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PARAPHERNALIA FOR MARIJUANA AND HASHISH USE: POSSESSION STATUTES AND INDIANA’S PIPE DREAM

INTRODUCTION

The unprecedented growth of illicit drug use in this country has prompted legislators to revamp statutory methods of drug control. As a result of the renewed interest in this area, a majority of states have adopted the Uniform Controlled Substances Act since 1970. Patterned after the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, the Uniform Act provides a comprehensive and flexible system for coordinating state and federal drug control. This Act updates methods of regulating legitimate drug handlers, thereby providing nationwide control over drugs which might be diverted into illicit traffic. In addition, the Act prohibits unauthorized manufacture, sale and possession of controlled substances. In adopting the Uniform Act, however, each state prescribes the applicable criminal penalties and alters its provisions to suit particular enforcement needs.

Some states have strengthened enforcement of the Uniform Act’s provisions by criminalizing activity surrounding drug use. Such ancillary drug legislation includes unique procedures for narcotics enforcement, such as forfeiture of vehicles being used in illicit drug traffic. Legislators have also created new criminal offenses, including possession of hypodermic needles for illegal drug injections, maintaining a narcotics nuisance where drugs

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1. By 1975, the Uniform Controlled Substances Act had been adopted in at least 43 jurisdictions. Table of Adopting Jurisdictions, 9 U.L.A. 24 (Supp. 1975).
4. UNIFORM CONTROLLED SUBSTANCES ACT §§ 301-08.
5. Id. at §§ 401-08.
6. The legislation is “ancillary” in the sense that its primary thrust is to support the basic legislation against drug possession and sale. The term “ancillary” is employed and discussed in Corcoran, Compilation & Analysis of Criminal Drug Laws in the 50 States and Five Territories, in Drug Use in America: 2d Report of the National Commission on Marihuana and Drug Abuse, III Appendix—Technical Papers 424 (1973).
are stored or consumed, and being a narcotics vagrant, i.e., a drug user who wanders about at night without having a "good" explanation for his activity.\textsuperscript{10}

Many of these ancillary statutes, however, have not survived constitutional challenge. For instance, some vehicle forfeiture laws have been found lacking in procedural due process.\textsuperscript{11} Hypodermic statutes have been deemed an unreasonable interference with property;\textsuperscript{12} narcotics nuisance and vagrancy statutes have been overturned for vagueness.\textsuperscript{13}

This note examines two types of ancillary statutes relating to drug paraphernalia:\textsuperscript{14} the first banning possession of objects used to smoke drugs such as marijuana and hashish, the second prohibiting manufacture or sale of this type of drug paraphernalia.

Initially, laws which prohibit pipe possession will be examined, their purposes and their constitutional defects considered. Currently, five states make it a criminal offense to possess a pipe or a similar object when the possessor intends to use it to smoke a controlled drug.\textsuperscript{15} These criminal statutes can best be understood by reviewing the ineffectiveness of earlier paraphernalia statutes against possessors of non-hypodermic paraphernalia. In this light, it can be shown that problems arose under the older statutes because of the very nature of the objects used for smoking illegal drugs. The nature of this type of drug paraphernalia

14. "Paraphernalia" in this context may be defined as "things used in some activity; equipment; apparatus; trappings; gear." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1061 (College Ed. 1966).
PARAPHERNALIA continues to create problems under the newer, more specific pipe statutes. After the purpose behind existing pipe possession statutes in these five states is identified, the laws will be scrutinized in light of due process standards for statutory definiteness. This note proposes that the present pipe possession statutes are unconstitutionally vague in that they fail to provide either notice to pipe possessors or adjudicative guidelines for law enforcers. Failure to provide adjudicative guidelines is particularly objectionable because of the crucial role which pipe possession laws play in justifying unreasonable searches of suspected drug users.

Secondly, the discussion focuses on the purposes and constitutional infirmities of Section 9 of Indiana's Controlled Substances Act, which prohibits manufacture or sale of paraphernalia for marijuana, hashish or cocaine use. Although Section 9 was intended to prevent the growth of drug abuse, it is, in comparison with other paraphernalia sale statutes, a totally ineffective and unreasonable means to prevent the use of controlled substances. As such, the statute is an arbitrary and irrational exercise of the police power to control drugs, violating the due process clause of the fourteenth amendment. In addition, Section 9 invites selective, discriminatory enforcement because it fails to provide adequate notice or adjudicative guidelines, violating due process definiteness standards.

PARAPHERNALIA POSSESSION STATUTES

Five states have laws which prohibit possession of pipes and other paraphernalia for non-heroin drug use. This section examines these recently enacted possession statutes, their language, purpose and impact in justifying drug searches. In order to understand these pipe laws, it is helpful to consider why other drug paraphernalia laws proved ineffective against possessors of paraphernalia for marijuana and hashish use.

Ineffectiveness of Prior Statutes

Statutes specifically prohibiting possession of paraphernalia for marijuana or hashish use are an extension of earlier laws which proscribe possession of hypodermic instruments. Many states have statutes outlawing possession of needles and syringes which are intended for illegal drug injection. Yet the very lan-

17. See note 15 supra.
18. See note 8 supra.
guage of most of these provisions renders them ineffective against possessors of non-hypodermic drug paraphernalia. For example, in Kraft v. State,\(^{19}\) the Maryland hypodermic statute was held not to proscribe possession of a marijuana pipe. In Kraft, an expert narcotics officer testified that the pipe, made from metal fittings and containing marijuana residue, was a type frequently used to smoke marijuana and seldom used for tobacco. Notwithstanding this evidence, the court rejected the state's claim that the pipe was contraband. Noting that the statute prohibited only instruments used for administering drugs "by hypodermic injections,"\(^{20}\) the court concluded that the law's clear language precluded prosecution for the possession of marijuana paraphernalia.

Where it is less clear from the statutory language whether pipes or other non-hypodermic implements are proscribed, prosecutors have had only mixed success when using the statutes against possessors of marijuana paraphernalia. In New York, a series of prosecutions for possession of non-hypodermic instruments resulted in serious disagreement among courts about the legislature's intent to include pipes in the statute. The ambiguous statute prohibited possession of a hypodermic needle or syringe, "or any instrument or implement adapted for the administration of narcotic drugs."\(^{21}\) While one court categorically excluded pipes from the purview of the statute, others strained to include pipes used for marijuana smoking.

The narrowest view of the New York statute was taken in People v. Berger.\(^{22}\) The prosecution in Berger contended that the presence of marijuana residue in an ordinary briar pipe made it an "adapted instrument" within the scope of the statute. Rejecting this argument, the Albany County Court emphasized that even marijuana residue does not transform the basic nature of such pipes which are used by countless persons for tobacco smoking.\(^{23}\) Considering the "any instrument" clause, the Berger court declared:

> It is inconceivable that the Legislature intended to proscribe the use of or possession of ordinary tobacco pipes

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20. Id. at 171, 305 A.2d at 491.
23. Id. at 476, 305 N.Y.S.2d at 790.
except with a prescription by a physician. To extend the
(statute) to the point of making ordinary tobacco pipes
illegal goes beyond reasonable interpretation of the law. 24

Thus, ordinary pipes, even with marijuana residue, were held not
to be "instruments or implements adapted" for drug use.

