definition of the term "drug paraphernalia" and includes particular descriptions of the most common forms of paraphernalia. Article I also outlines the more relevant factors a court or other authority should consider in determining whether an object comes within the definition.

Article II sets out four criminal offenses intended to prohibit the manufacture, advertisement, delivery or use of drug paraphernalia. The delivery of paraphernalia to a minor is made a special offense. Article II clearly defines what conduct is prohibited, and it specifies what criminal state of mind must accompany such conduct.

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;

(11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injected controlled substances into the human body;

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, 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 marijuana 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 who 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 should 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 circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than (), fined not more than (), or both."

Article III
(Civil Forfeiture)

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

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

Article IV
(Severability)

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

Appendix B

**Survey Instrument for State
Attorneys General and Prosecutors**

Survey Instrument for Police and Sheriffs

SURVEY OF AGs AND DAs

Hello, I'm _____ of Abt Assoc., Inc. in Cambridge, MA. We're conducting a study for N.I.J. about legislation and ordinances pertaining to the sale of drug paraphernalia. The questions will take approximately 20 minutes to answer, may I speak with you now?

(If "No") When may I call you back?

FOR STATES WHERE NO (OR PENDING) LEGISLATION IS INDICATED:

1. As far as you know, has (STATE) passed any legislation to ban the distribution and sale of drug paraphernalia?

YES (Ask Q. 1a-b) 1
NO (Skip to Q. 2) 2

- 1a. Was this law patterned after the DEA's Model Drug Paraphernalia Act?

YES 1
NO 2

- 1b. When was it enacted? _____ (YEAR)

2. As far as you know, is there legislation currently under consideration which bans or restricts the distribution and sale of drug paraphernalia?

YES (Ask Q. 2a) 1
NO (See below) 2

(IF "NO" TO BOTH Q. 1 AND Q. 2, SKIP TO Q. 3)
(IF "NO" TO Q. 2 ONLY, SKIP TO Q. 5)

(IF "NO")

- 2a. Please describe the pending legislation:

(SKIP TO Q. 5)

3. At the county and municipal levels, are you aware of ordinances that ban drug paraphernalia?

YES (Ask Q. 3a-c) 1
NO (If "NO" to Q.1-3, SKIP
to 19; OTHERWISE SKIP
to Q.3c.) 2

- 3a. In which counties and municipalities?

- 3b. How would you describe these ordinances? Are they ... (READ LIST. CIRCLE ALL THAT APPLY.)

Patterned after the
Model Act 1
Zoning ordinances 2
Other (SPECIFY) 3

- 3c. In your jurisdiction, how involved were citizens, or drug prevention groups, in encouraging the enactment of laws banning drug paraphernalia?

Very involved 1
Somewhat involved 2
Not too involved 3
Not at all involved 4

PROBE: What groups were involved? What did they do?

(SKIP TO Q. 7)

FOR STATES WHERE MDPAs ARE INDICATED:

4. When was the State's drug paraphernalia law enacted?
(YEAR)

4a. Have there been any significant revisions since the first enactment?

YES (Ask Q. 4b) 1

NO (Skip to Q. 5) 2

4b. What sort of revisions were made?

4c. Could you provide us with copies of these revisions?

YES 1

NO 2

5. In your jurisdiction, how involved were citizens, or drug prevention groups, in encouraging the enactment of laws banning drug paraphernalia?

Very involved 1

Somewhat involved 2

Not too involved 3

Not at all involved 4

PROBE: What groups were involved? What did they do?

6. At the county and municipal levels, are you aware of ordinances that ban drug paraphernalia?

YES (Ask Q. 6a-c) 1

NO (Skip to Q. 7) 2

6a. In which counties and municipalities?

6b. How would you describe these ordinances? Are they patterned after the ... (READ LIST. CIRCLE ALL THAT APPLY.)

Model Act 1
Zoning Ordinances 2
Other (SPECIFY) 3

6c. Are you aware of any municipal or county ordinances that have been preempted by State law?

YES (Ask Q. 6d) 1
NO (Skip to Q. 7) 2

6d. Which ordinances have been preempted?

7. Before the enactment of drug paraphernalia laws, how serious would you say the drug paraphernalia problem was in your jurisdiction?

Very serious 1
Somewhat serious 2
Not too serious 3
Not serious at all 4

7a. What form did the problem take?

(IF "HEAD SHOPS" ARE NAMED, SKIP TO Q. 8a)

8. Before the enactment of drug paraphernalia laws, some jurisdictions experienced problems with stores that are frequently called "head shops", that is, shops which openly sold, discussed and promoted the use of drug paraphernalia. Were "head shops" a problem in your jurisdiction?

YES (Ask Q. 8a-b) 1
NO (Skip to Q. 9) 2

8a. How effective have the laws been in eliminating the open sale and promotion of drug paraphernalia in "head shops" in your area? Would you say (READ CATEGORIES)?

Very effective 1
Somewhat effective 2
Not too effective 3
Not effective at all 4

8b. How effective have the laws been in reducing or deterring the more covert sale of drug paraphernalia?

Very effective 1
Somewhat effective 2
Not too effective 3
Not effective at all 4

9. How much of the drug paraphernalia problem was eliminated simply by the enactment of the law, that is, by voluntary action of the sellers?

All 1
Most 2
Some 3
None 4

10. The term "hard-core" drug paraphernalia is sometimes used for items for which there is no legal alternative use, such as a bong, or a cocaine free-basing kit. How effective do you feel the current law has been in controlling the sale of these items? Would you say (READ CATEGORIES)?

Very effective 1
Somewhat effective 2
Not too effective 3
Not effective at all 4

10a. Why do you think the law has (or has not) been effective?

11. Approximately how many drug paraphernalia cases have been prosecuted in your jurisdiction since the law was enacted?

None (SKIP TO Q. 19) 1
1 or 2 2
3 to 5 3
6 to 10 4
11 or more 5

(Actual number, if available _____)

11a. Approximately, what percentage of these cases dealt exclusively with the prosecution of "head shops"?

-----%

12. How often has the prosecution of "head shops" resulted in convictions?

Always 1
Frequently 2
Seldom 3
Never 4

12a. When were these cases prosecuted? (READ LIST)

Immediately after legis-
lation was enacted 1
On-going 2
Recently 3
Other (SPECIFY) 4

12b. Have there been any recent constitutional challenges to the drug paraphernalia laws, or cases over-turned on appeal due to the construction of legislation?

YES (PROBE) 1
NO (Skip to 13). 2

PROBE: What was the source of the difficulty?
What was the result? What is the impact?

13. To your knowledge, have forfeiture provisions been used in conjunction with any of these cases?

YES (for paraphernalia). . . 1
YES (for related assets) . . 2
NO 3

(Total value of paraphernalia and assets forfeited, if available
\$_____.)

14. What are the key elements of an effective investigation and prosecution?

15. What problems, if any, have been encountered in prosecuting drug paraphernalia cases?

16. What types of witnesses have been called to testify that an object was designed for use with illegal drugs?
(DO NOT READ. CIRCLE ALL THAT APPLY. PROBE: Any others?)

Narcotics agent/
Arresting officer 1
Drug Rehab Staff 2
Teenagers 3
Tobacconists 4
Informants 5
Other (SPECIFY)

- 16a. Have you experienced, or are you aware of problems in your jurisdiction with witness testimony or obtaining expert witnesses?

