INTRODUCTION

In 1981, the Eighth Circuit upheld the constitutionality of Nebraska's drug paraphernalia law in *Casbah, Inc. v. Thone*. The paraphernalia law, fashioned after the Model Drug Paraphernalia Act, was designed to curb the illegal use of controlled substances by prohibiting the sale of drug paraphernalia.

The Eighth Circuit's decision is important for several reasons. First, the court upheld the law's broad definition of drug paraphernalia by focusing on the statute's requirement of a culpable intent on the part of the violator. Second, the opinion delineated the criteria by which state paraphernalia statutes and community ordinances will be judged in this circuit, clarifying the opinion of the Eighth Circuit expressed a year earlier in *Geiger v. City of Eagan*. Finally, the decision has created a split among the federal circuits, as the Sixth Circuit had struck down a practically identical law in *Record Revolution No. 6, Inc. v. City of Parma*.

As drug paraphernalia laws are enacted in numerous cities and states, the constitutional questions raised by the laws and the methods of statutory interpretation adopted by the courts take on great significance. This article will analyze the significant consti-
tutional issues involving paraphernalia statutes addressed in Casbah—attacks on the statute based on vagueness and overbreadth, violation of search and seizure standards, and the abridgment of freedom of speech.\textsuperscript{10} It concludes that a drug paraphernalia act can be drafted within constitutional limits, but, when viewed in its entirety, Nebraska's paraphernalia law seems to be outside those limits. Although the court has sufficiently demonstrated that the Nebraska paraphernalia law has overcome some of the constitutional infirmities which plagued earlier drug paraphernalia laws, it failed to come to grips with several lingering problems of vagueness and free speech.

BACKGROUND

\textit{Drug Paraphernalia Laws}

While the problems of drug abuse may seem apparent, the early attempted solutions through drug paraphernalia laws met with difficulties. Ordinances which defined paraphernalia by such characteristics as the size of the pipe's or spoon's bowl,\textsuperscript{11} or by setting forth examples of narcotics paraphernalia, were found unconstitutionally vague because the items also had many lawful uses.\textsuperscript{12} Pre-Model Act ordinances and statutes generally failed to provide either notice to pipe possessors of what conduct was prohibited, or guidelines for law enforcement officials as to what was illegal.\textsuperscript{13} Often these acts offended first amendment free speech standards.

\textsuperscript{4267} (U.S. March 2, 1982), the Supreme Court upheld the constitutionality of an ordinance requiring businesses to obtain licenses before marketing items "designed or marketed for use with illegal cannabis or drugs." The statute in \textit{Flipside} was quite different from the Model Act in that it was only a "quasi-criminal business regulation" rather than a criminal statute. It provided licensing guidelines defining what items were regulated and was to be imposed only against businesses based on the design or marketing of the items. \textit{Id.} Despite the difference between the ordinance in \textit{Flipside} and the Model Act, the unanimous Supreme Court decision seems to indicate that a drug paraphernalia statute will be upheld against a pre-enforcement facial challenge unless it is "impermissibly vague in all of its applications." \textit{Id.} at 4269. The decision noted that the application of the law could present constitutional problems, but that those problems should be presented to the courts when they occur, and not in a pre-enforcement challenge. \textit{Id.} at 4271.

It should also be noted that the Supreme Court in a memorandum decision vacated the Sixth Circuit's opinion in Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916 (6th Cir. 1980), and remanded the case for the further consideration in light of changes in Ohio law. 101 S.Ct. 2998 (1981).

\textsuperscript{10} 651 F.2d at 556.
\textsuperscript{12} See, e.g., Record Museum v. Lawrence Township, 481 F. Supp. 768, 774 (D.N.J. 1979).
as well.\textsuperscript{14}

An example of the significant problems of poorly drafted drug paraphernalia laws was provided by the Eighth Circuit in \textit{Geiger v. City of Eagan}, where the court held a city ordinance unconstitutional.\textsuperscript{15} The ordinance had defined "drug-related device" as "any pipe or other object suitable to be used for smoking," containing one of several characteristics, such as a wire mesh screen, a bowl with an interior surface of metal, glass, acrylic, plexiglass, or plastic, a bowl of certain diameter, or containing a flexible tube or tubes.\textsuperscript{16} The statute was vague because the operative language, "any pipe suitable for smoking," included common tobacco accessories.\textsuperscript{17} The enumerated characteristics of drug-related devices were listed as alternatives, placing the unwary in the position of having to analyze each provision.\textsuperscript{18} Furthermore, the ordinance prohibited private possession in the home to the same extent as the owner of a commercial establishment.\textsuperscript{19} Finally, the ordinance lacked arrest and search standards.\textsuperscript{20}

