The Void-for-Vagueness Doctrine in Village of Hoffman Estates v. the Flipside, Hoffman Estates, Inc.: Revision or Misapplication

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Aware of the serious national problem of drug abuse and the "nexus between the abuse of controlled substances and the glorification of devices which facilitate such abuse," local communities in recent years have enacted statutes or ordinances that prohibit or otherwise regulate the sale, manufacture, or possession of drug paraphernalia. These enactments have resulted in an explosion of litigation and conflicting judicial opinions concerning the constitutionality of drug paraphernalia laws.

In Village of Hoffman Estates v. The Flipside, Hoffman Estates,

1. In 1981, the United States Congress found that drug abuse was rapidly increasing in the United States, afflicting urban, suburban and rural areas of the nation; that drug abuse substantially contributed to crime, and that the adverse impact of drug abuse inflicted increasing pain and hardship on individual, families, and communities and undermined our institutions. Drug Abuse Prevention, Treatment and Rehabilitation Act, Pub. L., No. 92-255, § 101, 86 Stat. 66, 66-67 (1972) (codified as amended at 21 U.S.C. §1101 (1976 & Supp. V 1981)).


[1273]
Inc., the United States Supreme Court passed upon the validity of one such drug paraphernalia law and in so doing may have substantially limited a civil plaintiff's ability to challenge a law on vagueness grounds. Deeming the ordinance not void for vagueness, the Court held that if an enactment does not reach constitutionally protected conduct, greater vagueness may be tolerated if the statute imposes only civil penalties, is a business regulation, or contains a scienter requirement.

This Comment explores the Court's vagueness analysis in *Flipside*. The Comment first outlines the provisions of the Village of Hoffman Estates drug paraphernalia ordinance and describes the difficulties that the retailer The Flipside experienced in determining what items were covered by the ordinance. After explaining the process used by the Court in assessing the ordinance's vagueness, the Comment analyzes the Court's treatment of the vagueness issue. Attention is given to the statute's "designed and marketed for use" terminology, explaining its operation and evaluating its constitutionality in the context of the modern standard for vagueness as enunciated in *Grayned v. Rockford*. The Comment criticizes the *Flipside* Court's application of the vagueness standard and warns that it may represent a weakening of constitutional protection from impermissibly vague legislation.

The Development of the Case

The Factual Background

In June, 1976, The Flipside, Hoffman Estates, Inc. (The Flipside) opened a retail store in a shopping mall in the Village of Hoffman Estates, Illinois (Village). The Flipside sold a wide variety of merchandise including records, tapes, concert tickets, tobacco, novelty devices, jewelry, and magazines. On February 20, 1978, the Village enacted Ordinance No. 969-1978, entitled "An Ordinance . . . Providing for Regulation of Items Designed or Marketed for Use with Illegal Cannabis or Drugs." The ordinance defined drug paraphernalia as any "item, effect, paraphernalia, accessory or thing which is designed or

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7. See infra notes 29-31 & accompanying text.
9. More specifically, the district court found the novelty and tobacco related items included mirrors, clamps, chain ornaments, cigarette holders, scales, pipes, water pipes, and tobacco snuff. The Flipside also sold cigarette rolling papers in a variety of colors, and literature that included *National Lampoon, A Child's Garden of Grass, Rolling Stone, Marijuana Grower's Guide*, and *High Times*. 485 F. Supp. 403 (N.D. Ill. 1980).
10. The full text of the ordinance provides:
"WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional Section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or things which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every time, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs $150.00.

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar
marketed for use with illegal cannabis or drugs . . . .”11 Persons who sold such items were subjected to various regulatory requirements, including a requirement to maintain a log of purchasers’ names and addresses. The ordinance also banned the sale of such items to minors. Violations of the ordinance were punishable by fines of up to $500.00 per item, with each day that a violation continued deemed a separate offense.12

A series of guidelines that were intended to clarify the “designed or marketed for use” standard13 accompanied the ordinance.14 According to the guidelines, certain innocuous items otherwise expressly year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

Section 4: That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5: That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.”


11. Ordinance, supra note 10, § 1(D) (emphasis added).

12. Additionally, the ordinance required sellers of paraphernalia to pay a $150.00 license fee to sell such items in addition to a separate general merchant fee for the privilege of selling other legal retail items, and have employees sign and file affidavits averring that the employee had never been convicted of a drug-related offense. 485 F. Supp. at 404.

13. The guidelines provide:

License Guidelines for Items, Effect. Paraphernalia, Accessory or Thing Which Is Designed Or Marketed For Use With Illegal Cannabis Or Drugs

Paper - white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips - designed for use with illegal cannabis or drugs and therefore covered.

Pipes - if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered (sic); otherwise, covered.

Paraphernalia - if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

License Guidelines to Ordinance, supra note 10 [hereinafter cited as Guidelines].