While other New York courts rejected the restrictive reason-
ing of Berger, they were unable to set a standard for determining
when a pipe was "adapted" for drug use. In People v. Queen, 25
the Duchess County Court held that the water pipes in question
were prohibited by the statute because they had been "adapted"
for drug use. The Queen court reasoned that the legislature did
not intend to prohibit water pipes per se, since they are frequently
used only for ornamentation. However, once such a pipe had been
"adapted" for narcotics purposes, the pipe, normally a harmless
instrument, was converted into a "dangerous object." 26 The court
held that to adopt the narrow view announced in Berger, restrict-
ing the statute to hypodermic instruments, would frustrate the
legislative attempt to alleviate the problems of drug use. 27 How-
ever, while holding that an "adapted" water pipe was within the
scope of the statute, the Queen court provided no rules or guide-
lines for determining what would constitute illegal adaptation of
an otherwise innocuous pipe.

A second New York decision rejecting the narrow view of
Berger also failed to set a standard for determining what would
make a pipe illegal paraphernalia. In People v. Landon, 28 the Cort-
land County Court upheld a conviction for possession of an ordi-
nary tobacco pipe which contained a wire filter with marijuana
residue. The court, unable to state as a matter of law that a wire
filter alone would make an ordinary pipe illegal, left that deter-
mination for the trier of fact. 29 Hence, both the Queen and
Landon courts made specific determinations regarding the ap-
lication of the statute without enunciating any criteria to be
used in deciding what instruments were within the purview of
the statute.

A careful examination of the language of the New York
statute suggests that the Berger reasoning, excluding non-hypo-
The possessory character of hypodermic paraphernalia, was closer to the intent of the legislature. The statute first mentioned specific items—hypodermic needles and syringes—before continuing to more general language—"other instrument or implement." If one applies the *ejusdem generis* rule of statutory construction,\(^{30}\) it is clear that the New York statute was limited to paraphernalia accompanying the use of drugs by hypodermic injection.\(^{31}\) In fact, a subsequent amendment of the statute limited the scope to hypodermic needles and syringes, indicating that the legislature intended to correct the ambiguity.\(^{32}\)

Although the New York amendment clearly determined that pipes are not contraband in that state, courts in other jurisdictions questioned whether pipes could be deemed illegal narcotics paraphernalia. For example, the District of Columbia, which does not have a specific drug paraphernalia statute, has a unique alternative technique for prohibiting possession of hypodermic instruments. The District of Columbia's general "implements of crime" statute prohibits possession of any "instrument, tool, or other implement . . . that is usually employed . . . in the commission of any crime."\(^{33}\) Although the statute itself is silent as to criminal intent, courts have construed it to require proof that the possessor intended to use the implement in a crime. There are two ways to establish the requisite criminal intent. Intent may be inferred either from circumstances surrounding the possession, or from possession of implements which themselves give rise to "sinister implications" of criminal purpose.\(^{34}\) Courts in the District of Columbia have consistently recognized that non-prescription possession of hypodermic needles or syringes gives rise to "sinister implications" that the possessor intended to use them in the crime of illegal drug injection.\(^{35}\)

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30. According to the rule, "where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words . . . are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." BLACK'S LAW DICTIONARY 608 (rev. 4th ed. 1968).

31. In People v. Gordon, 71 Misc. 2d 540, 336 N.Y.S.2d 753 (Batavia County Ct. 1972), the court held that the statute was restricted to hypodermic instruments. The decision rested on the *ejusdem generis* rule and the subsequent amendment.


Applying the general implements statute to non-hypodermic paraphernalia, however, presents certain problems. In *Williams v. United States*, the District of Columbia Municipal Court of Appeals held that a small wooden pipe containing marijuana residue did not raise the “sinister implications” necessary to make it an implement of crime. The court suggested, however, that further evidence as to the shape or size of the pipe or the significance of the residue could present “sinister implications” and justify a decision that a pipe was an implement of crime. In addition, the decision left open the possibility that mere possession of a pipe could be illegal, if the circumstances surrounding possession implied a criminal intent to use it for smoking illegal drugs.

Thus, attempts to use various drug paraphernalia statutes against non-hypodermic paraphernalia have been frustrated, primarily because of the nature of the objects themselves. Paraphernalia for marijuana and hashish use are subject to numerous beneficial uses; they cannot be restricted, like hypodermic instruments, to those with medical prescriptions. Moreover, pipes used to smoke drugs are not inherently sinister; they cannot be distinguished from ordinary tobacco pipes. Other states have enacted statutes specifically designed to include non-hypodermic paraphernalia. However, these statutes face similar problems raised by the nature of the objects they are intended to proscribe.

*Existing Pipe Possession Statutes*

Presently, five states have laws which are clearly intended to reach non-hypodermic paraphernalia. While these more specific statutes avoid the questions of legislative intent which plagued the general implements of crime and hypodermic statutes, their constitutional validity is questionable. Attempts to classify such diverse objects as might be used for marijuana and hashish consumption have resulted in statutes which violate due process standards of definiteness. This vagueness is particularly

37. Id. at 289.

In State v. Harper, 510 S.W.2d 749 (Mo. App. 1974), the court held that the Missouri paraphernalia statute, Mo. Ann. Stat. § 195.020 (1972), was broad enough to encompass “hash pipes.” However, the statute was held nugatory because no penalty was provided.
39. See notes 21-37 *supra* and accompanying text.
intolerable, considering the role these statutes play in justifying drug searches which violate the fourth amendment.

The language of all five pipe possession statutes is strikingly similar. The California statute is representative:

It is unlawful to possess an opium pipe or any device, contrivance, instrument or paraphernalia used for unlawfully injecting or smoking . . . a controlled substance.\(^4^0\)

Alabama's statute is identical,\(^4^1\) while Indiana's,\(^4^2\) Mississippi's\(^4^3\) and Florida's\(^4^4\) require proof of intent to violate other narcotics laws. In each state, the paraphernalia offense is a misdemeanor, generally carrying the same penalty as the first offense for possession of the drug itself.\(^4^5\)

There are several reasons which may have prompted the legislatures of these five states to draft pipe possession laws. First, the paraphernalia statutes bolster efforts to enforce drug possession laws by expanding police opportunities to arrest and search drug users.\(^4^6\) If a pipe used to smoke marijuana is itself contraband, police may arrest drug users for the paraphernalia offense even though the drug has been destroyed or consumed. The statute also permits arrests in group situations where only one person may have actual possession of the drug;\(^4^7\) others in the group may be arrested for possessing the objects used to smoke the drug. Pipe possession laws may also be intended to serve a preventative function. Indiana legislators, in enacting a pipe statute, were motivated by the belief that distinctive paraphernalia designed for marijuana and hashish smoking "tends to lure more

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43. MISS. CODE ANN. §§ 41-29-105 and 139 (1973).
45. For example, in Indiana, first offenses for both marijuana possession, IND. CODE § 35-24.1-4.1-11(b) (1975), and pipe possession, IND. CODE § 35-24.1-4.1-8(b) (1975), are misdemeanors, with maximum penalties of one year imprisonment and a five hundred dollar fine.
46. For a brief discussion of the use of various ancillary drug statutes in law enforcement, see Corcoran, supra note 6, at 245.
47. Possession of drugs, in the legal meaning, requires more than mere proximity to the drug or presence on the property where the drug is found. See Murray v. United States, 403 F.2d 694 (9th Cir. 1968).
young people into using these drugs." The legislators hoped to prevent drug use by removing what they felt was a "significant stimulus to use illegal drugs."