YES (PROBE) 1
NO 2

PROBE: What sort of problems? Are witnesses available? Are they effective?

17. In your opinion, have cases been lost or is there a reluctance to prosecute because of the unavailability of expert witnesses?

YES 1
NO 2

18. Do you believe that it would be easier to obtain convictions if the language of the law were narrowed to include only "hard-core" drug paraphernalia, such as bongs and cocaine free-basing kits, and to exclude items which have some legal use, such as pipes and rolling papers?

YES 1
NO 2

- 18a. In your opinion, if the language of the law were narrowed to include only "hard-core" drug paraphernalia, would it then be easier to obtain effective witnesses?

YES 1
NO 2

FOR ALL STATES:

19. Have zoning ordinances ever been used to control the sale of drug paraphernalia in your jurisdiction?

YES 1
NO 2

- 19a. In your opinion, how effective are (could be) zoning ordinances in eliminating head shops? Would you say...?

Very effective 1
Somewhat effective 2
Not too effective 3
Not effective at all 4

20. Have steps been taken to investigate or prosecute the manufacturers of drug paraphernalia?

YES 1
NO 2

IF YES, DESCRIBE: _____

IF NO, EXPLAIN: _____

21. In your opinion, how serious is the problem of direct mail advertisement or sale of drug paraphernalia?

Very serious 1
Somewhat serious 2
Not serious at all 3
Don't know 4

21a. Do many such cases come to your attention?

YES 1
NO 2

21b. Do you think it should be made a federal offense to distribute drug paraphernalia by mail?

YES 1
NO 2

22. What, if any, types of information or assistance would help to improve the enforcement of drug paraphernalia laws and ordinances? (For example, a manual to assist law enforcers in determining whether an object is designed for use with illegal drugs? A list of expert witnesses? Or a revised model legislation which narrowed the definitions of drug paraphernalia? (CIRCLE ALL THAT APPLY. PROBE: Anything else?))

Manual 1
Expert witness list 2
Revised model legislation . 3
Other (SPECIFY) 4

23. Using a scale of 1 to 5, with 1 being a high priority and 5 being a low priority, where would you place enforcing the ban on drug paraphernalia in comparison with other drug enforcement priorities?

Highest 1
 2
 3
 4
Lowest 5

23a. What types of drug enforcement cases are given the highest and lowest priorities?

HIGHEST: _____

LOWEST: _____

24. There have been some proposals for a federal law to deter or eliminate the manufacture of drug paraphernalia. In your opinion, is such a federal law needed?

YES 1
NO 2

- 24ε. Would you support such a law if it meant that federal law enforcement resources were diverted from drug interdiction?

YES 1
NO 2

CLOSE: Thank you for your time and attention.

Name: _____

Title: _____

Office Address: _____

Phone #: _____

SURVEY OF POLICE AND SHERIFFS

(Ask to speak to the head of the Narcotics Unit, or the officer in charge of drug-related crimes. Do not interview a public information officer).

Hello, this is _____ from Abt Associates Inc. in Cambridge, MA. Abt Associates is conducting a study for the National Institute of Justice--which is a branch of the U.S. Department of Justice--on the investigation and prosecution of drug paraphernalia cases under state and local laws. May I ask you some questions?

(If asked, "How long is the survey?" respond, "The questions will take approximately 20 minutes to answer.")

(If "No", ask, "When may I call you back?")

1. Approximately how many officers on your force are involved with the enforcement of drug laws on a full-time basis?

None	1
1 to 10	2
10 to 20.	3
20 to 50.	4
50 to 100	5
100 to 200.	6
200 to 300.	7
300 or more	8
(exact number if available_____)	

2. What laws, if any, ban the sales of drug paraphernalia in your jurisdiction? Do you have (READ CATEGORIES)?

State laws.	1
County or local ordinances. .	2
No state or local laws	
(Skip to Q.19).	3

SURVEY OF POLICE AND SHERIFFS

- Page 2 -

3. In your jurisdiction, how involved were citizens, or drug prevention groups, in encouraging the enactment of laws banning drug paraphernalia?

Very involved 1
Somewhat involved 2
Not too involved 3
Not at all involved 4
Don't know 5

PROBE: What groups were involved? What did they do?

- 3a. Are parent or citizen groups concerned with drug-related issues active in your area now?

Yes 1
No 2

- 3b. What issues do these parent and citizen groups focus on today?

Drugs in general 1
"Crack" cocaine 2
Drug paraphernalia 3
Drug education 4
Other (PLEASE SPECIFY) . . . 5

4. Before the enactment of drug paraphernalia laws, how serious would you say the drug paraphernalia problem was in your jurisdiction?

Very serious 1
Somewhat serious 2
Not too serious 3
Not serious at all 4

SURVEY OF POLICE AND SHERIFFS

- Page 3 -

What form did the problem take?

(IF "HEAD SHOPS" ARE NAMED, SKIP TO Q. 4b)

- 4a. Before the enactment of drug paraphernalia laws, some jurisdictions experienced problems with stores that are frequently called "head shops", that is, shops which openly sold, discussed and promoted the use of drug paraphernalia. Were "head shops" a problem in your jurisdiction?

YES (Ask Q. 4b-c) 1

NO (Skip to Q. 5) 2

- 4b. How effective have anti-paraphernalia laws been in eliminating the open sale and promotion of drug paraphernalia in "head shops" in your area? Would you say (READ CATEGORIES)?

Very effective 1

Somewhat effective 2

Not too effective 3

Not effective at all 4

- 4c. How is drug paraphernalia being sold in your jurisdiction today? Is it sold through. . .

Headshops 1

Tobacconists 2

Convenience or

Variety stores 3

Mail-Order Catalogs 4

Other (please specify) . . . 5

- (DO NOT READ) "Don't know where it comes from" 6
- No paraphernalia is sold (Skip to Q. 5). . . 7

SURVEY OF POLICE AND SHERIFFS

- Page 4 -

- 4d. Has there been an increase in the sale of crack-related paraphernalia, such as glass pipes and hand-held torches, in your jurisdiction?

YES. 1
NO 2

5. How much of the drug paraphernalia problem was eliminated simply by the enactment of the law, that is, by voluntary action of the sellers?

All 1
Most 2
Some 3
None 4

6. The term "hard-core" drug paraphernalia is sometimes used for items for which there is no legal alternative use, such as a bong, or a cocaine free-basing kit. How effective do you feel the current law has been in controlling the sale of these items? Would you say (READ CATEGORIES)?

Very effective 1
Somewhat effective 2
Not too effective 3
Not effective at all 4

- 6a. Why do you think the law has (or has not) been effective?
-

7. How often do you investigate cases where the possession, sale, distribution or manufacture of drug paraphernalia is the primary issue?

Never 1 (SKIP TO Q.19)
"We had one case" 2
Once or twice a year 3
Three to ten times a year 4
Ten or more times a year 5

- 7a. Approximately, what percentage of these cases dealt exclusively with the prosecution of "head shops"?

 %

SURVEY OF POLICE AND SHERIFFS

- Page 5 -

8. Are you familiar with the outcome of drug paraphernalia prosecutions in your jurisdiction?

YES 1
NO (Skip to Q.9) 2

- 8a. Of those cases which come to trial, what percent of drug paraphernalia cases result in convictions?

_____ %

- 8b. What sort of penalties have been imposed?

Jail Sentences 1
Fines (amount \$_____) . . . 2
Probation 3
Other (PLEASE SPECIFY) . . . 4

9. How often does a conviction for sale of drug paraphernalia succeed in deterring the defendant from future paraphernalia sales?