In an attempt to avoid the definitional difficulties of earlier paraphernalia laws, the Model Act emphasizes the criminal state of mind of the user rather than the characteristics of the object.\textsuperscript{21} In 1980, the Nebraska Legislature passed Legislative Bill 991, based on the Model Act.\textsuperscript{22} This act defines drug paraphernalia as "all equipment, products, and materials of any kind which are used, intended for use, or designed for use, in manufacturing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance . . . ."\textsuperscript{23} A list of examples follows, each restating that the devices be "used, intended for use, or designed for use" in drug-related activities.\textsuperscript{24}

The law also provides fourteen factors courts "shall" consider

\begin{itemize}
  \item \textsuperscript{14} See, e.g., High O! Times, Inc. v. Busbee, 456 F. Supp. 1035, 1043 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980).
  \item \textsuperscript{15} 618 F.2d at 28.
  \item \textsuperscript{16} Id. at 28-29.
  \item \textsuperscript{17} Id. at 29.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id. The court reasoned that "[w]here definite guidelines for enforcement officials are not present, use of the ordinance to expand arrest opportunities and justify searches magnifies the potential harm from enforcement of the ordinance."
  \item \textsuperscript{21} Comments, Model Drug Paraphernalia Act, supra note 3.
  \item \textsuperscript{22} See Appendix A infra.
  \item \textsuperscript{24} LB. 991, § 1, 1980 Neb. Laws at 1143.
\end{itemize}
in determining whether an object is drug paraphernalia.\textsuperscript{25} Included are such factors as statements made by the possessor of the object, residue from a controlled substance on the object, advertising concerning its use, and whether the possessor is a "legitimate supplier" of like items (e.g., a dealer in tobacco products).\textsuperscript{26}

The substantive criminal offense of delivery, possession with intent to deliver, or manufacture with intent to deliver drug paraphernalia comes into play when one knows or reasonably should know that it will be used as drug paraphernalia.\textsuperscript{27} Written advertising is also prohibited when one knows or reasonably should know that the purpose is to promote the sale of objects designed or intended for use as drug paraphernalia.\textsuperscript{28} The statute also contains a civil forfeiture section and a severability section.\textsuperscript{29}

Record Revolution No. 6, Inc. v. Parma

In Record Revolution No. 6, Inc. v. Parma,\textsuperscript{30} the question of the constitutional validity of the Model Act was addressed at the court of appeals level for the first time. Three Ohio communities passed ordinances based on the Model Act, and business owners in those cities challenged those ordinances as unconstitutional.\textsuperscript{31} The Sixth Circuit held that the ordinances were vague and overbroad, violating the first amendment right of free speech and the fourteenth amendment right of due process.\textsuperscript{32}

The Sixth Circuit found that the term "designed for use" in the definition of drug paraphernalia was unconstitutionally vague and overbroad, primarily because of what it perceived to be the ambiguity in defining paraphernalia in terms of "design" when the items lack "any design characteristics that distinguish lawful purposes from unlawful purposes."\textsuperscript{33} The court found the provision of the Model Act allowing prosecution when a seller "reasonably should know" the objects will be used to violate the drug laws to be "too open-ended and too susceptible to misapplication to satisfy

\textsuperscript{26} LB. 991, § 2, 1980 Neb. Laws at 1144.
\textsuperscript{30} 638 F.2d 916 (6th Cir. 1980).
\textsuperscript{31} Id. at 916.
\textsuperscript{32} Id.
\textsuperscript{33} Id. at 930.
the dictates of due process.' \( ^{34} \) The Sixth Circuit also concluded that the total prohibition on advertising which "in whole or in part" promotes the use or sale of drug paraphernalia unnecessarily infringes on the right of free speech. \( ^{35} \)

The court's reasoning in holding the Model Act unconstitutional provides an interesting contrast to the decision in *Casbah*, and will be explored further in this article.

The impact of the Sixth Circuit decision is uncertain at this time, as the United States Supreme Court vacated the decision and remanded on other grounds, \( ^{36} \) and upheld a drug paraphernalia law in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* \( ^{37} \) The Sixth Circuit's decision has been followed by some lower courts, \( ^{38} \) though, and its reasoning is worthy of analysis.