14. Lower courts, assessing the vagueness of similar drug paraphernalia ordinances, have referred to accompanying guidelines as a valuable means of interpreting the ordinances. See, e.g., Casbah, Inc. v. Thone, 651 F.2d 551, 560 (8th Cir. 1981). Although not expressly adopted by a legislative body, guidelines and regulations accompanying a statute may be considered when scrutinizing the enactment for vagueness. See United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548 (1973), wherein the Court used regulations purporting to construe a statute in rejecting a claim of vagueness. Id. at 575. Thus, the Supreme Court’s consideration of such guidelines in assessing an ordinance’s vagueness was accepted practice, and the Court did rely on the guidelines in its decision. See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 500-01 (1982).
excluded from the ordinance were considered drug paraphernalia if they were located in spatial proximity to certain enumerated items.\textsuperscript{15} No factors other than proximity were considered.\textsuperscript{16}

Soon after enactment of the ordinance, The Flipside consulted with the Village Attorney to determine what items in the store, if any, would be covered by the ordinance. The Village Attorney indicated that the ordinance applied to all colored cigarette rolling papers. When The Flipside asked whether the ordinance applied to any other items in the store, the Village Attorney merely gave The Flipside the guidelines.\textsuperscript{17}

After The Flipside was unable to secure advice in determining what merchandise was covered,\textsuperscript{18} The Flipside removed anything that might possibly be affected rather than risk the imposition of a $500.00-per-day fine for each item sold in violation of the ordinance.\textsuperscript{19} The Flipside then filed in federal district court for a temporary restraining order and preliminary injunction on the grounds that the ordinance was unconstitutionally vague, violated the plaintiff's first amendment rights, and denied plaintiff equal protection of the law.\textsuperscript{20}

The Treatment of the Case Below

The district court denied The Flipside's motion for a temporary restraining order and preliminary injunction. Trial for a permanent injunction and declaratory judgment was subsequently held without a jury or additional evidence and on stipulated testimony. The trial court awarded judgment to the Village, holding that the ordinance was not unconstitutionally vague, did not violate first amendment rights, was not overbroad, and did not deny defendants equal protection of

\begin{itemize}
  \item Enumerated items were those items deemed by the guidelines themselves to constitute drug paraphernalia. These included rolling papers of colorful design or with names oriented for use with illegal cannabis or drugs, roach clips, and literature encouraging the illegal use of cannabis or drugs. The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 485 F. Supp. at 404.
  \item The court of appeals in \textit{Flipside} found that "it appears that displaying almost any item in the proximity of, for example, "literature encouraging illegal use of . . . drugs," would trigger enforcement of the ordinance. The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d 373, 382 (1981). A careful reading of the ordinance reveals no reference to intent. \textit{See supra} note 10. The Supreme Court, however, read an intent element into the ordinance. \textit{See infra} notes 73-96 & accompanying text.
  \item Id. at 64, 71.
  \item In all, 79 articles, all legal retail items, were taken off the floor. About half the items were various types of pipes; the remaining items included such objects as surgical clamps, alligator clips, key chains, jewelry, and cigarette rolling papers. \textit{Id.} at 31-32.
\end{itemize}
the law.21

The Seventh Circuit Court of Appeals reversed on the ground that the ordinance was so vague as to violate the due process clauses of the fifth and fourteenth amendments of the United States Constitution. The court held that the ordinance failed to make clear what items were included in the statutory prohibitions and what items were not, and allowed a further danger of arbitrary enforcement in inferring use or possession of drugs from the purchase or possession of certain legal retail items.22 The Supreme Court, on appeal, noted probable jurisdiction.23

The Constitutional Attack on the Village of Hoffman Estates Ordinance

The Flipside raised two constitutional issues in its attack on the Village ordinance: 1) whether the ordinance violated due process standards by failing to give adequate notice of what items were regulated, encouraging discriminatory enforcement by failing to provide objective standards to judicial agents; and 2) whether the ordinance on its face was overbroad in that it affected both proscribed and protected conduct, thereby chilling the exercise of first amendment rights. Although the Supreme Court addressed both of these issues, the Court's ultimate disposition was founded primarily upon the vagueness attack.24

The Supreme Court's Decision

The Court in Flipside was faced with the task of determining whether the standard "designed or marketed for use" was so unclear in meaning as to fail to identify the type of merchandise the village desired to regulate. The Court undertook an evaluation of the vagueness

24. In addressing the overbreadth challenge, the Court held, first, that the scope of the ordinance did not embrace noncommercial speech. The Court reasoned that while the ordinance regulated the sale of items displayed "with" or "within proximity" of literature that encouraged use of illegal cannabis or drugs, it did not prohibit or regulate the sale of literature itself. As for drug-related designs or names on cigarette papers that caused such items to be subjected to regulation, the Court found the Village did not thereby restrict speech as such, but merely regulated the commercial marketing of items whose labels revealed that they could be used for an illicit purpose.

Second, regarding The Flipside's commercial speech interests, the Court found that the ordinance did not appreciably intrude on The Flipside's first amendment interests with the obvious and intended exception of commercial speech encouraging drug use. Such speech is speech proposing illegal conduct and is thus subject to government regulation. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982).
void-for-vagueness doctrine and the ordinance to determine if the language of the ordinance, which did not reach constitutionally protected conduct, was "impermissibly vague in all of its applications." The process encompassed an analysis of the applicability of the vagueness standard enunciated in *Grayned v. City of Rockford,* a linguistic analysis of the phrase "designed or marketed for use," and scrutiny of The Flipside's claim that the standards for enforcement were insufficient. The Court began with an analysis of the *Grayned* vagueness standard, declaring that the standard should not be mechanically applied, and that "[t]he degree of vagueness that the Constitution tolerates as well as the relative importance of fair notice and fair enforcement . . . depend in part on the nature of the enactment." The Court enumerated three situa-

25. Id.

26. Id. at 497. In a challenge to the facial vagueness of a law that implicates no constitutionally protected conduct, a court should not sustain the challenge unless the law is vague in all its applications. A statute that clearly applies to some conduct of the plaintiff cannot be challenged as vague when applied to the conduct of others. Parker v. Levy, 417 U.S. 733, 756 (1974). Should confusion over whether the ordinance applies to certain items ripen into an actual prosecution, however, The Flipside in a post-enforcement proceeding could then attempt to show that the ordinance was being unconstitutionally employed in the particular application.