In drafting pipe laws to implement these purposes effectively, legislatures face problems in including the wide range of objects which can be employed in non-hypodermic drug use. Marijuana, for instance, can be smoked in elaborate water pipes, or pipes which electrically cool the smoke, as well as in ordinary cigarette papers and common tobacco pipes. Hashish smokers may prefer small metal pipes, "bongs" or "chillams," yet an ordinary corncob pipe is adequate for their purposes. Attempting to include such diverse objects in the statutes, legislators have not listed specific items, but have instead resorted to such nebulous terms as "articles," "devices," or "implements." This broad language, together with the wide range and the normally innocent uses of most of the objects, suggests that the statutes are inherently vague. In order to determine whether the pipe possession statutes are so vague as to violate constitutional standards for definiteness, it is helpful first to review due process requirements for statutory definiteness.

Due Process Definiteness

The constitutional doctrine that statutes must be definite is grounded in the theory that an enactment may be so vague and indefinite that it would be a denial of due process to penalize a person for violating it. To determine whether a statute is so vague as to violate due process, two basic tests are applied. One requires that persons be given notice of what conduct is prohibited; the second is that the statute be sufficiently definite to provide guidelines for enforcement and adjudication.

49. Letter from Leslie Duvall to M. Gienapp, Sept. 18, 1975, on file Valparaiso University Law School Library.
50. Bongs and chillams (or "chillums") are types of pipes which often contain water for cooling the smoke. See HIGH TIMES magazine, published bimonthly by Trans-High Corp., New York, for advertising, articles and drawings of drug paraphernalia.
51. All five statutes use similar terms. See note 38 supra.
The traditional standard for measuring the definiteness of a criminal statute has been the notice requirement.\(^53\) This notice requirement is premised on the assumption "that man is free to steer between lawful and unlawful conduct."\(^54\) For this freedom to be meaningful, the terms of a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."\(^55\) Vague and indefinite language provides no warning and may thus trap those who act innocently.\(^56\)

A statute may be relieved of its objectionability for failing to provide notice if it punishes only "willful" conduct.\(^57\) As the Supreme Court emphasized in *Screws v. United States*,\(^58\) "willfulness" in this context means more than criminal intent; it denotes a bad purpose or an evil motive to accomplish that which the statute condemns.\(^59\) Because such a law cannot become a trap for those who act in good faith, the notice function of due process definiteness becomes less important. "A mind intent upon willful [conduct] is inconsistent with surprised innocence."\(^60\) As long as the statute, in punishing willful conduct, satisfies the second requirement of definiteness by providing adjudicative standards, it will be upheld.

The second test of due process definiteness, requiring guidelines for enforcement and adjudication, has been emphasized in recent cases involving indefinite criminal statutes. Personal, non-commercial conduct is not normally plotted out in advance; individuals do not generally consult criminal statutes before pursuing criminal conduct. Therefore, the notice test of definiteness is less


\(^{57}\) This facet of the notice requirement of definiteness was fully explored in *Screws v. United States*, 325 U.S. 91 (1945). The defendants were charged under a statute which punished those who, under color of law, willfully deprived a person of "any rights, privileges, or immunities secured or protected by the Constitution." See Act of Mar. 4, 1909, ch. 321, § 20, 35 Stat. 1091. They challenged the statute for vagueness, alleging that it provided no notice of what acts were prohibited. The Supreme Court upheld the statute since it punished only willful conduct, and therefore the accused could not be said to suffer from lack of notice. *Accord*, United States v. Ragen, 314 U.S. 513 (1942).

\(^{58}\) 325 U.S. 91 (1945).

\(^{59}\) Id. at 101.

\(^{60}\) United States v. Ragen, 314 U.S. 513, 524 (1942).
crucial and it is more meaningful to consider whether a criminal statute provides guidelines and limitations for those who apply the law.\textsuperscript{61}

The objective of the adjudicative test is to prevent selective enforcement and arbitrary convictions by setting out guidelines and limitations for those who apply the law.\textsuperscript{62} Accordingly, statutes must provide some ascertainable standard for determining what conduct is criminal. The constitutional infirmity of a vague statute is that it “allows policemen, prosecutors, and juries to pursue their personal predilections.”\textsuperscript{63} Indefinite language, creates an unclear, variable standard of guilt for the fact-finder, or permits an unduly broad discretion in the administrator, [and] the possibilities of an even-handed application of law and of effective judicial review are substantially decreased.\textsuperscript{64}

Because selective enforcement, arbitrary and inconsistent convictions are wholly at odds with fundamental notions of due process, indefinite statutes which invite such results are held void-for-vagueness.\textsuperscript{65}

Applying this analysis of due process definiteness to existing pipe possession statutes, it is clear that they are unconstitutionally vague. Although the same conclusion must be reached as to all five laws, the language of the Indiana statute may be used to illustrate the constitutional defects in pipe possession laws. The statute reads:

A person is guilty of unlawful possession of paraphernalia if with intent to violate any provision of [the Controlled Substances Act] he possesses any instrument or contrivance designed for smoking . . . a controlled substance.\textsuperscript{66}

The law requires proof that the person intend to sell or possess a controlled drug, and that he possess an object “designed for”

\begin{footnotes}
\item[64] Lewis, The Sit-In Cases: Great Expectations, 1963 SUP. CT. REV. 101, 110.
\item[65] See note 62 supra.
\end{footnotes}
smoking a controlled drug, including marijuana and hashish. Since the law applies only to persons who have a particular intent, the reasonableness of notice must be measured subjectively from that person's viewpoint. He is warned only that he may not possess an "instrument . . . designed for smoking" an illegal drug. He is given no standards to determine whether any object in his possession is, in fact, "designed for" that purpose.7 May he not possess a corncob pipe, an electrical clamp, a water pipe used for ornamentation? The language of the statute is so indefinite that it gives no warning of what objects must be avoided. Because it forbids conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning, [it] violates the first essential of due process."68

It may be argued that the absence of notice is rectified because the pipe statute requires a criminal intent. However, the inclusion of an intent requirement does not bring the statute within the Screws exception for statutes requiring willfulness.69 Because the defendants in Screws had an evil motive in violating the law, they did not act in good faith and could not claim surprise at discovering their conduct was unlawful. While those who intend to violate narcotics laws cannot claim innocence, they need not act with an evil motive to violate the pipe possession statute. The statute punishes possession of an object, a pipe, coupled with an intent to violate another law, possession of illicit drugs. It does not punish willful possession of a pipe. Even a good faith effort to avoid possessing objects "designed for" drug use may prove futile. The Indiana pipe statute is so vague that it may trap those who act innocently because it does not provide fair warning of the forbidden conduct.