**FACTS AND HOLDING**

In *Casbah, Inc. v. Thone*, retail merchants and wholesale distributors of novelty items, including items which could be used as drug paraphernalia, challenged the constitutionality of the Nebraska paraphernalia law. The district court found the statute to be constitutional; \( ^{39} \) however, it had to sever several statutory provisions to reach that finding. \( ^{40} \) First, it severed the requirement that courts and law enforcement officials consider whether a possessor or seller of an item suspected as drug paraphernalia is a legitimate supplier of like items. The court considered this portion of the statute to be imprecise because the statute is meant to apply to all persons who have the requisite intent. The court reasoned that the law does not change for so-called legitimate suppliers. \( ^{41} \)

The district court also held that the "reasonably should know" standard, with respect to delivery or advertising of items, was im-

---

34. Id. at 936.
35. Id.
36. See note 9 supra.
37. 50 U.S.L.W. 4267 (U.S. March 2, 1982).
40. 512 F. Supp. at 483. L.B. 991, § 10, 1980 Neb. Laws at 1149, provides that if any section of the Act is found unconstitutional the remainder of the Act shall remain valid.
41. 512 F. Supp. at 483.
permissably vague because it conflicted with the scienter requirement in the definition of drug paraphernalia. Under this standard, a defendant could be convicted without a showing that he specifically intended to violate the statute.

However, the district court concluded that, while the law will neither be easy to enforce nor single-handedly ameliorate drug abuse, it does not violate the Constitution.

The Eighth Circuit foreshadowed its decision in Casbah one year earlier in Geiger. There, the court stated that a city has the power to enact a drug paraphernalia law, and in a related footnote it referred to the Model Act as an example. Therefore, it was not surprising when the Eighth Circuit upheld the Nebraska version of the Model Act in its entirety.

The Eighth Circuit concluded that the statute adequately defined the mental state necessary to render an item drug paraphernalia, that the "designed for use" standard in the drug paraphernalia statute did not render the statute vague because it referred to the intent of the violator, that the law's examples of paraphernalia and relevant factors to be considered by law enforcement officials were helpful guidelines for such officials, that the search and seizure standard of probable cause is not altered by this law, and that the ban on advertising promoting drug paraphernalia was not impermissibly diluted that requirement. 618 F.2d 26 (8th Cir. 1980).

The court also considered whether the federal courts could properly exercise jurisdiction in this case at all. Id. at 556 & n.6. Although neither the merchants who brought the suit nor the state challenged the court's jurisdiction, the court viewed the issue important enough to address. Precedent in other drug paraphernalia cases was certainly on the side of federal jurisdiction. See Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 925 (6th Cir. 1980); High OI' Times, Inc. v. Busbee, 621 F.2d 135, 139 (5th Cir. 1980); Mid-Atlantic Accessories Trade Assoc. v. Maryland, 500 F. Supp. 834, 841 (D. Md. 1980). The court in Casbah also correctly found, in accordance with the rule announced in Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941), that abstention is inappropriate where construction by the state courts would not significantly alter the federal constitutional issue. 651 F.2d at 556-57.

---

42. Id. at 484. In the district court's opinion, the statute's requirement of scienter, or previous knowledge, was the statute's saving feature. The court held that the "reasonably should know" test impermissibly diluted that requirement. Id.
43. Id. at 485.
44. Id. at 488.
45. 618 F.2d 26 (8th Cir. 1980).
46. Id. at 28.
47. Id. at 28 n.4.
48. Unlike the district court, which had severed several portions of the statute, 512 F. Supp. at 483-85, the Eighth Circuit refused to consider each section separately. It found that a federal court could not remedy a state statute's defects by severing sections, see Hynes v. Mayor of Oradell, 425 U.S. 610, (1976)), but that it could extrapolate an allowable meaning of the statute under Grayned v. City of Rockford, 468 U.S. 104, 110 (1972). Casbah Inc. v. Thone, 651 F.2d at 557-58.