Always 1
Frequently 2
Seldom 3
Never 4

10. What sort of resources do you devote to an average drug paraphernalia investigation?

Personnel: Number of persons _____

Number of days _____

Duties of persons _____

Other resources (PLEASE SPECIFY) _____

SURVEY OF POLICE AND SHERIFFS

- Page 6 -

11. To your knowledge, have forfeiture provisions been used in conjunction with any of these cases?

- YES (for paraphernalia). . . 1
YES (for related assets) . . 2
NO 3

(Total value of paraphernalia and assets forfeited, if available
\$ _____.)

(IF "NO" ASK Q.11b, IF "YES" GO ON TO Q.12)

- 11b. Do you have access to forfeiture under your drug paraphernalia law?

YES (Ask Q.11c). 1
NO (Skip TO Q.12). 2

- 11c. Why have you chosen not to use it?

12. What are the key elements of an effective drug paraphernalia investigation?

- 12a. What problems, if any, have been encountered in investigating drug paraphernalia cases?

SURVEY OF POLICE AND SHERIFFS

- Page 7 -

13. In your opinion, do prosecutors give appropriate priority to the prosecution of drug paraphernalia cases in comparison to cases involving major drug sales?

YES 1
NO 2

Explain: _____

14. Which of the following factors affect your decision to pursue drug paraphernalia cases? (NAME AS MANY AS APPLY) Which is the most important factor?

	Most Important
Experience with drug paraphernalia investigations and prosecutions	1 1
The availability of expert witnesses	2 2
The availability of sufficient resources	3 3
Community pressure	4 4
Prosecutor's interest	5 5
Other (PLEASE SPECIFY)	6 6

- 14a. What factors, if any, currently discourage the active enforcement of drug paraphernalia laws?

Experience with drug paraphernalia investigations and prosecutions	1
The availability of expert witnesses	2
The availability of sufficient resources	3
Community pressure	4
Prosecutor's interest	5
Other (PLEASE SPECIFY)	6

SURVEY OF POLICE AND SHERIFFS

- Page 8 -

15. What types of witnesses have been called to testify that an object was designed for use with illegal drugs?
(DO NOT READ. CIRCLE ALL THAT APPLY. PROBE: Any others?)

Narcotics agent/
Arresting officer 1
Drug Rehab Staff 2
Teenagers 3
Tobacconists 4
Informants 5
Other (PLEASE SPECIFY)

- 15a. Have you experienced, or are you aware of problems in your jurisdiction with witness testimony or obtaining expert witnesses?

YES (PROBE) 1
NO 2

PROBE: What sort of problems? Are witnesses available? Are they effective?

16. Have steps been taken to investigate or prosecute the manufacturers of drug paraphernalia in your jurisdiction?

YES 1
NO 2

PROBE: (IF "YES"): What was done? (IF "NO") Are you aware of any paraphernalia manufacturers in your jurisdiction?

SURVEY OF POLICE AND SHERIFFS

- Page 9 -

17. What, if any, types of information or assistance would help to improve the enforcement of drug paraphernalia laws and ordinances? (For example, a manual to assist law enforcers in determining whether an object is designed for use with illegal drugs? A list of expert witnesses? (CIRCLE ALL THAT APPLY. PROBE: Anything else?)

Manual (Ask Q.17A) 1
Expert witness list (Skip to
Q.18). 2
Other (SPECIFY) (Skip to
Q.18 3

- 17a. What topics should be covered in an enforcement manual?

18. Using a scale of 1 to 5, with 1 being a high priority and 5 being a low priority, where would you place enforcing the ban on drug paraphernalia in comparison with other drug enforcement priorities?

Highest 1
 2
 3
 4
Lowest 5

- 18a. What types of drug enforcement cases are given the highest and lowest priorities?

HIGHEST: _____

LOWEST: _____

SURVEY OF POLICE AND SHERIFFS

- Page 10 -

19. In your opinion, how serious is the problem of direct mail advertisement or sale of drug paraphernalia?

Very serious 1
Somewhat serious 2
Not serious at all 3
Don't know 4

- 19a. Do many such cases come to your attention?

YES 1
NO 2

- 19b. Do you think it should be made a federal offense to distribute drug paraphernalia by mail?

YES (Ask Q.19c). 1
NO (Skip TO Q.20). 2

- 19c. Would your support such a federal law if it diverted funds from other federal drug enforcement efforts?

YES 1
NO 2

20. There have been some proposals for a federal law to deter or eliminate the manufacture of drug paraphernalia. In your opinion, is such a federal law needed?

YES (Ask Q.20a). 1
NO (Skip TO Q.21). 2

- 20a. Would you support such a law if it meant that federal law enforcement resources were diverted from other drug enforcement efforts?

YES 1
NO 2

That concludes the section concerning drug paraphernalia laws. To complete the survey, we have a few general questions about drug enforcement practices.

21. Are you, or other members of your force, currently involved in school-based drug education programs?

YES 1
NO 2

SURVEY OF POLICE AND SHERIFFS

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22. Is your force considering drug-testing for any or all of its members?

YES (Ask Q. 22a-b) 1

NO (Skip to Q. 23) 2

22a. What type of personnel will be tested?

22b. Please describe the proposed testing program.

23. What unit is responsible for the street-level enforcement of drug laws?

Patrol 1

Narcotics Unit 2

Other (please specify) . . . 3

SURVEY OF POLICE AND SHERIFFS

- Page 12 -

24. Has your force used forfeiture laws to seize or forfeit drug-related assets?

YES (Ask Q. 24a) 1

NO (Skip to Q. 25) 2

24a. Who initiated the forfeiture? Was it . . .

Local police 1

State authorities 2

Federal Authorities 3

24b. What sort of assets were seized?

Cars/trucks/planes 1

Property 2

Merchandise 3

Other (please specify) . . . 4

24c. Have you seized cars belonging to drug buyers?

YES 1

NO 2

24d. Approximately, what was the total value of assets forfeited?

\$ _____

25. Is an effort being made to enforce drug laws against users?

YES (Ask Q. 25a) 1

NO (Skip to Q. 26) 2

25a. What approach is being used? For example, do you have...?

Undercover drug sales 1

Seizure of cars 2

Other (please specify) . . . 3

SURVEY OF POLICE AND SHERIFFS

- Page 13 -

26. Is your unit or force currently involved in any special law enforcement activities concerning drugs laws?

YES (Ask Q. 26a) 1

NO (Skip to Q. 27) 2

- 26a. What sort of activities?

27. In your opinion, what is the most critical problem confronting drug enforcement today?

- 27a. What could be done to reduce or solve this problem?

- PROBE: What is the most important response?

SURVEY OF POLICE AND SHERIFFS

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CLOSE: Thank you for your time and attention.