The statute is also defective under the second, adjudicative, test of definiteness. By considering the pipe statute from the viewpoint of those who must enforce the law, it is clear that no

67. The next section of the Indiana statute, IND. CODE § 35-24.1-4.1-9 (1975), prohibiting sale of paraphernalia, lists a number of objects which are "designed for or intended for use in" smoking drugs. Although the list is to be used only for the sale section, there is a danger that the same list could be used to supply the design and intent elements of the possession section. The danger exists because both statutes apply to the same type of objects. If the list is employed in possession cases, the possessor of any of the enumerated items would be forced to overcome the legislative presumption of intent to prove his innocence. See notes 127 and 151 infra and accompanying text.


69. See notes 57-59 supra and accompanying text.
ascertainable standards are enunciated for determining when the statute is violated. How is a police officer to know that a particular pipe is "designed for" smoking marijuana and not for smoking tobacco? On what basis could a jury say that the officer's judgment was correct or incorrect? The statute simply provides no guidelines for enforcement or adjudication, but allows arrests and convictions of an ad hoc, subjective basis. Such a law invites selective and discriminatory enforcement and permits arbitrary convictions—the precise results due process definiteness serves to prevent.

None of the factors which can impart meaning to vague language are present here to redeem the statute. Where common law terms are used in a statute, they carry with them a long history of interpretation and specialized meanings. Indiana's pipe possession law, however, contains no common law terms. If there is prior judicial interpretation limiting the scope of an otherwise vague statute, that interpretation is treated as though written into the law. Although Indiana has had a similar possession statute since 1971, there are no reported cases interpreting or applying it. Thus, there is no judicial gloss on the language of the statute which would supply notice or guide future adjudication. Common experience may also indicate that terms are understandable and contain adjudicative standards. However, it is beyond the common experience of a jury to know what constitutes drug paraphernalia. Recognizing this, California courts have required expert testimony to establish that a particular pipe is in fact used for illegal drug consumption. Neither the California nor the Indiana statute provides any guidelines for the jury to assess the expert testimony, nor is there any standard by which a defense attorney could challenge it.

Practical factors must be taken into account in determining the degree of definiteness required of a particular statute. Courts will consider whether, given the nature of the subject matter, it

72. Ind. Code § 16-6-8-3(g) (1973).
73. Sproles v. Binford, 286 U.S. 374, 393 (1932) ("shortest practicable route" held sufficient by common experience); Mahler v. Eby, 264 U.S. 32, 40 (1924) ("undesirable residents" meaningful by common usage).
is possible to make the law more precise.\textsuperscript{75} If the subject matter of a statute eludes precision, the statute must still provide "reasonable" or "adequate" notice.\textsuperscript{76} A necessarily indefinite statute which arguably lacks enforcement guidelines will be deemed sufficiently definite if it is necessary to vest broad discretion in law enforcement officials. Thus, in \textit{Colton v. Kentucky},\textsuperscript{77} the Supreme Court upheld a disorderly conduct statute against a vagueness challenge. Because of the wide range of conduct which could be considered disorderly, exact precision was impossible. The \textit{Colton} Court held that the law gave reasonable notice,\textsuperscript{78} and emphasized that police must be permitted to make on-the-spot decisions when they attempt to maintain public order.\textsuperscript{79} A tightly worded statute would not be desirable because of the threat to public order posed by disorderly conduct.

It may be argued that Indiana's pipe possession statute is necessarily indefinite. Because of the wide range of objects which are used to smoke controlled drugs, greater precision may not be possible. However, the statute does not provide reasonable warning of what is forbidden; it gives no warning at all. Also, unlike disorderly conduct, possession of a pipe presents no imminent danger to the public. There is simply no justification for vesting unbridled discretion in police officers.\textsuperscript{80}

Indiana's pipe possession statute is currently being challenged on due process grounds,\textsuperscript{81} and should be held void-for-vagueness. The statute violates due process in that it fails to provide even minimal notice or enforcement guidelines. The dangers inherent in such a vague statute can be illustrated by examining the manner in which a pipe possession statute can be used to circumvent the probable cause requirement for drug searches. A pipe law which fails to delineate ascertainable standards for enforce-

\textsuperscript{77} 407 U.S. 104 (1972).
\textsuperscript{78} Id. at 110.
\textsuperscript{79} Id. at 111.
\textsuperscript{81} Indiana Chapter, National Organization for the Reform of Marijuana Laws, Inc. (NORML) v. Sendak, Civil No. TH 75-142-C (S.D. Ind., filed July 18, 1975).
ment effectively authorizes police conduct which violates the fourth amendment.

Fourth Amendment Implications of Vague Pipe Possession Statutes

There have been few actual prosecutions for paraphernalia possession;"82 the real impact of a pipe possession statute is to validate drug searches which would be patently unreasonable in the absence of a pipe law. A paraphernalia statute, in effect, dilutes the fourth amendment standard that all searches be made with probable cause.83 Mere possession of a pipe creates no more than a suspicion of illegal drug activity. That suspicion will not justify a drug search. When, however, the pipe itself is illegal, a search may be made incident to a paraphernalia arrest. Thus, the existence of a pipe possession statute becomes the determinative factor in justifying drug searches.

The California pipe possession statute has frequently been used to justify drug searches when probable cause for a search would not exist in states without such a law.84 Two hypothetical fact situations may be posed to illustrate the use of the statute in the area of searches:

(a) A police officer sees a small metal pipe in plain view in a vehicle. He proceeds to search the vehicle and discovers hashish; or,

(b) During a reasonable pat-down frisk for weapons, a police officer finds a corncob pipe in a suspect’s pocket. He searches the inside of the pipe which contains an unidentifiable residue. A further search of the suspect discloses marijuana on his person.

In each case, the possessor of the pipe will be charged with drug possession. When the defendant moves to suppress evidence of the drugs on the ground that the officer did not have probable cause for the search, the existence of a pipe law becomes of paramount importance. In fact, whether he will be convicted for drug

82. Dacus v. State, 307 So. 2d 505 (Fla. App. 1975), is the only reported prosecution under any of the five existing statutes. One case also arose under a Texas pipe statute which has since been repealed. Pierron v. State, 475 S.W.2d 775 (Tex. Crim. App. 1972).

83. See notes 107-21 infra and accompanying text.

possession depends almost entirely on whether the state has a pipe possession law. 85

In those jurisdictions having no pipe law, the further searches of the vehicle or suspect would be unreasonable, violating the fourth amendment. Mere possession of a pipe does not present such a strong inference of criminal purpose as to create probable cause for a drug search. 86 In one Pennsylvania case, where an officer saw a small metal pipe in a car, the subsequent search of the vehicle, which disclosed hashish, was held to violate the fourth amendment. 87 The Superior Court concluded that,

the officer’s linking of the pipe with illicit activity could not have been more than a suspicion, since such pipes can be used to smoke tobacco or hashish or just for ornamentation. 88

Bare suspicion is no substitute for the probable cause required to support a search under the fourth amendment. 89 Therefore, a search based solely on possession of a pipe is unreasonable.