The court also considered whether the federal courts could properly exercise jurisdiction in this case at all. Id. at 556 & n.6. Although neither the merchants who brought the suit nor the state challenged the court's jurisdiction, the court viewed the issue important enough to address. Precedent in other drug paraphernalia cases was certainly on the side of federal jurisdiction. See Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 925 (6th Cir. 1980); High OI' Times, Inc. v. Busbee, 621 F.2d 135, 139 (5th Cir. 1980); Mid-Atlantic Accessories Trade Assoc. v. Maryland, 500 F. Supp. 834, 841 (D. Md. 1980). The court in Casbah also correctly found, in accordance with the rule announced in Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941), that abstention is inappropriate where construction by the state courts would not significantly alter the federal constitutional issue. 651 F.2d at 556-57.
nalia is permissible.49

ANALYSIS

Vagueness and Overbreadth

The law regarding vagueness and overbreadth developed out of the fourteenth amendment due process requirement, and requires that statutes give persons of common intelligence fair notice of the persons covered and the conduct proscribed by a criminal statute.50 As Justice Marshall pointed out in Grayned v. City of Rockford,51 vague laws trap the innocent by not providing fair warning, and fail to provide explicit standards for law enforcement officers, leading to arbitrary and discriminatory law enforcement.52 Such laws also could inhibit the exercise of first amendment freedoms by leading citizens to "steer far wider of the unlawful zone" than if the boundaries were more clearly marked.53 The Eighth Circuit in Geiger followed this rationale: laws must provide notice to the ordinary person of what is prohibited, and provide standards for law enforcement officials to prevent arbitrary and discriminatory enforcement.54

i) "Used, Intended for Use, Designed for Use"

The Nebraska law's definition of drug paraphernalia includes any item "used, intended for use, or designed for use" in drug-related activities.55 It also forbids sale, delivery or advertising of objects where the seller knows or "reasonably should know" that they will be used as drug paraphernalia.56 The plaintiffs in Casbah argued that these words are vague since they do not specify exact items to which they apply, and are overly broad in that many innocent items may be defined as drug paraphernalia.57

According to the Eighth Circuit in Casbah,58 the mens rea or culpable intent requirement in the Nebraska drug paraphernalia statute saved it from unconstitutional vagueness. The Sixth Circuit in Parma similarly found that the Model Act reliance in the

49. See notes 50-131 and accompanying text infra.
51. 408 U.S. 104 (1972).
52. Id. at 108-09.
53. Id. (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
54. 618 F.2d at 28.
57. 651 F.2d at 558-61.
58. 651 F.2d at 557.
paraphernalia definition on the words "use" and "intended for use" did not cause vagueness or overbreadth problems.\textsuperscript{59} However, the Sixth Circuit found the term "designed for use" to be unconstitutionally vague and overbroad.\textsuperscript{60} The term "could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil."\textsuperscript{61} As a result, the Sixth Circuit found that the definition gave no hint to those manufacturers wanting to comply with the law as to what was included in the definition.\textsuperscript{62} In \textit{Information Mgt. Services, Inc. v. Borough of Pleasant Hills},\textsuperscript{63} a Pennsylvania federal district court followed the analysis in \textit{Parma} and reasoned: "Potentially the use by a purchaser of an object in connection with controlled substances could serve to create liability in the manufacturer."\textsuperscript{64} This "transferred intent" analysis would permit the act of one person to make the act of another illegal.\textsuperscript{65} Following the Eighth Circuit's decision in \textit{Geiger}, the Sixth Circuit in \textit{Parma} found that under the Model Act the type of object that can become drug paraphernalia is limited only by the imagination of the user, and that this absence of design characteristics is a fundamental flaw.\textsuperscript{66}

The lack of so-called design characteristics would not seem to constitute a fundamental flaw under a proper interpretation of the statute. "Designed" refers to the \textit{intent}\textsuperscript{67} of the manufacturer and not to any particularly defined characteristics of the object.\textsuperscript{68} Transferred intent analysis is inapplicable because no act by any person other than the manufacturer could create the necessary

\textsuperscript{59} 638 F.2d at 929.
\textsuperscript{60} 638 F.2d at 930.
\textsuperscript{61} Id. at 930 (quoting Indiana Chapter, NORML, Inc. v. Sendak, No. 80-1305 (7th Cir. July 22, 1980)).
\textsuperscript{62} 638 F.2d at 930.
\textsuperscript{64} Id. at 1073.
\textsuperscript{65} Id. The example given by the \textit{Parma} decision is of a chamber pipe that the manufacturer intended be used for ingesting hashish and that the purchaser uses for that purpose. The question the Sixth Circuit posed was whether a seller who lacks intent and did not ingest hashish can be convicted on the basis of the manufacturer's intent and the purchaser's use. 638 F.2d at 928.
\textsuperscript{66} 636 F.2d at 930.
\textsuperscript{67} No judicial re-defining of the word "design" is needed to find that "design" refers to the intent of the manufacturer. \textit{BLACK'S LAW DICTIONARY}, for example, defines design in terms of purpose or intention: "To form plan or scheme of, conceive and arrange in mind, originate mentally, plan out, contrive. . . . In evidence, purpose or intention, combined with plan, or implying a plan in the mind." \textit{BLACK'S LAW DICTIONARY} 402 (5th ed. 1979). The Sixth Circuit in \textit{Parma} seems to have misinterpreted the statute by emphasizing design characteristics rather than intent.
\textsuperscript{68} Comments, \textit{MODEL DRUG PARAPHERNALIA ACT}, \textit{supra} note 3.
mens rea in the manufacturer, and no act by the manufacturer could create liability in the seller.\(^69\)