27. 408 U.S. 104 (1977). An ordinance is void-for-vagueness when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" and allows discriminatory and arbitrary arrests. See United States v. Harris, 347 U.S. 612, 617 (1954); Thornhill v. Alabama, 310 U.S. 88 (1940). The basis for this rule of law is that "[a]ll persons are entitled to be informed as to what the [government] commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). For an in-depth analysis of the United States Supreme Court's treatment of the void-for-vagueness doctrine, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67 (1960). While it is recognized that "[i]n most English words and phrases there lurk uncertainties," Rose v. Locke, 423 U.S. 48, 50 (1975), a statute written in terms so ambiguous that persons "of common intelligence must necessarily guess at its meaning and differ as to its application" is unconstitutionally vague. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). The modern-day standards for vagueness have been enunciated by the Supreme Court in *Grayned v. City of Rockford,* 408 U.S. 104 (1972):

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.

Id. at 108-09 (footnotes omitted).

28. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. at 498. Neither the district court nor the court of appeals had acknowledged this concept. The vagueness standard as enunciated in *Grayned* simply declared, "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." 408 U.S. 104, 108 (1972). No lesser qualification was made for enactments that do not abut
tions in which an enactment may be subject to a less strict vagueness analysis: 1) when economic interests are regulated, 2) when civil rather than criminal penalties are imposed, and 3) when scienter is required.

By declaring the ordinance to be one regulating business behavior, imposing only "nominal" civil penalties, and containing a scienter requirement, the Court cleared the way for applying a less constitutionally protected conduct. Indeed, it could be argued that Grayned set out a "bottom-line" standard; that is, when an enactment reaches constitutionally protected conduct, an even stricter standard is required. See Edwards v. South Carolina, 372 U.S. 229 (1963), on which the Grayned Court commented that "where First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be ... proscribed,' assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation." Grayned v. Rockford, 408 U.S. 104, 109 n.5 (1972) (quoting Edwards v. South Carolina, 372 U.S. 229, 236 (1963)).

29. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. at 498. The Court partially based this determination on dictum in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), to the effect that the subject matter of economic regulation is often more narrow, and on the grounds that businesses that are faced with economic pressure to plan behavior carefully, "can be expected to consult relevant legislation in advance of action," either through their own inquiry or through an administrative review process. Id. at 162.


31. At least one commentator has noted that there are different kinds of scienter, only one of which is useful as a tool for clarifying vagueness. See, Note, supra note 27: "Scienter" has frequently been found a component of the offense created by the statute charged with indefiniteness, and on each occasion the statute has been sustained, in part on the notion that the requirement of guilty knowledge clarified it. Yet it is evident that, unless the Court has been fooling itself in these cases, the "scienter" meant must be some other kind of scienter than that traditionally known to the common law—the knowing performance of an act with intent to bring about that thing, whatever it is, which the statute proscribes, knowledge of the fact that it is so proscribed being immaterial. Such scienter would clarify nothing; a clarificatory "scienter" must envisage not only a knowing what is done but a knowing that what is done is unlawful or, at least, so "wrong" that it is probably unlawful. One difficulty here is that it is uncertain whether the courts which subsequently enforce the statutes which the Court sustains will employ the same brand of "scienter" as the Court; if not, and if "scienter" was essential to the Court's holding, then of course the statute which is constitutional is not being administered and the statute which is being administered is not constitutional. In any event, "scienter" has become a recognized element of the lore of vagueness, and represents at its best, a tool to be designedly used in the service of other ends; at its worst, a port of entry for the ethical predilections of the then sitting Court. Id. at 87 & n.98 (citations omitted). See also Colautti v. Franklin, 439 U.S. 375, 395 & n.13 (1979).

32. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. at 499. While the Village conceded that the ordinance was "quasi-criminal" by virtue of its prohibitory and stigmatizing effect, and could therefore require a strict vagueness test, the Court...
restrictive vagueness test to the Village ordinance.

After conceding that the words "item, effect, paraphernalia, accessory or thing" did little to identify those items the village sought to regulate,33 the Court conducted a linguistic analysis of the standards "designed for use" and "marketed for use" to determine if they satisfied the "fair warning" prong of the Grayned vagueness test. After noting the court of appeals' objections to the term "designed for use,"34 the Court held that the term could only refer to the design of the manufacturer, and that the phrase therefore referred to the physical characteristics "of items deemed per se fashioned for use with drugs," e.g., colored rolling papers.35 Items primarily used for non-drug purposes, such as tobacco pipes, are not "designed for use" with illegal cannabis or drugs, and hence could not be regulated under this standard.36 The Court concluded that because "the standard encompass[ed] at least an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer,"37 the standard was not vague in all its applications,38 and thus was not impermissibly vague.39

Turning to the alternative "marketed for use" standard, the Court found this standard "transparently clear."40 Holding that the standard referred to a retailer's intentional display and marketing of merchan-

33. The district court did not analyze the "designed or marketed for use" standard, analyzing instead the words "item, effect, paraphernalia, accessory or thing." Such analysis led to circular and equally vague definitions as illustrated by the district court's determination that the word "paraphernalia" was becoming an accepted term to those who would purchase paraphernalia for use with illegal cannabis or drugs, while at the same time noting Webster's definition of paraphernalia to be "articles of equipment." The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 485 F. Supp. at 406-07. Such definitions left the uninformed no better off than before, and it may be for this reason that the high Court agreed with the court of appeals that such a regulation of "paraphernalia" would not satisfy the fair warning prong of the Grayned test.