An examination of other cases from states where there is no pipe law suggests that because marijuana and hashish paraphernalia are often used for innocent purposes, there is at best a suspicion of illegal use. In Ivins v. State, 90 police officers conducted a search after seeing a belt buckle which they decided resembled a marijuana pipe. The Georgia Court of Appeals held that the search was unreasonable, since the pipe could have been used for tobacco or illegal drugs, or simply for ornamentation:

A pipe merely usable for marijuana smoking but for other things as well, did not justify the further search of [the suspect]. Merely placing a possible criminal con-

88. Id. at 127, 310 A.2d at 291 (emphasis added).
struction on a thing or event which will support other constructions is not a reliable tactic to justify personal searches.\(^91\)

At best, a police officer's sight of a metal pipe, corncob pipe or water pipe raises only a suspicion that the object is intended for illegal drug use. A search based on that suspicion is unreasonable under the fourth amendment.

In California, however, as in other jurisdictions which have pipe laws,\(^92\) these further searches of the vehicle or suspect could be upheld as incident to a paraphernalia arrest. The California pipe statute prohibits possession of "an opium pipe or any device, contrivance, instrument or paraphernalia" used for smoking controlled drugs.\(^93\) The police officer's expert testimony is used to establish that a particular pipe is in fact contraband within the scope of the statute.\(^94\) California courts have recognized that plain sight of such an object does not create probable cause for a marijuana or hashish arrest.\(^95\) At the same time, however, they have held that plain sight of such an object gives the officer probable cause for a paraphernalia arrest. Thus, the officer can arrest for possession of paraphernalia and conduct the ensuing search as incident to a lawful arrest.\(^96\)

California courts have rested their decisions in pipe cases on the power of the officer to arrest for pipe possession before the drug search was made. These courts have not, however, carefully considered whether there was probable cause for the underlying paraphernalia arrest.\(^97\) When a pipe is discovered, the only criterion for determining criminal purpose is the expert testimony of the arresting officer. That testimony alone, without objective standards for the defense attorney, judge or jury to evaluate it, has been held sufficient to establish probable cause.\(^98\)

91. Id. at 867, 201 S.E.2d at 685 (emphasis added).
92. Although the pipe possession statutes in Alabama, Florida, Indiana and Mississippi have not yet been used to justify drug searches, the danger for abuse remains as long as the vague statutes stand. See note 38 supra.
93. CAL. HEALTH & SAFETY CODE § 11364 (West 1975).
94. See note 84 supra.
96. See note 84 supra.
98. See note 84 supra.
A warrantless search which is made incident to an arrest is proper so long as it is limited in scope and based on a lawful arrest. The Supreme Court stated recently in United States v. Robinson:

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search.

If the underlying arrest is itself unlawful or made without probable cause, it cannot justify the incidental search. Moreover, probable cause to arrest must exist before the search is made in order for the search to be valid as incident to an arrest.

In states having pipe laws, a defendant arrested for pipe possession and subsequently searched can attack the validity of the search in two possible ways. First and most obviously, the defendant can allege that there was no probable cause for the paraphernalia arrest. As noted earlier, possession of a pipe raises merely a suspicion of illegal purpose. The expert testimony of the police officer does not change the basic nature of the pipe itself; he had at best a suspicion that the pipe was intended for drug use. That suspicion cannot be elevated to probable cause without further evidence such as sight or smell of the drug itself. However, if such additional evidence existed at the time of the search, the police would not need to rely on a paraphernalia statute, since probable cause for a drug search could be established independently.

Similarly, the police may not use the drugs disclosed in an incidental search to establish retroactively probable cause for the underlying paraphernalia arrest. But unless drugs are found in

99. The permissible scope of a warrantless search as incident to an arrest was dramatically restricted in Chimel v. California, 395 U.S. 752 (1969). A search is limited to the geographic area in which the arrestee might be able to reach a weapon or destructible evidence. Id. at 763.
100. 414 U.S. 218 (1973).
101. Id. at 235 (emphasis added).
104. See notes 86-91 supra and accompanying text.
the concomitant search, the suspicion that a pipe is contraband cannot be raised to probable cause because of the innocent uses of such objects. Although California courts have invoked the paraphernalia statute to justify drug searches, the foregoing analysis suggests that, without probable cause for a paraphernalia arrest, the searches are still unreasonable.

Defendants might also challenge a drug search based on the purported power of the police to make a paraphernalia arrest by alleging that the paraphernalia statute itself is incompatible with the fourth amendment.\textsuperscript{107} In making the possession of a pipe a crime, the legislature has indirectly authorized arrests based on mere suspicion. As the Ninth Circuit noted recently in Powell v. Stone,\textsuperscript{108}

A legislature could not reduce the standard for arrest [or for incidental search] from probable cause to suspicion and it may not accomplish the same result by making suspicious conduct a substantive offense.\textsuperscript{109}

Possession of a pipe is suspicious conduct, creating a suspicion of illegal drug use. By making that conduct illegal, the legislature has subverted the probable cause requirement, authorizing arrests and searches which are based solely on suspicion.

Pipe laws also negate the probable cause requirement because of their unconstitutional vagueness. As noted above, the statutes fail to provide any guidelines for those who enforce the law.\textsuperscript{110} Each of the pipe laws is so vague that even a police officer acting in good faith could not determine when the law was violated. Discussing a vague vagrancy ordinance, the Powell court stated:

[The] language is so general and vague, the elements of the offense so obscure, that they afford no reasonable criteria by which an officer may determine whether the ordinance has or has not been violated. . . . [A]n officer

\textsuperscript{107} Several recent federal circuit court decisions have held that vagrancy ordinances which violate the fourth amendment cannot be used to justify personal searches. Powell v. Stone, 507 F.2d 93 (9th Cir. 1974), rev'd on other grounds, 44 U.S.L.W. 5313 (U.S. July 6, 1976); United States ex rel. Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974); Hall v. United States, 469 F.2d 831 (D.C. Cir. 1972 (en banc), noted in 47 N.Y.U.L. Rev. 595 (1972) and 18 VILL. L. REV. 117 (1972).

\textsuperscript{108} 507 F.2d 93 (9th Cir. 1974).

\textsuperscript{109} Id. at 96.

\textsuperscript{110} See notes 69-70 supra and accompanying text.
cannot "gauge justification for . . . arrests consistently with Fourth Amendment principles."\textsuperscript{111}

Because the vagueness of pipe possession statutes gives rise to "an inherent tendency to promote arrests based on mere surmise"\textsuperscript{112} that the statutes have been violated, they conflict with the fourth amendment.