The Eighth Circuit in *Casbah* focused on intent in its interpretation of the “designed for use” provision, stating: “We cannot agree that the term ‘designed’ refers to the structure of an object. The comments to the Model Act expressly indicate the contrary, specifying that items are innocent until coupled with the intentional act of design.”\(^70\) The lower court in *Casbah* also found that “designed for use” refers not to the object's physical characteristics, but to the subjective intent of the person controlling the object.\(^71\) The court reasoned, “The whole tenor of the statute makes clear that any object, depending upon its use, can be drug paraphernalia.”\(^72\) It concluded that when “designed for use” is integrated into the statute, “it is not vague or even easily susceptible to misunderstanding.”\(^73\)

The Eighth Circuit’s reliance on the necessary mens rea as the statute’s saving grace is justified by Supreme Court precedent. A criminal statute’s requirement of the presence of culpable intent can save what might otherwise be an unconstitutionally vague statute.\(^74\) Such a standard should be read into a statute to preserve its constitutionality.\(^75\) Those courts which have seen the lack of particularly-defined design characteristics as a fundamental flaw would seem to be misreading the statute. When read in light of the intent or design of the alleged violator, the statute is an adequate guide for private citizens and law enforcement officials.\(^76\) It also meets the standards set forth by the Eighth Circuit in *Geiger*\(^77\) and the Supreme Court in *Grayned*.\(^78\)

\(^{69}\) In *Flipside* the Supreme Court criticized an argument similar to that advanced by the Sixth Circuit in *Parma*. 50 U.S.L.W. at 4270. The Court said, “A business person of ordinary intelligence would understand that this term [“designed for use”] refers to the design of the manufacturer, not to the intent of the retailer or customers. It is also sufficiently clear that items which are principally used for nondrug purposes, such as ordinary pipes, are not ‘designed for use’ with illegal drugs.” *Id.*

\(^{70}\) 651 F.2d at 560.

\(^{71}\) 512 F. Supp. at 482.

\(^{72}\) *Id.* (emphasis in original).

\(^{73}\) *Id.* See also Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834, 845 (D. Md. 1980), where the court found it apparent that all three verbs (used, designed and intended) were included in the definition of drug paraphernalia so that the terms would be applicable to all the kinds of conduct barred in the substantive sections. A seller will “intend” an item for use, while a manufacturer is more likely to “design” an object for use, and a user will simply “use” the item.


\(^{75}\) See *Screws v. United States*, 325 U.S. 91, 100 (1945).


\(^{77}\) 618 F.2d at 28.
ii) "Reasonably Should Know"

The Nebraska statute places potential liability on those who sell, deliver or place written advertisements in the media when they know or "reasonably should know" that the items will be used with controlled substances.79 A "reasonably should know" standard has been held not to be unconstitutionally vague when used in laws prohibiting the carrying of electronic devices for wiretapping or intercepting oral communications,80 or in a law prohibiting the possession of burglary tools.81 The question is whether this constructive knowledge standard is adequate when the statute must regulate a myriad of items which have a lawful purpose and no specific physical design characteristics.82

According to the Eighth Circuit, there are two requirements of an alleged sale or delivery: (1) that the defendant intended that an item be used for the production or consumption of controlled substances, and (2) that he either knew, or that he acted in a set of circumstances from which a reasonable person would know, that the buyer of the item would thereafter use it for those purposes.83 Under the court's reasoning, constructive knowledge is significant only when the defendant is selling or delivering items intended to be used with controlled substances.84

The difficulty with the Eighth Circuit's approach is determining precisely what set of facts gives a seller notice of a buyer's illicit intentions.85 This is illustrated by the example of a gift shop which sells ornate pipes.86 If a well-dressed man in a business suit purchases a pipe from the merchant and states that he will enjoy the pipe with his friends, should the merchant know the pipe will be used to ingest a controlled substance, thereby subjecting the seller to criminal penalty? If the buyer is unshaven and in ragged clothes and makes the same statement is the merchant on constructive notice? The difficulties in articulating when a merchant