34. These objections centered on whether the items had to be inherently suited for drug use only; whether the intent of the manufacturer, a third party, was to be the center of any inquiry of "design"; and whether the intent of the retailer could obviate the design of a manufacturer. The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d at 381-82.


36. Id. at 501.

37. Id. (emphasis added).

38. See supra note 26.

39. That the ordinance and guidelines "[did] contain ambiguities," did not trouble the Court. The Court stated that whether further guidelines would clarify the ambiguous scope of the "designed for use" standard was of "no concern in this facial challenge." Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. at 502.

40. Id.
the Court articulated a test for determining whether such items were "marketed for use," thereby subjecting a store to the ordinance's licensing requirements; a store must obtain a license "if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use." Additionally, the Court found the standard contained a scienter requirement. Noting that The Flipside displayed *High Times* magazine in proximity to pipes and colored rolling papers, that the store's co-owner admitted that The Flipside sold roach clips, and that The Flipside posted a sign in its shop saying "You must be 18 or older to purchase any head supplies," the Court concluded that The Flipside had sufficient warning that its marketing activities would require a license. Under either the "designed for use" or "marketed for use" standards, then, at least some of the items sold by The Flipside were covered, and The Flipside therefore failed to meet its burden of showing the ordinance to be impermissibly vague in all of its applications.

Finally, in reviewing The Flipside's claim that the Village ordinance did not furnish sufficient standards for enforcement, the Court declared that "[n] in reviewing a business regulation for facial vagueness . . . the principal inquiry is whether the law affords fair warning of what is proscribed." Thus, by determining that the ordinance provided some degree of fair warning, the Court could conclude that "[t]he language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness." While acknowledging the confusion in the testimony of

41. Id.
42. Id.
43. The Court reasoned that "a retailer could scarcely 'market' items 'for' a particular use without intending that use." Id.
44. Id. at 502-03.
45. See supra note 26.
46. A common fear of the courts dealing with drug paraphernalia ordinances has been that the ordinances would be used to harass individuals with differing political views and lifestyles. See, e.g., The Flipside, Hoffman Estates, Inc., v. Village of Hoffman Estates, 639 F.2d at 384; Housworth v. Glisson, 485 F. Supp. 29, 38 (N.D. Ga. 1978), aff'd, 614 F.2d 1295 (5th Cir. 1980).
47. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. at 503. The Court gave two rationales: first, such an emphasis was necessary because the complaint constituted a pre-enforcement challenge to a law; and second, no evidence was or could have been introduced to support the claim that the ordinance would be enforced in an arbitrary manner. Id. See also supra note 26.
48. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. at 503. The Court alluded to Papachristou v. City of Jacksonville, 405 U.S. 156, 168-71 (1977), and Coates v. City of Cincinnati, 402 U.S. 611, 614 (1977), suggesting that the danger of arbitrary and discriminatory enforcement is directly tied to the use of vague terms. While such a theory may have previously held merit when any finding of vagueness would be sufficient to strike down an enactment as unconstitutional (or, when the enactment reaches constitutionally protected conduct), the question arises as to whether the theory is logically supportable when an enactment must be vague in all its applications to be void for vagueness. As the
the Village President and the police chief as to whether certain items were covered by the ordinance, the Court was not prepared to declare that the risk of arbitrary or discriminatory enforcement jeopardized the entire ordinance.\textsuperscript{49} Further, the Court assumed that the Village would take further steps to minimize the dangers of arbitrary enforcement, including relying primarily on the "marketed for use" standard and adopting additional administrative procedures to aid in clarification of the ordinance.\textsuperscript{50}

\textbf{Analysis of the Supreme Court's \textit{Flipside} Decision}

The \textit{Flipside} Court did not discuss certain critical factors that could have led to a stricter vagueness analysis. First, under the Court's construction of the Village ordinance, an enactment may be subject to a less strict vagueness analysis when the enactment imposes civil as opposed to criminal penalties.\textsuperscript{51} In so declaring, the Court failed to account for a line of cases holding that the Constitution requires an ordinance to give adequate warning of prohibited conduct, regardless of whether the ordinance imposes civil penalties or criminal sanctions.

In \textit{A. B. Small Co. v. American Sugar Refining Co.},\textsuperscript{52} the Supreme Court decided a contract case in which the defendant referred to a criminal statute that the Supreme Court had previously found to be unconstitutionally vague. The Court stated:

[D]efendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction . . . . It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the [vagueness]


The testimony of the Village Police Chief illustrates that the proximity standard would initiate enforcement without regard to other factors or intent. Counsel asked the police chief: "Now if I were to tell you that Exhibit No. 6 was sold in a Flipside Records without any signs but merely there where literature was displayed, where the literature that contained The Child's Garden of Marijuana or whatever other literature they displayed, would it then be a regulated item?" The chief responded: "It would be if an officer could tell me that it can be used or is presumed to be used for illegal cannabis and drugs." Joint Appendix at Record at 67, Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982).