Once it is established that the pipe possession statutes violate the fourth amendment, some justification must be found for excluding the fruits of a search based on a paraphernalia arrest. Even if the traditional function of the exclusionary rule is not served, application of the rule will deter the legislature and maintain judicial integrity.\textsuperscript{113} The exclusionary rule would not serve to deter objectionable police conduct because the arresting officer was relying in good faith on a presumably valid statute. An officer arresting for paraphernalia possession and searching incident to that arrest should not be faulted for pursuing conduct authorized by a statute.\textsuperscript{114} However, two functions would be served by excluding the fruits of a paraphernalia-based search. First, legislators would be deterred from enacting statutes violating the fourth amendment. Unless the exclusionary rule is applied, the legislature could re-enact vague pipe laws which, until challenged in an actual paraphernalia prosecution, could be used to justify unreasonable searches. Second, judicial integrity is maintained by application of the exclusionary rule. In Terry v. Ohio,\textsuperscript{115} the Supreme Court stated:

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.\textsuperscript{116}

Thus, to deter the legislature and preserve judicial integrity, evidence obtained in a drug search based on the police officer's reliance on a paraphernalia statute should be excluded.

\textsuperscript{111} Powell v. Stone, 507 F.2d 93, 96-97 (9th Cir. 1974), quoting Hall v. United States, 459 F.2d 831, 837 (D.C. Cir. 1972).
\textsuperscript{112} Hall v. United States, 459 F.2d 831, 837 (D.C. Cir. 1972).
\textsuperscript{113} See Comment, Evidence Obtained by Search After a Valid Arrest Under a Vagrancy Statute Violative of the Fourth Amendment Probable Cause Requirement is Inadmissible in a Subsequent Narcotics Prosecution, 47 N.Y.U.L. Rev. 595 (1972); Recent Developments, Fourth Amendment Vagueness, 18 VILL. L. Rev. 117 (1972); Powell v. Stone, 507 F.2d 93, 97-98 (9th Cir. 1974).
\textsuperscript{114} Id.
\textsuperscript{115} 392 U.S. 1 (1968).
\textsuperscript{116} Id. at 12-13.
In sum, current statutes prohibiting possession of paraphernalia for marijuana and hashish use are unconstitutionally vague and violate the fourth amendment. Such statutes neither adequately notify citizens of what items are contraband, nor do they restrict police and prosecutors from selective enforcement. As such, they deny due process of law. Furthermore, pipe possession statutes enable police to make searches without the probable cause contemplated by the fourth amendment. Due to the dangers posed to freedoms guaranteed by the Constitution, pipe possession statutes cannot stand. As shall be shown, Indiana's statute prohibiting sale and manufacture of drug paraphernalia suffers from the same infirmities.

SALE OF PARAPHERNALIA—INDIANA'S SECTION 9

A recent amendment to Indiana's Controlled Substances Act 117 marks a significant extension of legislation controlling drug paraphernalia. In addition to prohibiting possession, the 1975 bill included a new statute, Section 9, which prohibits manufacture or sale of paraphernalia used with marijuana, hashish or cocaine. 118 Section 9 is unique in that no other state restricts sale of such paraphernalia. 119 Yet the provision's probable ineffectiveness as a deterrent of drug use and its unreasonable interference with many types of legitimate activity render it an unjustifiable exercise of the state's power to protect the public health and welfare. 120 The defects inherent in attempting to prohibit sale of pipes and other objects for marijuana and hashish use can be seen from a comparison of Section 9 with other state statutes which regulate the sale of hypodermic drug paraphernalia. Furthermore, Indiana's novel statute is unconstitutionally vague; it not only invites, but is designed for, selective enforcement.

As a foundation for analysis of Section 9, its purposes and problems, the statute must first be viewed in its entirety.

119. From 1969 to 1973, Florida prohibited sale of paraphernalia used to smoke drugs. No cases arose under that section of the statute, which was deleted when the Controlled Substances Act was adopted. Possession of smoking paraphernalia is still illegal. Fla. Laws, 1969, c. 69-270, § 1, as amended FLA. STAT. ANN. § 893.13(3) (a) (4) (Supp. 1975).
120. Indiana's drug paraphernalia statutes, both possession and sale, are currently being challenged in federal court. A temporary restraining order was issued at the time Section 9 was to go into effect, and a hearing on the constitutionality of the statute is pending. NORML v. Sendak, Civil No. TH 75-142-C (S.D. Ind., filed July 18, 1975).
The Statute—Section 9

Indiana's new paraphernalia section prohibits unlawful dealing in paraphernalia. One is guilty of unlawful dealing if he "knowingly manufactures or delivers paraphernalia"\(^{1}\) or possesses it with the intent to manufacture or deliver.\(^{2}\) "Delivery," which includes sale, is defined by the statute as "the actual, constructive, or attempted transfer" of paraphernalia.\(^{3}\) "Manufacturing," as defined by Section 9, encompasses a wide range of conduct, including,

production, preparation, construction, or processing of paraphernalia, . . . packaging or repackaging of the paraphernalia, or the labeling or relabeling of it or its container.\(^{4}\)

Thus, almost any handling of paraphernalia is forbidden.

In addition to defining what conduct is proscribed by the law, Section 9 also attempts to define "paraphernalia." At the beginning of the statute, the legislature resorted to the same general terms which were used in the pipe possession statutes.\(^{5}\) "Paraphernalia" is defined as,

any instrument, device, article, or contrivance used, designed for use, or intended for use in ingesting, smoking, administering, or preparing marijuana, hashish, hashish oil, or cocaine.\(^{6}\)

Attempting to provide further specificity, the lawmakers listed fourteen items which are to be considered "paraphernalia." The list includes,

(i) metal, wooden, acrylic, glass, stone, plastic, or ceramic marihuana or hashish pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) water pipes designed for use or intended for use with marihuana, hashish . . . ;

(v) roach clips;

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125. See note 51 supra and accompanying text.
(vi) separation gins designed for use or intended for use in cleaning marihuana;

(vii) cocaine spoons and vials;

(viii) chamber pipes;

(x) electric pipes;

(xii) chilams;

(xiii) bongs; or,

(xiv) ice pipes or chillers.127

The penalties for unlawful dealing in paraphernalia are not trivial. In fact, if the Act is enforced,128 a pipe seller could be penalized more than a seller of the drug used in the pipe. This is particularly ironic since the Controlled Substances Act was amended to lower marijuana penalties at the same time Section 9 was added. Under Section 9, a person convicted of selling a roach clip is guilty of a felony and can receive a sentence of five years and a thousand dollar fine.129 In stark contrast, a person selling small amounts of marijuana or hashish commits only a misdemeanor, and upon conviction can be sentenced to a maximum of one year imprisonment and receive a five hundred dollar fine.130 This disparity is particularly peculiar when one considers that the purpose of the legislature in promulgating Section 9 was to prevent the growth of illicit drug use.

**Purpose and Unreasonableness of Section 9**

Legislative history demonstrates that Section 9’s prohibition on manufacture and sale of marijuana and hashish paraphernalia was designed to prevent use of these drugs. However, unlike older narcotics paraphernalia statutes in other states, the criminalization of paraphernalia manufacture and sale does not rationally serve to deter drug abuse. As such, Section 9 violates the due process requirement that a statute reasonably further the legitimate ends it seeks to promote.

Comments from Indiana legislators who were instrumental in passing Section 9 indicate that it was enacted to prevent drug
use. One state senator described the motivation behind passage of the bill:

The paraphernalia section was added . . . because the majority of the senators were persuaded that the sales of so-called paraphernalia was increasing marijuana and hashish sales. According to the proponents of the amendment young people were being introduced into the drug subculture with the purchase of [a] fancy roach clip or hashish pipe. The sponsors of the bill were convinced that the attractive and novel paraphernalia was a significant stimulus to use illegal drugs.  