Name:

Title:

Office Address:

Phone #:

Appendix C

Select List of Drug Paraphernalia Prosecutions and Constitutional Challenges Originating in Surveyed Jurisdictions

Respondents discussed their experience with the following cases:

1. A Better Place v. Giani; A Better Place v. Motwane's America (1984) 445 So. 2d 728.
New Orleans, Louisiana
2. Back Door Records v. Jacksonville (1981 ED ARK) 515 F. Supp. 857.
Jacksonville, Arkansas
3. Bamboo Brothers v. Carpenter (1982 2d Dist.) 133 Cal. App. 3d 116, 183 Cal. Rptr. 748.
Santa Barbara, California
4. Cardarella v. Overland Park (1980) 228 Kan. 698, 620 P.2d 1122.
Overland Park, Kansas
5. Casbah v. Thone (1981 CA8 NEB) 651 F.2d 551, cert. den. 455 U.S. 1005, 71 L. Ed. 2d 874, 102 S.Ct. 1642, Reh. den. 456 U.S. 950, 72 L.Ed 2d 476, 102 S.Ct. 2023.
Omaha, Nebraska
6. Cochran v. Commonwealth (1982) 69 PA Cmwlth. 74, 450 A.2d 756.
Bucks County, Pennsylvania
7. Commonwealth v. Jasmin (1986) 396 Mass. 653, 487 N.E. 2d 1983.
Springfield, Massachusetts
8. Commonwealth v. McKinney (1986) Supreme Court of Kentucky de-published Circuit Court ruling, No. 84-CA-1172-DG, Frankfort, Kentucky reversing and remanding Warren Circuit Ct., No. 83-X-013.
9. Commonwealth v. Potter (1986) 504 A.2d 243.
Media, Pennsylvania
10. Delaware Accessories Trade Association v. Gebelein (1980 DC Del) 497 F. Supp. 289.
Wilmington, Delaware
11. Dougal v. Suffolk (1985 CA NY) 65 N.Y. 2d 668, 481 N.E. 2d 254, 491 N.Y.S. 2d 622.
Suffolk County, New York
12. Franza v. Carey (1984) 102 A.D. 2d 780, 478 N.Y.S. 2d 873.
New York, New York
13. Gless v. City of New York (1985) 65 N.Y. 2d 669, 481 N.E. 2d 254, 491 N.Y.S. 2d 622.
New York, New York
14. High Gear v. Brown (1984) 689 P.2d 624 (affirmed, S.Ct., Jan. 9, 1985).
Brighton, Colorado
15. Idaho v. Newman (1985 SC ID) 695 P.2d 856.
Coeur D'Alene, Idaho

-
16. Illinois v. Crow's Nest, Inc., (1985) 137 Ill. App. 3d 461, 484 N.E. 2d 907.
Joliet, Illinois
 17. Illinois v. Zeigler (1986) 139 Ill. App. 3d 1088, 488 N.E. 2d 310.
Tazewell Co., Illinois
 18. Kansas v. Rome (1985) 700 P.2d 148, (appeal unpublished).
Hays, Kansas
 19. Levin v. Illinois (1986) Supreme Court No. 63724 (unpublished, case in progress).
Chicago, Illinois
 20. Maine v. Huntley (1984 S.C. ME) 473 A.2d 859.
Bangor, Maine
 21. Maryland v. Gallery News (unpublished; under appeal).
Baltimore, Maryland
 22. New England Accessories Trade Association v. Nashua (1982 CA1 NH) 679 F.2d 1.
Manchester, New Hampshire
 23. People (Morton) v. Santa Clara (1984) 151 Cal. App. 3d 889, 199 Cal. Rptr. 153,
Feb. 8, 1984; Hg. den. Apr. 19, 1984.
San Jose, California
 24. People v. Nelson, Wolf and Vitale (1985 CA Superior CA) 171 Cal. App. 3d Supp. 1.
Los Angeles, California
 25. People v. Pipe Dreams (1985) (case dropped).
Los Angeles, California
 26. People v. White (1983) unpublished.
Ventura County, California
 27. Shults (Gas Pipe) v. Texas (1985) 696 S.W. 2d 126.
Dallas Co., Texas
 28. State v. Gill, State v. Sellers (1985) 254 Ga. App. 848, 329 S.E. 2d 172.
Jonesboro, Georgia
 29. Tobacco Road v. Novi (1980 Ed MICH) 490 F.Supp. 537.
Birmingham, Michigan
 30. Webster Groves v. Spectrum Smoke Shop (1983) (unpublished).
Webster Groves, Missouri
 31. Whitehall v. Ferguson (1984) 14 Ohio App. 3d 434, 471 N.E. 2d 838.
Whitehall, Ohio
 32. World Imports, Inc. v. Woodbridge Township (1980 NC NJ) 493 F.Supp. 428.
New Brunswick, New Jersey

Appendix D

Geographical Distribution of Survey Respondents

	Attorneys General	Prosecutors or District Attorneys	Police or Sheriffs
ALABAMA	1	1	2
ALASKA	1	1	0
ARIZONA	1	1	3
ARKANSAS	1	1	0
CALIFORNIA	1	4	13
COLORADO	1	1	1
CONNECTICUT	1	1	7
DELAWARE	1	0	2
DISTRICT OF COLUMBIA	N/A	1	0
FLORIDA	1	1	11
GEORGIA	1	2	5
HAWAII	1	1	0
IDAHO	1	1	1
ILLINOIS	1	3	3
INDIANA	1	0	4
IOWA	1	1	2
KANSAS	1	1	2
KENTUCKY	1	0	0
LOUISIANA	1	1	1
MAINE	1	1	0
MARYLAND	1	1	3
MASSACHUSETTS	1	2	6
MICHIGAN	1	3	1
MINNESOTA	1	0	0
MISSISSIPPI	1	1	1
MISSOURI	1	1	0
MONTANA	1	0	0
NEBRASKA	1	1	0
NEVADA	1	1	0
NEW HAMPSHIRE	1	1	0
NEW JERSEY	1	1	0
NEW MEXICO	1	1	0
NEW YORK	1	2	7
NORTH CAROLINA	1	0	0
NORTH DAKOTA	1	0	0
OHIO	1	1	4
OKLAHOMA	1	0	1
OREGON	1	1	2
PENNSYLVANIA	1	3	2
RHODE ISLAND	1	0	0
SOUTH CAROLINA	1	1	1
SOUTH DAKOTA	1	0	0
TENNESSEE	1	1	1
TEXAS	1	1	2
UTAH	1	0	1
VERMONT	1	0	0
VIRGINIA	1	1	6
WASHINGTON	1	1	5
WEST VIRGINIA	1	1	1
WISCONSIN	1	1	1
WYOMING	1	1	0
TOTAL	50	51	102

Appendix E

State Statutes Pertaining to Drug Paraphernalia: Provisions and Penalties

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
ALABAMA: Alabama Code 86-425 (1986)			
86-425, Sec 1c	use, possession	Class A misdemeanor	imprisonment not more than 1 yr., or fine not more than \$2,000, or both
86-425, Sec 1d-1	delivery, sale: 1st offense	Class A misdemeanor	(see above)
	2nd offense	Class C felony	imprisonment not less than 1 yr. 1 day nor more than 10 yrs., or fine not more than \$5,000, or both
86-425, Sec 1d-2	delivery/sale to minors	Class B felony	imprisonment not less than 2 yrs. nor more than 20 yrs., or fine not more than \$10,000, or both
ARIZONA: Ariz. Rev. Stat. tit. 13-3411 (1982)			
13-3411(a)	use, possession	Class 2 misdemeanor	imprisonment not more than 4 mo., or fine not more than \$750, or both
13-3411(b)	delivery, manufacture	Class 2 misdemeanor	(see above)
13-3411(c)	delivery to minor	Class 1 misdemeanor	imprisonment not more than 6 mo., or fine not more than \$1,000, or both
13-3411(d)	advertisement	Class 2 misdemeanor	(see above)