\textsuperscript{50} The Court did not proceed to identify what these additional administrative procedures might be.


\textsuperscript{52} 267 U.S. 233 (1925).
principle.\textsuperscript{53} 

In \textit{Baggett v. Bullitt},\textsuperscript{54} the Court reaffirmed the requirement that all enactments conform to a standard of certainty. The \textit{Baggett} case arose from a Washington state law that forced state employees to sign an oath of loyalty to the United States as a condition of employment. The Court cited \textit{A. B. Small} and held that "[t]he State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution (for perjury), and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession. . . ."\textsuperscript{55}

More recently, the courts have looked at the severity of the penalty to determine whether a civil enactment should be held to the same standard of specificity as a criminal law. In \textit{Jordan v. De George},\textsuperscript{56} the Supreme Court held that "[d]espite the fact that this is not a criminal statute, we shall . . . test this statute under the established criteria of the 'void for vagueness doctrine'" because of the "grave nature" of the penalty involved.\textsuperscript{57} In \textit{Jacobs v. Board of School Commissioners},\textsuperscript{58} the Seventh Circuit noted "the substantial danger of inadequate warnings" and of "arbitrary enforcement," and held that even though a criminal statute was not involved "the penalties for violation are sufficiently grievous to mandate careful scrutiny for vagueness."\textsuperscript{59}

The \textit{A. B. Small-Jordan} line of cases thus suggests that civil as well as criminal statutes must avoid vagueness, at least if grave civil penalties are involved. The Village ordinance therefore should not have been held to a lower vagueness standard merely because it did not impose criminal penalties. The ordinance could have subjected The Flipside to a fine of $39,500 for each day The Flipside was in violation of the ordinance.\textsuperscript{60} Owing to the severity of the penalty, the ordinance should meet a specificity standard equal to that required of a criminal

\textsuperscript{53} Id. at 239.  
\textsuperscript{54} 377 U.S. 360 (1964).  
\textsuperscript{55} Id. at 374. Most recently, the principle was applied in Houseworth v. Glisson, 485 F. Supp. 29 (N.D. Ga. 1978), aff'd, 614 F.2d 1295 (5th Cir. 1980), a case with facts very similar to those of the \textit{Flipside} case. Under a county ordinance, the county finance director attempted to revoke the business licenses of certain retailers whose merchandise included "materials that may be used for the consumption of illegal drugs." Id. at 31. The Supreme Court's reasoning in \textit{A. B. Small} and \textit{Baggett} impelled the district court in \textit{Houseworth} to reach the conclusion that, whether or not the law governed business activities or imposed criminal sanctions, "the principles behind the vagueness doctrine remain the same and the language in Grayned is as important to the present case as any other." Id. at 37.  
\textsuperscript{56} 341 U.S. 223 (1951).  
\textsuperscript{57} Id. at 231.  
\textsuperscript{58} 490 F.2d 601 (7th Cir. 1973).  
\textsuperscript{59} Id. at 605.  
\textsuperscript{60} Joint Appendix to Record at 12, 29, Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc. 455 U.S. 489 (1982). The Flipside's owners removed 79 items from the store's shelves that the owner's thought might come under the ordinance. If The Flipside
The Court also pointed out that economic regulations are often held to a less demanding vagueness standard because there is often recourse to clarifying administrative processes, and because businesses that face economic pressure to carefully plan their behavior can be expected to consult relevant legislation before they act.

The Flipside, however, was not able to clarify the meaning of the regulation, either by resort to an administrative process or by its own inquiry. No interpretive rules had been adopted by the Village to clarify the ordinance, and when The Flipside made its own inquiry of the Village Attorney about which items in the store the ordinance applied to, the Village Attorney could not state what merchandise was covered. Nor did The Flipside face economic pressures to investigate beforehand; the items it sold that were alleged to be drug paraphernalia were only a sideline to its primary inventory of records, tapes, and numerous other items. Because neither of the conditions justifying application of a less strict vagueness test were present in The Flipside's situation, the less demanding standard may have been unwarranted.

Finally, in evaluating the "designed for use" and "marketed for use" standards, the Supreme Court determined that each contained a scienter requirement. The Court has long recognized that a scienter requirement may mitigate a law's vagueness, both in respect to the ade-

61. Moreover, the Village conceded that the ordinance was "quasi-criminal" because of the stigmatizing effects of the purchaser's log. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. at 499 n.16. Because the effects of the ordinance were stigmatizing and the penalty was severe, a strict vagueness test may have been warranted.


65. See supra note 18 & accompanying text.

66. Such economic pressures, which arise from the nature of the business activity, are to be distinguished from penal pressures that arise from the threat of legal punishment. See, e.g., United States v. National Dairy Prod. Corp., 372 U.S. 29 (1963). The former may well lead an individual to seek clarification of statutes the coverage of which is unclear. The mere existence of a penal pressure such as the fine faced by The Flipside, without notice that one is or may be subject to the law which imposes it, could hardly be expected to induce individuals to seek clarification of such laws. Cf. Lambert v. California, 355 U.S. 225, 228 (1957) (city ordinance requiring ex-felons within city limits to register with chief of police violates due process clause of fourteenth amendment when applied to person who has no actual knowledge of duty to register).
quacy of notice to the complainant that his conduct is prohibited and to the adequacy of standards to prevent arbitrary and discriminatory enforcement by law enforcement officials.