The author and sponsor of Section 9 also emphasized that it was intended to prevent drug use:

If possession of certain substances is to be illegal, we ought not contradict ourselves by saying its [sic] all right to market items to inject [sic] these illegal substances. The marketing of paraphernalia tends to glorify the use of drugs and likewise tends to lure more young people into using these drugs.  

Thus, the legislators passed Section 9, prohibiting manufacture or sale of paraphernalia, in order to de glamorize the use of drugs and thereby prevent the growth of drug abuse.

The power of the states to prevent and control drug abuse has been recognized as within the states' police power to promote public health and safety. In exercising their authority to combat drug abuse, however, states are bound by due process standards imposed by the federal constitution. Due process requires that the means chosen to exercise the police power must be reasonably adapted to effectuate some permissible purpose. Thus, the Indiana paraphernalia statute must be reasonably adapted to

131. Letter from Leslie Duvall to M. Gienapp, Sept. 18, 1975, on file Valparaiso University Law School Library.


prevent drug use; it must not be unreasonable or arbitrary, nor
can it unduly interfere with individual freedoms.

Section 9, however, is neither an effective nor a reasonable
means of preventing drug use. Because of the ready availability
of common substitutes for expressly outlawed paraphernalia, en-
forcement of the law would have little, if any, effect in reducing
drug use. In addition, due to the wide variety of activity swept
into the statute's scope, it unreasonably interferes with conduct
having no connection with drug use. Accordingly, Section 9 is
not a justifiable exercise of the state's police power. The ineffect-
iveness and unreasonableness of Section 9 may be illustrated by
comparing it to older and more numerous laws regulating the
sale of other types of drug paraphernalia.

Two types of drug paraphernalia sale statutes have been en-
acted in other states. First, many states control the sale of hypo-
dermic needles which are indispensable for heroin injection. 136
Heroin addicts require some type of hypodermic needle in order
to inject the drug. 137 Sale or manufacture of needles is not totally
prohibited, however, because of the legitimate medical uses for
the instruments. Rather, legal sale of hypodermic instruments is
limited to those with a valid prescription or persons in special
professions. 138 Only the slight inconvenience of obtaining a pre-
scription is imposed on legitimate needle users. 139

In addition to regulating sale of hypodermic instruments, a
few states also regulate the sale of another type of heroin para-
phernalia—articles needed by drug traffickers to prepare and
package heroin for sale. 140 These trafficking paraphernalia stat-
utes restrict the sale of common heroin diluents necessary for
"cutting," i.e., mixing or diluting the potent drug, as well as con-
tainers such as empty capsules or envelopes used to package heroin
in individual doses. 141 Like hypodermic instruments, heroin di-

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136. See, e.g., CAL. BUS. & PROF. CODE § 4140 (West 1974); ILL. ANN.
137. Hearings Before the House Select Comm. on Crime, Crime in Amer-
ica, Heroin Importation, Distribution, Packaging and Paraphernalia, 91st
138. See note 136 supra.
140. MD. ANN. CODE art. 27, §§ 287-88 (Supp. 1973); N.Y. PENAL LAW
141. For a more extensive discussion of heroin trafficking parapherna-
lia, see, Hearings Before the House Select Comm. on Crime, Crime in Amer-
ica—The Heroin Paraphernalia Trade, 91st Cong., 2d Sess. (1970), and

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lubnants and containers can be used for many beneficial and innocent purposes.\textsuperscript{142} To protect these innocent uses, the statutes do not forbid all sales. Rather, some statutes require that each sale be recorded,\textsuperscript{143} others limit sales to small amount of dilutants or capsules which are insufficient for heroin trafficking purposes.\textsuperscript{144}

In comparison to these hypodermic and trafficking paraphernalia statutes, Indiana's Section 9 is ineffective in preventing drug abuse. No special devices are necessary to use marijuana, hashish or cocaine. Unlike the heroin addict who needs a hypodermic needle for injections, a marijuana smoker does not require a specially designed pipe, or any of the paraphernalia listed in the statute. Cocaine users do not need a "cocaine spoon" forbidden under Section 9; any kitchen spoon or piece of tinfoil can be used to hold the drug. Therefore, even if the statute were enforced, it would have at most a minimal effect on drug use. However, the ineffectiveness of Section 9 in implementing its purpose does not alone make it an unreasonable exercise of the police power.\textsuperscript{145} The unreasonableableness of the statute grows out of a second difference between it and the other types of sale statutes.

Unlike the other paraphernalia sale statutes, Section 9 unduly interferes with conduct which presents no danger to the public. The statute does not recognize or provide for legitimate uses of the items listed as "paraphernalia." No "water pipes designed for" drug use can be sold under the statute, although those identical pipes are frequently used only for ornamentation. "Separation gins designed for" preparing marijuana cannot be sold, although those same separators are normally used by tea and spice makers for cleaning herbs. "Roach clips," another prohibited item, are nothing more than small clamps, commonly used for constructing electrical equipment. The statute makes no allowance for these legitimate uses, but puts a blanket prohibition on the sale or manufacture of these devices. That prohibition is an unreasonable interference with conduct having no rational connection with drug use.

In drafting Section 9, the legislature did not limit the statute to objects necessarily connected with drug use. Because of the


\textsuperscript{142} See notes 137 and 141 supra.


\textsuperscript{145} "A statute is not invalid under the Constitution ... because it may not succeed in bringing about the result that it tends to produce." \textit{Joseph E. Seagram \\& Sons, Inc. v. Hostetter}, 384 U.S. 35, 50 (1966).
indefinite language of the statute, Section 9 unreasonably interferes with innocent conduct and goes beyond the permissible scope of the state's police power. Accordingly, Section 9 violates due process because it is arbitrary and irrational. In addition, the broad language of the statute runs afoul of due process standards for definiteness.

Section 9—Due Process Definiteness

Since the Indiana paraphernalia sale statute creates a new criminal offense without any common law history, it is particularly susceptible to a void-for-vagueness challenge. New criminal statutes must be carefully scrutinized for definiteness because they now forbid conduct which was previously considered to be acceptable legal behavior.\(^{146}\) Under due process, a criminal statute must provide both notice and enforcement guidelines.\(^{147}\) To ensure that people are not trapped by their heretofore innocent conduct, the statute making that conduct illegal must provide adequate notice to those who might be subject to its penalties. In addition, the new statute must set forth enforcement guidelines so that law enforcement officials, judges and juries can know what conduct is forbidden and how to apply the new statute. Section 9 meets neither criteria, at least as to most paraphernalia. Moreover, its vagueness invites selective enforcement against shops catering to youths.