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
ARKANSAS: Ark. Stat. Ann. 82-2601(y), 86-2645 (1981)			
86-2644 (1981)	owning/managing an illegal drug paraphernalia business: 1st offense	Class A misdemeanor	imprisonment not more than 1 yr., or fine not more than \$1,000, or both
	2nd offense	Class D felony	imprisonment not more than 6 yrs., or fine not more than \$1,000, or both
	3rd offense	Class C felony	imprisonment not less than 3 yrs., nor more than 10 yrs., or fine not more than \$10,000, or both
86-2619 (1981, am. 1983)	delivery to minor at least 3 yrs. younger	Class B felony	imprisonment not less than 5 yrs. nor more than 20 yrs., or fine not more than \$15,000, or both
86-2619	advertisement	Class C felony	(see above)
86-2619	use, possession	Class C felony	(see above)
86-2619	delivery, manufacture	Class C felony	(see above)

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
CALIFORNIA: Cal. Health & Safety Code 11014.5 (1982)			
11364.5 (1980, am. 1984)	maintenance/operation of business where paraphernalia is sold/ displayed, <u>unless</u> minors are excluded from store or room with drug paraphernalia	not a criminal offense	grounds to revoke or not renew a business license
11364.7(a) (1982)	delivery, manufacture	misdemeanor	imprisonment not more than 6 mo., or fine not more than \$1,000, or both
11364.7(b) (1982)	delivery to minor	misdemeanor	imprisonment not more than 1 yr., or fine not more than \$1,000, or both
COLORADO*: Colo. Rev. Stat. 12-22-501 to 503 (1980, am. 1981)			
12-22-504 (1980) 12-22-505 (1980)	use, possession manufacture, sale delivery	Class 2 petty offense Class 2 misdemeanor	fine not more than \$100 imprisonment not less than 3 mo. nor more than 12 mo, or fine not less than \$250, or more than \$1,000, or both
12-22-506 (1980)	advertisement	Class 2 misdemeanor	(see above)

*State statute is not patterned on the DEA's Model Drug Paraphernalia Act.

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
CONNECTICUT: Conn. Gen. Stat. Rev. 21a.240, 21a.270, (1980, am. 1984)			
21a.267(a) (1980, am. 1984)	use, possession	Class C misdemeanor	imprisonment not more than 3 mo., fine not more than \$500, or both
21a.267(b) (1980, am. 1983)	delivery, manufacture	Class C misdemeanor	(see above)
DELAWARE: Del. Code tit 16 4701(13), 4775, (1980)			
tit. 16 4771 (1980)	use, possession	--	imprisonment not more than 2 yrs., or fine not more than \$100, or both
tit. 16 4772 (1980)	manufacture, delivery	--	imprisonment not less than 1 yr. nor more than 5 yrs., or fine not less than \$200 nor more than \$1,000, or both
tit. 16 4773 (1980)	delivery to a minor	--	imprisonment not less than 1 yr. nor more than 10 yrs., or fine not less than \$1,000 nor more than \$10,000, or both
tit. 16 4774 (1980)	advertisement	--	imprisonment not more than 1 yr., or fine not more than \$50, or both

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
DISTRICT OF COLUMBIA: D.C. Code Ch. 6 Sec. 33-603 (1982)			
33-603(a) (1982)	use, possession	--	imprisonment not more than 30 days, or fine not more than \$100, or both
33-603(b) (1982)	delivery, sale, manufacture, possess with intent to sell:	--	imprisonment not more than 6 months, fine not more than \$1000, or both
	2nd offense	--	imprisonment not more than 2 years, fine not more than \$5,000, or both
33-603(c) (1982)	delivery by adult to minor at least 3 years younger	--	imprisonment not more than 8 years, fine not more than \$15,000, or both
FLORIDA: Fla. Stat. 893.145, 893.146, (1980)			
893.147(1) (1980)	use, possession	1st degree misdemeanor	imprisonment not more than 1 yr., or fine not more than \$1,000, or both
893.147(2) (1980)	manufacture, delivery	3rd degree felony	imprisonment not more than 5 yrs., or fine not more than \$5,000, or both
893.147(3) (1980)	delivery to minor	2nd degree felony	imprisonment not more than 15 yrs., or fine not more than \$10,000, or both
893.147(4)	advertisement	1st degree misdemeanor	(see above)

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
GEORGIA: Georgia Code Ann. 16-13-32 (1978, am. 1980)			
16-13-32(b)	Sale, distribution, possession, advertisement: 1st offense	misdemeanor	confinement in state correctional instit. not less than 6 mo., nor more than 12 mo., or alternatively: confinement in county jail not more than 12 mo., or fine not more than \$1,000, or both
	2nd offense	misdemeanor of a high and aggravated nature	confinement in county jail not more than 12 mo., or fine not more than \$5000, or both
	3rd offense	felony	imprisonment not less than 1 yr. nor more than 5 yrs. and may in addition be fined not more than \$5,000
16-13-32.1(a) (1981)	Sale, distribution, possession, advertisement of horti- cultural aids: 1st offense	misdemeanor	(see above)
	2nd offense	misdemeanor of a high and aggravated nature	(see above)
	3rd offense	felony	(see above)

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
IDAHO: Idaho Code 37-2701 (bb), 37-2744(a7), (1980)			
37-2734A(1,2) (1980)	use, possession, advertisement	misdemeanor	imprisonment not more than 1 yr., or fine not more than \$1,000, or both
37-2434A(4) (1980)	delivery to minor at least 3 yrs younger	misdemeanor	imprisonment not more than 1 yr., or fine not more than \$25,000, or both
37-2434B (1980)	delivery, manufacture	felony	imprisonment not more than 9 yrs., or fine not more than \$30,000, or both
ILLINOIS*: Ill. Rev. Stat. 1983 Ch. 56.5 2101-2102 (1983, am. 1985) (ruled unconstitutional by State Supreme Court 9/1987)			
2103 (a) (1983, am. 1985)	sale, delivery (by an individual)	business offense	fine of \$1,000 for each item
2103(b) (1983, am. 1985)	sale, delivery (by a store)	public nuisance	grounds for shutting down premises for 1 yr., or alternatively: busi- ness can agree to condition that no offense will be committed at that location and give bond in an amount between \$5,000 and \$10,000 payable to the State of Illinois
2358-4 (1982)	sale of tobacco accessories to minors	Class C misdemeanor	imprisonment not more than 30 days, or fine not more than \$500, or both

*State statute is not patterned on the DEA's Model Drug Paraphernalia Act.