78. 408 U.S. at 108-09.
79. See note 56 supra.
80. United States v. Novel, 444 F.2d 114, 114 (9th Cir. 1971).
81. Hogan v. Atkins, 441 F.2d 576 (5th Cir. 1969).
82. See 512 F. Supp. at 485-86.
83. 651 F.2d at 561 n.12.
84. Id. The Eighth Circuit upheld the "reasonably should know" standard, and found it "not constitutionally improper that the seller be required to open his eyes to the objective realities of the sale." Id. at 561. The Sixth Circuit in Parma held that this standard was vague and overbroad because it allowed conviction based on the weakness of a seller's perception rather than on his criminal intent. 638 F.2d at 936.
85. 512 F. Supp. at 485.
86. Id. at 485-86.
reasonably should know the intent of the buyer, in a case as simple and presumably as common as the example above, led the lower court to conclude that the standard is unconstitutionally vague. It "simply cannot be justified on the theory that a merchant's 'objective' observations about his customers will keep him out of harm's way." To allow a law enforcement officer to enforce this standard against a vendor seems to come perilously close to entrusting law-making "to the moment-to-moment judgment of the policeman on his beat." The problem could be solved by a statutory requirement of knowledge on the part of the seller in addition to the requirement of culpable intent.

iii) Examples and Relevant Factors

The list of examples of drug paraphernalia included in the statute did not cause any vagueness or overbreadth problems, according to both the Eighth and Sixth Circuits. The two courts agreed that the items are exemplary only and not irrefutably presumed to be drug paraphernalia. The court in Casbah reiterated that, under the statute, no item is drug paraphernalia without the requisite intent.

A more difficult problem came in the section of the statute which enumerated fourteen factors for "a court or other authority" to use in determining whether an item is drug paraphernalia. The Eighth Circuit found that "other authority" clearly referred to law enforcement personnel and that the factors were valuable guides in determining what was prohibited. However, the Sixth Circuit in Parma held the delegation of such decision making power to the police, prosecutors, and juries to be an impermissible delegation by the legislature of its policy making power in violation of due process.

The better view was expressed by the lower court in Casbah, which found that the factors do not give the police policy making

---

87. Id. at 486.
89. See 512 F. Supp. at 486.
91. 651 F.2d at 560.
92. 638 F.2d at 932.
93. 651 F.2d at 560; Revolution No. 6, Inc. v. Parma, 638 F.2d at 932.
94. 561 F.2d at 560. See notes 43-66 and accompanying text supra.
96. 651 F.2d at 560.
97. 638 F.2d at 931.
authority, but merely serve as guidelines: "The fact that enforcement officials are obliged to consider the factors... minimizes the danger that an object will erroneously be identified as paraphernalia."\footnote{98}

Search and Seizure

Because it creates a new class of contraband, the drug paraphernalia statute expands the number of instances when searches and seizures can be made.\footnote{98} While this may be debated as a matter of policy, it does not by itself make the law unconstitutional. If possession of drug paraphernalia may be made criminal, then the fourth amendment allows searches incident to arrest for that crime.\footnote{100}

Previous paraphernalia statutes, partly because of their lack of clear enforcement standards, have been particularly susceptible to attack as violative of the fourth amendment.\footnote{101} In fact, the Eighth Circuit in \textit{Geiger} held that a city ordinance which did not clearly define "drug-related device" lacked sufficient arrest and search standards for enforcement officers.\footnote{102}

However, the Eighth Circuit in \textit{Casbah} held that the Nebraska statute differed significantly from the ordinance in \textit{Geiger} so that it overcame these objections. The court relied on the statute's requirement of culpable intent in the paraphernalia definition and on the enumerated factors which an officer must consider in determining whether an object is drug paraphernalia.\footnote{103} It held that nothing in the law altered the requirement that searches and seizures be based on probable cause.\footnote{104} Since the fourth amendment argument against the law is premised on the theory that the definition of drug paraphernalia is too vague to provide sufficient