As one circuit court has noted, "[t]here is concern that it is difficult to identify drug characteristics that distinguish lawful purposes from unlawful purposes." Consequently, "the courts have generally required that the statutory definition of drug paraphernalia include a subjective intent on the part of the . . . seller." By focusing on intent, courts can distinguish retailers selling items for non-legal purposes from innocent retailers who sell the exact same items for legal purposes.

The Supreme Court noted that the Village's "designed for use" standard was the subject of considerable confusion on the part of the Seventh Circuit in *Flipside* in the face of multiple alternative meanings. The appellate court thought that some of these interpretations, especially those not incorporating an intent element, were unconstitutionally vague.

The Supreme Court, however, construed the "designed for use"

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68. See *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972); see also Note, supra note 4. at 453.
70. *Id.*
72. The appellate court found the "design for use" standard objectionable because items deemed by the guidelines to be "designed for use" with illegal substances had innocent uses as well:

The license guidelines imply that items "designed" for use with drugs mean those items which are inherently suited only for drug use, and are thus covered by the ordinance regardless of the manner of display or avowed intent of the retailer. For example, the guidelines state that the "roach clips" are "designed for use with illegal cannabis or drugs and therefore covered." But the guidelines do not define "roach clip." Consequently, stocking any item that could possibly be used as a roach clip, such as an alligator clip or bobby pin, could subject a retailer to the licensing requirement. In reality, it is inconceivable that sale of these innocent items would subject a hardware store or drugstore to the burdens of the license fee and sales register, as well as to the label of "drug paraphernalia store." Perhaps the village wishes to draw a line between items which inherently are roach clips and "innocent" items merely used as roach clips. But neither the ordinance nor the guidelines draws this distinction, and we are uncertain as to whether any definition of a roach clip could draw such a distinction based on design alone.

The *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d at 380-81 (emphasis in original). The appellate court also noted that "designed for use" could signify only devices that have no use or function other than to aid in the ingestion of illegal cannabis or drugs; or, it could refer to any device that could be altered from its normal function to become a makeshift drug device. *Id.* Because neither the ordinance nor the guidelines clarified the meaning of "designed for use," the appellate court found the phrase to be impermissibly vague.
standard to contain an intent element, declaring that the standard referred to the structural characteristics of an item intended by the manufacturer.\(^73\) These items were deemed by the ordinance to be drug paraphernalia \textit{per se}, \textit{i.e.}, their only purpose was to serve as drug paraphernalia.\(^74\) This standard thus satisfied the two purposes of \textit{Grayned}: the retailer was afforded fair warning that specific items were automatically drug paraphernalia; and, arbitrary and discriminatory enforcement by the police was avoided because the ordinance deemed the items to have no legal use and an officer, upon finding such items for sale, knew with certainty that a violation had occurred.

Consideration of the "marketed for use" standard's operation before and after the Court's interposition of a scienter requirement shows that the addition of an intent element did little to alleviate the standard's vagueness. As defined by the plain language of the ordinance and guidelines, the "marketed for use" standard originally operated as a statutory presumption devoid of any intent element.\(^75\) The Court has recognized the right of legislative bodies to devise such statutory presumptions as rules of evidence.\(^76\) However, in the case of the Village ordinance, the fact proved (proximity) was itself too vague a standard to reasonably give rise to the fact presumed (drug paraphernalia).\(^77\) The guidelines did not define proximity. The term itself carries an inherent vagueness unless further clarified.\(^78\) The lack of an objective reference point created at best a strict liability statute in which the intent of the retailer becomes irrelevant, and at worst left the application of the ordinance to the subjectivity of the enforcer, giving rise to the dangers of arbitrary and discriminatory enforcement.

Even with an objective reference point, a proximity standard

\(^73\) A finding of manufacturer's intent is not equal to a finding of seller's intent. Were the Village ordinance a criminal enactment, there would be little question as to the law's invalidity. A statute is not unconstitutionally vague if it requires the defendant's specific intent to violate the law. See Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952).

\(^74\) Examples of \textit{per se} or "designed for use" articles of drug paraphernalia as defined by the guidelines to the Village ordinance include paper of colorful design or with names oriented for use with illegal drugs, roach clips, and literature encouraging illegal drug use. The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d at 379.

\(^75\) See supra note 16 & accompanying text.


\(^77\) See Leary v. United States, 395 U.S. 6 (1969), wherein the Court upheld the use of statutory presumptions so long as there is a "rational connection" between the "facts proved" and the "facts presumed." \textit{Id.} at 33 (citing Tot v. United States, 319 U.S. 463, 467 (1943)).