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
INDIANA: Ind. Code 35-48-4-8.1 to 8.3 (1980)			
35-48-4-8.1 (1980)	manufacture	Class D felony	imprisonment of 2 yrs and may in addition be fined not more than \$10,000
35-48-4-8.2 (1980, am. 1986)	dealing, delivery	Class D felony	(see above)
35-48-4-8.3 (1980)	possession but if no prior conviction and drug paraphernalia for use with marijuana, hashish, or hash oil	Class D felony Class A misdemeanor	(see above) Fixed term of imprisonment not more than 1 yr., and may in addition be fined not more than \$5,000

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
KANSAS: K.S.A. 1984 Supp. 64-4150 to 4151 (1981)			
65-4152(a,2) (1981)	use, possession	Class A misdemeanor	confinement in county jail not more than 1 yr., or fine not more than \$2,500, or both
65-4153(a,2) (1981)	delivery, manufacture	Class A misdemeanor	(see above)
65-4153(c) (1981)	delivery to minor at least 3 yrs younger	Class E felony	imprisonment not less than 1 yr. nor more than 2-5 yrs. (fixed by court), or fine not more than \$10,000, or both
65-4154 (1981)	advertisement	Class A misdemeanor	(see above)
KENTUCKY: K.R.S. 218A.500(1), 218A.510, (1982)			
218A. 500(2) (1982) 218A.990(14) (1982)	use, possession	Class A misdemeanor	imprisonment not more than 12 mo., or fine not more than \$500, or both
218A.500(3) (1982)	delivery, manufacture	Class A misdemeanor	(see above)
218A.500(4) (1982)	advertisement	Class A misdemeanor	(see above)

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
LOUISIANA: La. Rev. Stat. 40:1031 to 1032 (1980)			
40:1033(A,B,C) (1980) - 40:1035 (1980)	sale, distribution display, possession, use: 1st offense	--	imprisonment not more than 6 mo., or fine not more than \$500, or both
	2nd offense	--	imprisonment not more than 1 yr., or fine not more than \$1,000, or both
	3rd offense	--	imprisonment with or without hard labor not more than 5 yrs., or fine not more than \$1,000, or both
MAINE: Me. Rev. Stat. tit. 17A, 1111-A (1981)			
17-A, 1111-A(4,7)	use, possession	civil violation	Forfeiture of not more than \$200
17-A, 1111-A(5,8)	trafficking in, furnishing	Class E crime	imprisonment not more than 6 mo., or fine not more than \$500, or both
17-A, 1111-A(6,8)	advertising	Class E crime	(see above)
17-A, 1111-A(8)	traffick or furnish to child under 16 yrs of age	Class D crime	imprisonment for less than 1 yr., or fine not more than \$1,000, or both

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
MARYLAND: Md. Ann. Code Art 27, 287A (1980, am. 1984)			
Art 27, 287A(c)	use, possession: 1st offense	misdemeanor	fine not more than \$500
	Subsequent violation	misdemeanor	imprisonment not more than 2 yrs., or fine not more than \$2,000, or both
Art 27, 287A(d1)	delivery, sale, manufacture: 1st offense	misdemeanor	(see above, 1st offense)
	Subsequent violation	misdemeanor	(see above, Subsequent violation)
Art 27, 287A(d2)	delivery to minor at least 3 yrs. younger	--	imprisonment not more than 8 yrs., or fine not more than \$15,000, or both
MASSACHUSETTS: Mass. Ann. Laws Ch. 94C, Section 1 (1980, am. 1983)			
94C, Sec 32I(a) (1981)	sale, possession, manufacture	--	imprisonment in jail or house of correction not less than 1 yr. nor more than 2 yrs., or fine not less than \$500 nor more than \$5,000, or both
94C, Sec32I(b) (1981)	sale to minor	--	imprisonment in state prison not less than 3 yrs. nor more than 5 yrs., or fine not less than \$1,000 nor more than \$5,000, or both

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
MINNESOTA: Minn. Stat. Ann. 152.01 (18) (1982, am. 1985)			
152.092 (1982)	use, possession	petty misdemeanor	fine not more than \$100
152.093 (1982)	delivery, manufacture	misdemeanor	imprisonment not more than 90 days, or fine not more than \$700, or both
152.094 (1982)	delivery to minors at least 3 yrs. younger	gross misdemeanor	fine not more than \$3,000
152.095 (1982)	advertisement	misdemeanor	(see above)
MISSISSIPPI: Miss. Code Ann. tit. 41-29-105(v) (1982)			
41-29-139(d,1) (1982)	possession, use	misdemeanor	imprisonment not more than 6 mo., or fine not more than \$500, or both
41-29-139(d,2) (1982)	sale, delivery, manufacture	misdemeanor	(see above)
41-29-139(d,3) (1982)	sale to minor at least 3 yrs. younger	misdemeanor	imprisonment not more than 1 yr., or fine not more than \$1,000 or both
41-29-139(d,4) (1982)	advertisement	misdemeanor	imprisonment not more than 6 mo., or fine not more than \$500, or both

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
MISSOURI: Missouri Stat. Ann. Ch. 195-010 (11) (1982)			
195.020 (2) (1982) 195-200 (2) (1982)	use, possession	Class B misdemeanor	imprisonment not more than 6 mo., or fine not more than \$500, or both
195.020 (3) (1982) 195.200 (3) (1982)	delivery, possession with intent to deliver	Class D felony	imprisonment not more than 5 yrs., or fine not more than \$5,000, or fine not more than double the amount of the offender's gain from commission of the crime (\$20,000 maximum), or both fine and imprisonment
195.020 (4) (1982)	advertisement	Class B misdemeanor	(see above)
MONTANA: Mont. Code Ann. tit. 45-10-101 to 102 (1982)			
45-10-103 (1981)	use, possession	misdemeanor	imprisonment in county jail not more than 6 mo., or fine not more than \$500, or both
45-10-104 (1981)	delivery, manufacture	misdemeanor	(see above)
45-10-105 (1981)	delivery to minor at least three yrs. younger	misdemeanor	imprisonment in county jail not more than 1 yr., or fine not more than \$1,000, or both
45-10-106 (1981)	advertisement	misdemeanor	imprisonment in county jail not more than 6 mo., or fine not more than \$500, or both

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
NEBRASKA: Neb. Rev. Stat. 28-431, 28-439 to 440 (1980)			
28-441 (1980)	use or possession	infraction: 1st offense 2nd offense (within 2 yrs) 3rd offense (within 2 yrs)	fine not more than \$100 fine not less than \$100 nor more \$300 fine not less than \$200 nor more than \$500
28-442 (1980)	delivery, manufacture	Class II misdemeanor	imprisonment not more than 6 mo., or fine not more than \$1,000, or both
28-443 (1980)	delivery to minor	Class I misdemeanor	imprisonment not more than 1 yr., or fine not more than \$1,000, or both
28-444 (1980)	advertisement	Class III misdemeanor	imprisonment not more than 3 mo., or fine not more than \$500, or both

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
NEVADA: Nev. Rev. Stats. Ann. 453-554, 453-556, (1981)			
453.560 (1981)	sale, possession, manufacture	--	imprisonment in state prison not less than 1 yr. nor more than 6 yrs., or fine not more than \$5,000, or both
453.562 (1981)	delivery to minors at least 3 yrs. younger	--	imprisonment in state prison not less than 1 yr. nor more than 10 yrs., and may in addition be fined not more than \$10,000
453.564 (1981)	advertisement	misdemeanor	imprisonment in county jail not more than 6 mo., or fine not more than \$1,000, or both
453.566 (1981)	use, possession with intent to use	misdemeanor	(see above)
NEW HAMPSHIRE: N.H. Rev. Stat. Ann. 318 B:1(X-a), 318 B:2 (IV), (1981)			
318 B:2 (II) 318 B:26 (II,C)	delivery, manufacture	misdemeanor	imprisonment not more than 1 yr., or fine not more than \$1,000, or both
318 B:2 (III) 318 B:26 (II,d)	advertisement	misdemeanor	(see above)