\begin{footnotes}
\item[98] 512 F. Supp. at 483. The lower court severed factor (11), which allowed consideration of whether the suspected violator was a "legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products." \textit{Id.} The reference to legitimate suppliers was criticized as imprecise and misleading because the law applies to all users, distributors and advertisers. \textit{Id.} The Eighth Circuit found the provision constitutional as a whole despite factor (11), reasoning that the factors are merely guides. 651 F.2d at 560.
\item[99] See Note, \textit{Paraphernalia for Marijuana and Hashish Use: Possession Statutes and Indiana's Pipe Dream}, 10 Val. U.L. Rev. 353, 367 (1976) [hereinafter cited as \textit{Pipe Dream}], which argues that the "real impact" of paraphernalia statutes is to validate drug searches which would not be allowed in the absence of such a law.
\item[100] Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834, 849 (D. Md. 1980).
\item[102] 618 F.2d at 29.
\item[103] 651 F.2d at 561-62.
\item[104] \textit{Id.}
\end{footnotes}
guidelines for enforcement officials, a finding that the definition is not vague negates that premise and therefore the argument as well.

The civil forfeiture provisions have been found constitutional. The court in Casbah noted that forfeiture statutes which help to render illegal behavior unprofitable, without prior notice and hearing before seizure, have been held constitutional. Also, the provision in Nebraska law for forfeiture of conveyances in drug traffic previously has been held constitutional.

The First Amendment and the Statute's Advertising Ban

Advertising which in whole or in part promotes the sale of drug paraphernalia is banned under the Nebraska law and the Model Act. The question of whether this ban violates the first amendment protection of free speech brought a split between the courts in Casbah and Parma, with the court in Casbah upholding the statute.

The United States Supreme Court decision in Central Hudson Gas & Elec. Corp. v. Public Service Commission provides guidelines for government regulation of commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

The Eighth Circuit admitted the possible violation of first amendment rights was a “close” question, but, after interpreting

105. 651 F.2d at 558.
106. See 500 F. Supp. at 848.
108. 651 F.2d at 562 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-87 (1974)).
111. MODEL DRUG PARAPHERNALIA ACT, supra note 3, at art. II, sec. D.
112. See notes 119-20 and accompanying text infra.
113. 651 F.2d at 563-64.
115. Id. at 566.
the statute in its "narrowest" sense, held it was not unconstitutional. First, the court found that the statute was limited to a ban on advertisements promoting illegal drug paraphernalia and facially did not reach speech which merely glorifies the drug culture without inviting purchases of banned items. However, the court admitted difficulty with that portion of the statute which prohibits advertisements that only "in part" promote the sale of drug paraphernalia. The "in part" provision was offensive to the Sixth Circuit in Parma, which found that the law "may allow the ban of speech discussing the reform of drug laws or speech glorifying the drug culture."

Another serious problem, with which the Eighth Circuit did not deal adequately, is the law's enforcement against advertisers or publishers who advertise in printed media which circulates in other jurisdictions as well as in those where the ads are banned. The law also could prevent local residents from receiving information about the availability of drug paraphernalia in other jurisdictions where paraphernalia is not illegal. In Bigelow v. Virginia, the Supreme Court was confronted with a similar situation. A Virginia law banned advertising intended to encourage or prompt the procuring of an abortion. A newspaper editor published an advertisement of a New York organization which offered services related to obtaining abortions legal in New York. Noting that a state is not free of constitutional restraints merely because the advertisement involved sales or solicitations, the Supreme Court held that a state may not bar a citizen of another state from disseminating information about an activity that is legal in the other state. Applying the holding in Bigelow to the Nebraska law, the ban on advertising would seem to face the same problem, since it bars a citizen of another state from disseminating information in Nebraska about an activity legal in that other state.

The recent Flipside case did not pose first amendment

116. 651 F.2d at 563. This interpretation in the "narrowest" sense of the statute is questionable when considered in light of the rule that a federal court may not remedy a statute's defects. See note 48 supra.
117. 651 F.2d at 563.
118. Id. at 564.
119. 638 F.2d at 937.
120. Id.
121. Id.
122. Id.
124. Id. at 811.
125. Id. at 812.
126. Id. at 818.
127. Id. at 824-25.
problems similar to those in *Casbah* since the ordinance did not place a ban on advertising.\(^{128}\) The Supreme Court did deal with the first amendment in another context in *Flipside*\(^ {129}\) and reiterated the point made in *Central Hudson Gas* that a speech proposing an illegal transaction may be regulated or banned.\(^ {130}\) It also held that the overbreadth doctrine does not apply to purely commercial speech.\(^ {131}\) Nevertheless, it seems that under the decisions in *Bigelow* and *Central Hudson Gas* the Nebraska statute's ban on advertising is offensive to the first amendment protection of free speech in that it may apply to more than purely commercial speech. If the law applied in situations where the speech is only in part promoting drug paraphernalia, or if it is applied against an out-of-state seller's advertisements in a Nebraska publication, promoting only out-of-state sales, that application of the law would seem to be unconstitutional.