\(^78\) Pipes displayed next to colored rolling papers are probably covered by the ordinance; pipes displayed at the opposite end of the store are probably not covered. It is arguable whether pipes are covered if displayed three feet away from such paper. See The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 455 U.S. at 492 n.3.
would still have been unreasonable and arbitrary. Items listed in the
guidelines could be marketed within a specifically defined proximity to
each other, erroneously giving rise to a finding that they were drug par-
aphernalia. Such items could have been marketed close to each other
as a "point of purchase" marketing strategy or to prevent shoplifting;79
yet, under a proximity standard, they would have been presumed to be
drug paraphernalia even absent actual intent to market them as such on
the part of the seller.80

The consequence of upholding the constitutionality of such a
vague standard is that the dangers of arbitrary and discriminatory en-
forcement remain unabated, and the concerns of the Grayned Court are
not met.81 The testimony of the Village legislators and the chief law
enforcer demonstrated the danger of arbitrary and discriminatory en-
forcement arising from the presumption.82 Because a finding of prox-

79. The Flipside asserted that certain items alleged by the Village to be drug paraph-
ernalia were placed close to each other by a cash register because such items were often
purchased on impulse by consumers while standing in line. Still other items were placed
together near the register because they were small in size and easily shoplifted. By placing
them together, store clerks could keep an eye on them. Joint Appendix of Record at 43,
These marketing strategies in no way reflect the seller's intent as to the use of these items
by its customers.

80. Owing to the inherently vague nature of the proximity standard, no court prior to
the Flipside case had allowed a proximity standard by itself to be determinative of the fact
that an item was intentionally "marketed for use" as drug paraphernalia. The Eighth Cir-
cuit upheld a drug paraphernalia ordinance as constitutional, in part because a finding of
proximity was but one step in the prosecutorial process. The court stated: "For example,
Section 2(3) provides that authorities shall consider that "[T]he proximity of marijuana . . .
outside of a store to roach clips inside the store might be considered as one factor in assess-
ing whether the clips were intended as drug paraphernalia by the store owner." Casbah, Inc.
v. Thone, 651 F.2d 551, 560 n.11 (8th Cir. 1981) (emphasis in original). Once proximity was
found, "the focus of inquiry [had to] necessarily shift to the intent of the individual in-
volved." Id. at 560. The Casbah court permitted a similarly vague proximity standard to
stand insofar as it merely triggered an inquiry into the intent of the individual accused. By
contrast, the Village of Hoffman Estates ordinance does not allow for such a change in the
focus of inquiry, but allows intent to be presumed from a finding of proximity. Other courts
have upheld drug paraphernalia laws in which proximity was but one factor of several listed
as contributing to an inference that an item was marketed as drug paraphernalia. See Hejira
Corp. v. MacFarlane, 660 F.2d 1356, 1356 (10th Cir. 1981) (one of eleven factors); Record
Revolution No. 6, Inc. v. City of Parma 638 F.2d 916, 920 (6th Cir. 1980) (one of fourteen
factors). Thus, both jurists and legislators recognized that proximity can at best give rise to
an inference that an item was marketed as drug paraphernalia.

81. See supra note 27 & accompanying text.

82. When asked by counsel "what types of pipes are drug paraphernalia . . .", the
Village President answered, "I rely on those people who know what drug paraphernalia is,
per se." Joint Appendix of Record at 84, Village of Hoffman Estates v. The Flipside, Hoff-
under the purview of the ordinance, it was stipulated that the Village Police Chief would
testify that such a determination would be left, in large part, to the judgment of detectives on
his staff. Id. at 34. The record demonstrated an inability to use the proximity standard
imity was left in the hands of enforcement officials, the presumption in the Village ordinance that “proximity equals paraphernalia” was flawed in that it delegated a judicial function to executive officials.83

In its attempt to adopt a saving construction of the “marketed for use” standard, the Supreme Court found that this standard contained an element of intent, and, additionally, that an item could be “marketed for use” with illegal cannabis or drugs if the seller intentionally displayed items in a manner that encouraged illegal drug use.84 The Court construed the standard in this manner despite the language of the ordinance and guidelines that indicated that “proximity” alone would support a finding of “marketed for use.”85

Unlike the “designed for use” standard, the Court’s finding of a scienter element in the “marketed for use” standard was an inappropriate response. As Professor LaFave notes,86 vague statutes may be of two types. Uncertain language can result in a statute with limited alternative meanings, each of which is sufficiently definite but none of which is specifically imported into the statute, or the language may be so uncertain that the range of meanings cannot be discerned at all. The “designed for use” standard was an example of the former.87 When there are such multiple meanings, each of which is certain enough, there may be sufficient fair warning to justify subsequent construction and validation of the statute.88 This is what the Supreme Court did with the “designed for use” standard: from among many meanings, it construed the standard to be one that contained an intent element.

On the other hand, when the language is so uncertain that no standard can be ascertained at all, the appropriate remedy is to invalidate the statute.89 When no readily apparent construction suggests itself as a vehicle for rehabilitating the statute, the Court will not endeavor to construe the statute as constitutional because the constitutional infirmi-
ties are too great. By finding that the "marketed for use" standard contained a scienter requirement, the Court held that an item may be found to be drug paraphernalia if intentionally placed in proximity to certain other items. However, the criterion of "proximity" itself remains impermissibly vague. The Court in Screws v. United States stated that "[t]he requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain." Under such a construction the statute still provides no ascertainable standard of liability; a retailer could be held liable if a trier of fact later concludes only that the retailer displayed a certain item close to another item. Such a conviction would violate the retailer's due process rights to fair warning. Because a "marketed for use" standard hinging on proximity, even with a requirement of intent, provides no ascertainable standard at all, the Court should have voided the statute.