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
NEW JERSEY: N.J. Stat. Ann. 24:21-46 (1981)			
24:21-47 (1981)	use, possession	disorderly persons offense	imprisonment not more than 6 mo., or fine not more than \$1,000, or both
24:21-48 (1981)	distribution, manufacture	crime of the 4th degree	imprisonment not more than 18 mo., or fine not more than \$7,500, or both
24-21-49 (1981)	advertisement	crime of the 4th degree	(see above)
24:21-50 (1981)	delivery to minor at least 3 yrs. younger	crime of the 3rd degree	imprisonment not less than 3 yrs. nor more than 5 yrs., or fine not more than \$7,500, or both
NEW MEXICO: N.M. Stat. Ann. 30-31-2(w) (1981)			
30-31-25.1(A,C) (1981)	use, possession	misdemeanor	definite prison term not more than 1 yr., or fine not less than \$50 nor more than \$100, or both
30-31-25.1(B,C) (1981)	delivery, manufacture	misdemeanor	(see above)
30-31-25.1(D) (1981)	delivery to minor at least 3 yrs. younger	4th degree felony	imprisonment of 18 mo., and may in addition be fined not more than \$5,000

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
NEW YORK*: NY Gen. Bus. Law, Art. 39, 850(2) (1980) -- NY Stat. Penal Law, Art 220 (1971, am. 1973)			
Art 39, 851(1980) Art 39, 852(2)(1980) Art 39, 853(1980)	Sale, purchase, possession	nuisance	license to sell may be revoked; fine not less than \$1,000 nor more than \$10,000 for each violation
Art 220.50 (1971, am. 1973) Art 220.55 (1971, am. 1973)	possession/sale of dilutents, dilutants, adulterants, gelatin capsules: 1st offense (criminally using drug paraphernalia in the 1st degree) 2nd offense (criminally using drug paraphernalia in the 2nd degree)	Class A misdemeanor Class D felony	imprisonment not more than 1 yr., or fine not more than \$1,000, or both imprisonment not more than 7 yrs., or fine not more than \$500 or twice the amount of defendant's gain from commission of the crime, or both

*State statute is not patterned on the DEA's Model Drug Paraphernalia Act.

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
NORTH CAROLINA: 1981 N.C. Sess. Laws 90-113.21 (1981)			
90-113.22 (a,b) (1981)	use, possession	misdemeanor	imprisonment not more than 1 yr., or fine not more than \$500, or both
90-113.23 (a,b,c) (1981)	delivery, manufacture	misdemeanor	imprisonment not more than 2 yrs., or fine not less than \$1,000, or both (each separate item = a separate offense)
90-113.23 (c) (1981)	delivery to minor at least 3 yrs. younger	Class I felony	imprisonment not more than 5 yrs., or fine, or both
90-113.24 (1981)	advertisement	misdemeanor	imprisonment not more than 6 mo., fine not more than \$500, or both
NORTH DAKOTA: N.D. Crim. Code Ch. 12.1-31.1-01 to 02 (1981)			
12.1-31.1-03 (1981)	use, possession	Class A misdemeanor	imprisonment not more than 1 yr., or fine not more than \$1,000, or both
12.1-31.1-04 (1981)	delivery, manufacture	Class A misdemeanor	(see above)
12.1-31.1-05 (1981)	delivery to minor at least 3 yrs. younger	Class C felony	imprisonment not more than 5 yrs., or fine not more than \$5,000, or both
12.1-31.1-06 (1981)	advertisement	Class A misdemeanor	(see above)

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
OHIO*: Ohio R.C. Section 2925.14 (1981)			
2924.14 (1981)	sale of marijuana paraphernalia to a minor without permission of parent guardian or custodian, or a document purporting to show the minor's age to be eighteen or older	misdemeanor of the first degree	imprisonment not more than 6 months or fine not more than \$1000
OKLAHOMA: Okla. Stat. tit. 63, 2-101(32) (1982)			
tit. 63, 2-405 (B,E) (1982)	use, possession	misdemeanor	imprisonment in county jail not more than 1 yr. or fine not more than \$1000, or both
tit. 63, 2-405 (C,E) (1982)	delivery, manufacture	misdemeanor	(see above)
tit. 63, 2-405 (D) (1982)	delivery to minors at least 3 yrs. younger	felony	imprisonment in state penitentiary not more than 2 yrs., or fine not more than \$1,000, or both

*State statute is not patterned on the DEA's Model Drug Paraphernalia Act.

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
OREGON*: Or. Rev. Stat. 163.575 (1e,2) (1981)			
163.575 (1e,2)	Selling device in which tobacco or any controlled substance is burned in order to inhale smoke into the human body, to a minor (endangering the welfare of a minor)	Class A misdemeanor	imprisonment not more than 1 yr., or fine not more than \$2,500, or both
PENNSYLVANIA: Pa. Stat. Ann. tit. 35, 780-102(b) (1980)			
35, 780-113 (a,32) (1980) 35, 780-113 (i) (1980)	use, possession	misdemeanor	imprisonment not more than 1 yr., or fine not more than \$2,500, or both
35, 780-113 (a,33) (1980)	delivery, manufacture	misdemeanor	(see above)
35, 780-113 (a,34) (1980)	advertisement	misdemeanor	(see above)
35, 780-113 (i) (1980)	delivery to minor at least 3 yrs. younger	misdemeanor of the 2nd degree	imprisonment not more than 2 yrs., or fine not more than \$5,000, or both

*State statute is not patterned on the DEA's Model Drug Paraphernalia Act.

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
RHODE ISLAND: R.I. Stat. 21-28.5-1 (1982)			
21-28.5-2 (1982)	manufacture, delivery, sale	--	imprisonment not more than 2 yrs., or fine not more than \$5,000, or both
21-28.5-3 (1982)	delivery to minor	--	imprisonment not more than 5 yrs., or fine not more than \$5,000, or both
SOUTH CAROLINA: S.C. Code 44-53-110, 44-53-391(b) (1982)			
45-53-391 (a,c) (1982)	advertisement, manu- facture, possession, sale, delivery: by an individual	Civil fine	fine not more than \$500
	by a corporation	Civil fine	fine not more than \$50,000
SOUTH DAKOTA: S. Dak. Stat. 22-42A-1-2 (1983, am. 1984)			
22-42A-3	use, possession	Class 2 misdemeanor	imprisonment in county jail not more than 30 days, or fine not more than \$100, or both
22-42A-4	delivery, manufacture	Class 1 misdemeanor	imprisonment in county jail not more than 1 yr., or fine not more than \$1,000, or both

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
TENNESSEE*: Tenn. Code Ann. 39-6-455, 39-6-402(26), 53-11-409 (1984)			
39-6-456(a) (1984)	use, possession	misdemeanor	imprisonment in county jail or workhouse not more than 1 yr., or fine not more than \$1,000, or both
39-6-456(b1,b2) (1984)	delivery, manufacture	felony	imprisonment not less than 1 yr. nor more than 5 yrs., or fine not more than \$5,000, or both
39-6-456(b3) (1984)	delivery to minor at least 3 yrs. younger	felony	imprisonment not less than 3 yrs. nor more than 10 yrs., or fine not less than \$5,000, or both
TEXAS: Tex. Civ. Stat. Ann. 4476-15, Sec. 1-02 (14) (1981)			
4476-15, Sec. 4.07 (a,d) (1981)	use, possession: 1st offense 2nd offense	Class C misdemeanor Class B misdemeanor	fine not more than \$200 imprisonment not more than 180 days, or fine not more than \$1,000, or both
4476-15, Sec. 4.07 (b,e) (1981)	delivery, manufacture	Class A misdemeanor	imprisonment not more than 1 yr., or fine not more than \$2,000, or both
4476-15, Sec. 4.07 (c,f) (1981)	delivery to minor at least 3 yrs. younger	felony of the 3rd degree	confinement in Texas Dept. of Corrections not less than 2 yrs. nor more than 10 yrs., and may in addition be fined not more than \$5,000

*State statute is not patterned on the DEA's Model Drug Paraphernalia Act.