**CONCLUSION**

Despite the Eighth Circuit's finding that the Nebraska paraphernalia law is constitutional, serious questions remain to be answered concerning the resolution of the conflicting opinions of the Eighth and Sixth Circuits,\(^ {132}\) the practical application of the "reasonably should know" standard as applied to sellers of drug paraphernalia,\(^ {133}\) and the practical application of the statute's ban on advertising.\(^ {134}\)

The Model Act upon which the Nebraska paraphernalia statute was based has cleared one hurdle, since the Eighth Circuit upheld the statute in *Casbah*. The court is wise in recognizing the value of the requirement of culpable intent included in the definition of drug paraphernalia.\(^ {135}\) However, there remain other infirmities in this law, and defense counsel, lawmakers, and courts should be aware of its shortcomings.

*Anthony F. Rupp—'83*

---

\(^{128}\) The ordinance licensed and regulated the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs." 50 U.S.L.W. at 4269. The ordinance therefore was not a prohibition of speech, but rather a simple regulation of the commercial marketing of items that the labels revealed may be used for an illegal purpose. *Id.*

\(^{129}\) *Id.* at 4267.

\(^{130}\) *Id.*

\(^{131}\) *Id.*

\(^{132}\) See note 8 and accompanying text *supra*.

\(^{133}\) See notes 79-89 and accompanying text *supra*.

\(^{134}\) See notes 111-31 and accompanying text *supra*.

\(^{135}\) See notes 55-78 and accompanying text *supra*. 
The Nebraska Act provides:

Section 1. As used in this act, unless the context otherwise requires, drug paraphernalia shall mean all equipment, products, and materials of any kind which are used, intended for use, or designed for use, in manufacturing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this act or the Uniform Controlled Substances Act. It shall include, but not be limited to, the following:

1. Dilutents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances;

2. 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;

3. Hypodermic syringes, needles, and other objects used, intended for use, and designed for use in parenterally injecting controlled substances into the human body; and

4. 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, which shall include but not be limited to the following:

   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;

   d[sic] Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, which 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; and

   m. Ice pipes or chillers.

Sec. 2. In determining whether an object is drug paraphernalia-
lia, a court or other authority shall 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 any controlled substance;

5. The existence of any residue of a controlled substance 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 any person whom he or she knows, or should reasonably know, intends to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

7. Instructions, oral or written, provided with the object concerning its use;

8. Descriptive materials accompanying the object which explain or depict its use;

9. National and local advertising concerning its use;

10. The manner in which the object is displayed for sale;

11. Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

12. Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise;

13. The existence and scope of any legitimate use for the object in the community; and


Sec. 3. (1) It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this act.

(2) Any person who violates this section shall be guilty of an infraction.

Sec. 4. (1) It shall be 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 manufacture, inject, ingest, inhale, or otherwise be used to introduce into the human body a controlled substance in violation of this act.

(2) Any person who violates this section shall be guilty of a Class II misdemeanor.

Sec. 5. Any person eighteen years of age or older who violates section 4 of this act by delivering drug paraphernalia to a person under eighteen years of age who is at least three years his or her junior shall be guilty of a Class I misdemeanor.

Sec. 6. (1) It shall be 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.

(2) Any person who violates this section shall be guilty of a Class III misdemeanor.

Sec. 7. That section 28-431, Revised Statutes Supplement, 1978, be amended to read as follows:

28-431. (1) The following shall be seized without warrant by an officer of the Division of Drug Control or by any peace officer, and the same shall be subject to forfeiture: . . . (f) all drug paraphernalia defined in section 1 of this act. . . .

(2) Any conveyance, including aircraft, vehicles, or vessels, which is used, or intended for use to transport any property described in subdivisions (a) and (b) of subsection (1) of this section is hereby declared to be a common nuisance, and any peace officer having probable cause to believe that such conveyance is so used or intended for such use shall make a search thereof with or without a warrant. . . . [Such property seized without a search warrant is not subject to a replevin action under Section 3; Section 4 specifies the condemnation procedures to be used by the seizing party]. . . .

Section 10. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof. . . .

Section 12. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.