The Court concurrently adopted a construction of the "marketed for use" standard that was equivalent to a "totality of all the facts and circumstances" test. However, by declaring that the surrounding facts and circumstances gave rise to a finding of "marketed for use," the Court introduced several new factors. By incorporating such new factors into the standard, the Court went beyond the scope of "readily apparent constructions" of a standard expressly limited to proximity.

90. In United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), the Court declared the cardinal principle that it would not render definite a vague statute when the constitutional infirmities were too great. Id. at 369. Such a situation could arise when the uncertain language is so vague that no standard is discernible at all. Dombrowski v. Pfister, 380 U.S. 479, 491 (1965).

91. See supra notes 77-78 & accompanying text.

92. 325 U.S. 91 (1945).

93. Id. at 102.

94. Id. at 97.

95. See supra text accompanying note 44.

96. Screws v. United States, 325 U.S. at 97. The Court's action has a basis in precedent and indeed is identical to the technique employed to save an otherwise vague statue in the Screws case. In Screws, a Georgia sheriff beat a black prisoner to death, and was subsequently charged with violating 18 U.S.C. § 52, which prohibited "willfully" depriving another "of any rights, privileges or immunities secured or protected" to him by the fourteenth amendment, on account of color or race. Id. at 93. The Court determined that the statute was flawed by the second type of vagueness, i.e., no standard of conduct was discernible at all because the courts were constantly interpreting the due process clause of the fourteenth amendment; consequently a person could be sent to prison if he did an act which some court later held violated a person's rights to due process. Moreover, finding an intent requirement did nothing to render the statute less uncertain, since a person is still deprived of fair warning even if he intentionally commits an act that some court could later determine violated a person's due process rights. While the proper remedy ordinarily would have been to void the statute, the Court reluctantly engaged in the extraordinary action of adopting a meaning outside the scope of readily apparent constructions by declaring that a requirement of a specific intent to deprive a person of a federal right "made definite by decision or other rule
The Court thereby "created" a constitutionally valid ordinance, though voiding the ordinance may have been a better solution since it was practical for the legislative body to draft a more precise ordinance. Such a solution would also avoid allegations of improper judicial intrusion into the legislative domain, which this decision may well raise.

Conclusion

The Flipside Court declared that when an enactment does not reach constitutionally protected conduct, several factors may permit the ordinance to be subject to a less strict vagueness analysis. Specifically, greater vagueness may be permissible when an ordinance contains a scienter requirement, imposes only civil penalties, or is an economic regulation. In upholding the Village ordinance, the Supreme Court ignored its own line of cases requiring that civil enactments be reviewed for vagueness under the same standards as criminal statutes. In addition, the traditional reasoning behind allowing greater vagueness in economic regulations was not applicable to The Flipside's situation. Finally, the Court may have unjustifiably rehabilitated the ordinance's "marketed for use" standard in violation of principles previously ar-

of law" saves the Act from any charge of unconstitutionality on the grounds of vagueness. *Id.* at 103. As Justice Douglas made clear in the majority opinion, the Court's primary concern was with preserving a statute that the Court felt to be vital to enforcement of the fourteenth amendment. Justice Douglas declared that if the statute were to fall for vagueness, other decisions under the fourteenth amendment could also be found to have a "similar lack of specificity." *Id.* at 100. In *Screws*, two competing constitutional values were in fundamental conflict. In that extreme situation, the Court decided that the guarantees of equal protection under the fourteenth amendment should prevail over the due process considerations behind the vagueness doctrine. In the *Flipside* case, only one constitutional issue was involved: The Flipside's right to fair warning of prohibited conduct under due process. Unlike in *Screws*, the government interest was not a competing constitutional claim, but an interest in curtailed the use of drugs. Moreover, in *Screws* the Supreme Court interpreted a *federal* statute. The Court thus had much more freedom to adopt a saving construction. *Cf.* Coates v. Cincinnati, 402 U.S. 611 (1971), in which the Supreme Court held violative on its face a municipal ordinance making it a criminal offense for three or more persons to assemble on sidewalks and conduct themselves in a manner annoying to persons passing by. *Id.* at 614. Noting that conduct which annoys some people may not annoy others, the Court found the ordinance vague, "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.* While the Court could have itself adopted a definition of "annoy" as it did in adopting a definition of "due process rights" in *Screws*, the Court in interpreting a state or municipal statute is limited to giving the statute a reasonable interpretation, one within the scope of readily apparent constructions.

98. An exploration into the murky waters separating judicial and legislative powers is beyond the scope of the Comment. *See generally* U.S. CONST. art. II, § 2; THE FEDERALIST Nos. 45, 47 (J. Madison).
ticulated by the Court. The Supreme Court's questionable application of the various vagueness doctrines will substantially limit a plaintiff's ability to successfully challenge a statute on vagueness grounds.

Although the Court saved a statute whose worthwhile goal is to aid the fight against drug abuse, the techniques used by the Court to achieve this end should not be applied to other enactments. If the vagueness analysis of *Flipside* is broadly applied, plaintiffs faced with a law whose meaning or coverage is unclear may now find a successful pre-enforcement challenge to the law to be unobtainable.100

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100. Pre-enforcement challenges also face the requirement that the plaintiff show the law to be vague in all its applications. *See supra* note 26 & accompanying text. Plaintiffs are able to receive broader and more in-depth consideration of their claims in a post-enforcement action since they need not show the law to be vague in all its applications. *Id.*

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