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
UTAH: Utah Code Ann. 58-37a-1 to 37a-4 (1981)			
58-37a-5(1) (1981)	use, possession: by an individual	Class B misdemeanor	imprisonment not more than 1 yr., or fine not more than \$1,000, or both
	by a corporation	Class B misdemeanor	fine not more than \$5,000
58-37a-5(2) (1981)	delivery, manufacture: by an individual	Class A misdemeanor	imprisonment not more than 1 yr., or fine not more than \$2,500, or both
	by a corporation	Class A misdemeanor	fine not more than \$10,000
58-37a-5(3) (1981)	delivery to a minor at least 3 yrs. younger: by an individual	3rd degree felony	imprisonment not more than 5 yrs., or fine not more than \$5,000, or both
	by a corporation	3rd degree felony	fine not more than \$20,000
58-37a-5(4) (1981)	advertisement	Class B misdemeanor	(see above)

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
VERMONT: Ver. Stat. Ann. 18-89-4475 (1983)			
18-89-4476(a) (1983)	sale, possession, manufacture	--	imprisonment not more than 1 yr., or fine not more than \$1,000, or both
18-89-4476(b) (1983)	sale to minor	--	imprisonment not more than 2 yrs., or fine not more than \$2,000, or both
VIRGINIA: Va. Code 18.2-2651.1-2 (1981, am. 1983)			
18.2-265.3(a) (1981, am. 1983)	sale, possession	Class 1 misdemeanor	confinement in jail not more than 12 mo., or fine not more than \$1000, or both
18.2-265.3(b) (1981, am. 1983)	sale to minor at least 3 yrs. younger	Class 6 felony	imprisonment not less than 1 yr. nor more than 5 yrs., or as an alternative: confinement in jail not more than 12 mo., or fine not more than \$1,000, or both
18.2-265.3(c) (1981, am. 1983)	distribution to a minor	Class 1 misdemeanor	(see above)
18.2-265.5 (1983)	advertisement	Class 1 misdemeanor	(see above)

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
WASHINGTON: Rev. Code of WA 69.50.102 (1981)			
69.50.412(1) (1981)	use	misdemeanor	imprisonment in county jail not more than 90 days, or fine not than \$1,000, or both
69.50.412(2) (1981)	delivery, manufacture, possession	misdemeanor	(see above)
69.50.412(3) (1981)	delivery to minor at least 3 yrs. younger	gross misdemeanor	imprisonment in county jail not more than 1 yr., or fine not than \$5,000, or both
69.50.412(4) (1981)	advertisement	misdemeanor	(see above)

STATE/STATUTE	OFFENSE	CLASSIFICATION	SENTENCE
WEST VIRGINIA*: W. Vir. Code Art 19 Ch 47-19-1 to 47-19-8 (1982)			
47-19-1, 47-19-7	sale without a license	misdemeanor	fine not less than \$10 nor more than \$500 (each day violation continues = a separate & distinct offense)
47-19-6	sale to minors	felony	imprisonment in penitentiary not less than 1 yr. nor more than 5 yrs., or imprisonment in county jail not more than 1 yr., and may in addition be fined not more than \$15,000
60-A-4-403a (1980)	owning/managing an illegal drug paraphernalia business	misdemeanor	imprisonment not less than 6 mo. nor more than 1 yr., or fine not or fine not more than \$5,000, or both
WYOMING: Sessions Laws of Wyoming 1982 Ch. 46 W.S. 35-7-1002 (a,xxvii) (1982)			
Ch 46 W.S.35-7-1056 (1982)	delivery, possession	crime	imprisonment not less than 6 mo., or fine not more than \$750, or both
Ch 46 W.S.35-7-1057 (1982)	delivery to minor	crime	imprisonment not less than 5 yrs., or fine not more than \$2,500, or both

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NOTE: The following states have no state statute pertaining to drug paraphernalia and were not included in this appendix: Alaska, Hawaii, Iowa, Michigan, and Wisconsin

Appendix F

Advertising Trends in *High Times* Magazine Before and After the Model Drug Paraphernalia Act

Ad Category	BEFORE THE MODEL ACT						CURRENT PRACTICE					
	Publication date and issue number											
	Dec. 1977* #28		Dec. 1978* #40		Dec. 1979* #52		May 1986 #129		June 1986 #130		August 1986 #132	
	no.	%	no.	%	no.	%	no.	%	no.	%	no.	%
Paraphernalia	112	69	110	74	89	63	65	75	53	70	56	60
Nonparaphernalia	50	31	38	26	72	37	22	25	23	30	37	40
TOTAL	162	100	148	100	161	100	87	100	76	100	93	100

Subcategories of paraphernalia ads													
	Marijuana ^a	62	55	60	55	39	44	7	11	5	9	3	5
	Horticultural aids ^f	9	8	8	7	9	10	32	49	23	43	23	41
	Cocaine	17	15	22	20	19	21	1	2	2	4	2	4
	Mushrooms	6	6	3	3	4	5	3	5	3	6	3	5
	Chemicals	5	4	1	0	1	1	8	12	6	11	9	16
	Herbs	7	6	3	3	1	1	1	2	1	2	2	4
	Nonspecific	7 ^a	6	13 ^a	12	16 ^a	18	13 ^c	20	13 ^c	25	14 ^c	25

Subcategories of nonparaphernalia ads												
Books/magazines	12	24	7	18	19	26	8	36	9	39	14	38
Posters/graphics	4	8	4	11	5	7	0	0	0	0	0	0
Jewelry	5	10	6	16	1	1	1	5	0	0	1	3
Clothing/T-shirts	9	18	5	13	15	21	2	9	4	17	3	8
Miscellaneous	20 ^b	40	16 ^b	42	32 ^b	45	11 ^d	50	10 ^d	44	19 ^d	51

General information						
Total pages	176	172	172	100	100	100
% of total pages with ads	62	62	58	38	39	35
% of ad pages with full-page ads	29	23	17	42	41	54

^aThe nonspecific paraphernalia category includes scales, equipment for testing the purity of drugs, catalogs for all types of paraphernalia, devices to intercept wiretaps, and kits for establishing personal identification.

^bThe miscellaneous nonparaphernalia category includes ads for such items and services as records, stereo equipment, air mattresses, massage lotions, abortions, hot tubs, soaps, and games. It also encompasses distributors who advertise by name only (no products) and organizations such as NORML, Arica, and ACTION.

^cThe nonspecific paraphernalia category includes marijuana coffee houses in the Netherlands, cactus, poppy seeds, kits for establishing personal identification, electronic security equipment and "psychedelic" honey.

^dThe miscellaneous non paraphernalia category includes sex aids, vacations, legal advice, horoscopes, personals, Sierra Club promotions.

^eH.E.W. data are adjusted to reflect the insertion of the category "horticultural aids"--which is composed of marijuana-related paraphernalia products.

^fCategory not included in H.E.W. Report; data for 1977-1979 provided by DEA (see note "e" above).

*Source: H.E.W. Report, Community and Legal Responses to Drug Paraphernalia, 1980, (DHEW Publication No. [ADM] 80-963).