Section 9 violates the first test of definiteness because it does not provide fair notice of what items may not be sold. This notice test of definiteness is particularly important because, unlike the pipe possession statutes examined earlier, Section 9 regulates commercial behavior which can be planned out in advance.\(^{148}\) The minimal notice required of a drug paraphernalia statute was considered in Cole v. State.\(^{149}\) The Oklahoma law made it illegal to possess "any paraphernalia" used by drug abusers. The statute was held unconstitutionally vague because a person would not know what "paraphernalia" meant, and could not determine what


\(^{147}\) See text at notes 52-65 supra.


objects were forbidden.\textsuperscript{150} Indiana's Section 9 also uses the indefinite term "paraphernalia;" unlike the Oklahoma statute, however, Section 9 includes a definition of the term.

The Indiana legislature's attempt to further define "paraphernalia" does not save Section 9 from vagueness. Merchants are warned that they may not sell any objects "used, designed for use, or intended for use" with specified drugs. Yet merchants must still speculate as to whether "intended for use" means that the manufacturer intended the object to be used for drugs, or that the buyer intends drug use. No guidelines are set out for deciding what devices are "designed for use" with drugs. Even the enumerated list of types of paraphernalia in Section 9 does not give merchants and manufacturers fair warning. For example, the first inclusion is "metal, wooden, acrylic, glass, stone, plastic, or ceramic marihuana or hashish pipes."\textsuperscript{151} This provision gives no indication of what makes a pipe a "marihuana or hashish pipe" rather than a tobacco pipe. The statute also prohibits sale of water pipes which are "designed for use or intended for use" with controlled drugs.\textsuperscript{152} Because the statute does not state what differentiates an ornamental water pipe from one designed for drug use, manufacturers and retailers are not given adequate notice of what conduct would subject them to criminal prosecution under Section 9. They would have to forego dealing in any pipes at all in order to avoid violating Section 9.

In drafting Section 9, the legislature considered the difficulties in defining "paraphernalia." Attempting to differentiate between legal and illegal pipes, the legislators determined that there was a structural difference:

Proponents of the amendment argued that there is a vast difference between tobacco pipes and hashish or marijuana pipes which require totally different structure. Proponents argued that whereas tobacco pipes try to reduce the amount of condensation of tars and other by-products, marijuana pipes capitalize on the condensation of the smoke to augment the effect of the drug.\textsuperscript{153}

If, in fact, such a structural difference in pipes exists, the legislature did not reflect the difference on the face of the statute.

\begin{footnotes}
\item[150] \textit{Id.} at 595.
\item[151] \textsc{Ind. Code} § 35-24.1-4.1-9 (c) (3) (i) (1975).
\item[152] \textsc{Ind. Code} § 35-24.1-4.1-9 (c) (3) (ii) (1975).
\item[153] Letter from Leslie Duvall to M. Gienapp, Sept. 18, 1975, on file Valparaiso University Law School Library.
\end{footnotes}
As written, the statute provides no standard by which any pipe seller could determine whether a particular pipe is "designed for" marijuana rather than tobacco use.

For some items listed in Section 9, adequate notice may be provided. Where terms used in a statute have special significance within the group to which the law applies, the group is deemed to have notice based on that special meaning.\(^{154}\) Some terms used in Section 9 are absolutely meaningless to the general public and do not even have dictionary meanings: chamber pipes, chilams, bongs, ice pipes. However, these words are frequently used in the pipe business, and refer to special pipes and smoking devices.\(^{155}\) Merchants and manufacturers could reasonably be charged with notice as to these items because of the meaning in the trade. As to the majority of items listed, however, no notice is provided. Because notice, an essential element in definiteness, is lacking, Section 9 violates due process.

Section 9 also fails to satisfy the second test of due process definiteness which requires guidelines for those who enforce and apply the law. If pipe makers and sellers cannot determine what pipes are "designed for" drug use, neither can a policeman or jury. Although "expert testimony" by narcotics officers could be used to establish that an item sold was within the definition of paraphernalia,\(^{156}\) there would be no way to challenge the testimony. The effect of the statute's failure to limit law enforcement is not, as in the case of the pipe possession statutes, to expand the opportunity for unreasonable searches. Rather, Section 9 invites selective enforcement because it does not limit the power of the law enforcer.

Section 9 permits the arrest of any pipe seller in Indiana, without any objective standard by which a judge or jury could determine guilt or innocence. Inviting selective enforcement, Section 9 would most likely not be applied against tobacconists or novelty gift shops. The police probably would concentrate on proprietors of "head shops," which are small businesses, selling records, posters, pipes and other novelty items, catering to young people's tastes. Sale of the same pipes by different proprietors could be ignored.


\(^{155}\) See note 50 supra.

\(^{156}\) See note 84 supra.
Comments by Indiana legislators reinforce the conclusion that Section 9 was primarily enacted for selective enforcement against head shops. The author of the statute stated:

The bill was prompted by the fact that "head shops" were able to circumvent existing laws prohibiting the offering for sale of paraphernalia.\textsuperscript{157}

In fact, there were no "existing laws;" the paraphernalia business of head shops and other stores was not prohibited until the enactment of Section 9. Another state senator stated that,

It seemed inconsistent and unreasonable to outlaw marijuana and other drugs but overlook the \textit{pot shops} that were in existence.\textsuperscript{158}

The "pot shops" referred to by the learned senator were apparently head shops, not illegally selling "pot," but legally selling records, posters and pipes. The plaintiff head shop owners in the suit challenging Section 9 have alleged that they had been warned by state officials that their shops would be closed when the bill took effect.\textsuperscript{159} In fact, numerous shops throughout the state closed when Section 9 was passed and signed into law.

Because the section has never been enforced, it is not possible to state whether discriminatory enforcement would actually result. The vagueness of the statute, though, invites discriminatory enforcement. Because no pipe seller could, acting in good faith, avoid selling the forbidden items, and because the statute forbids every pipe currently sold, Section 9 must necessarily be enforced only against those whom policemen and prosecutors, without objective criterion, choose to harass. Due process forbids such a law. Section 9 is ineffective, unreasonable, and impermissibly vague; Indiana's "pipe dream" should be held unconstitutional.

\textbf{CONCLUSION}

The recent flurry of legislative activity to curb illicit drug use in this country has led to the enactment of several statutory measures which are of questionable constitutional validity. Pipe possession laws, which outlaw paraphernalia for marijuana and

\textsuperscript{157} Letter from Charles E. Bosma to M. Gienapp, Oct. 1975, on file Valparaiso University Law School Library.

\textsuperscript{158} Letter from Wilfrid J. Ullrich to M. Gienapp, Nov. 1, 1975, (emphasis added), on file Valparaiso University Law School Library.

\textsuperscript{159} Complaint at 5, NORML v. Sendak, Civil No. TH 75-142-C (S.D. Ind., filed July 18, 1975).

https://scholar.valpo.edu/vulr/vol10/iss2/6
hashish use, are unreasonably and unconstitutionally vague. Because these statutes neither notify citizens of what items are contraband nor provide any adjudicative guidelines for police, prosecutors or juries, such statutes violate fundamental notions of due process. In addition, pipe possession statutes artificially create probable cause of illegal drug possession, thereby authorizing police to arrest and make incidental searches of suspected drug users that could not otherwise be lawfully made. As such, these statutes dilute the substance of the probable cause requirement and violate the essence of the fourth amendment.

Indiana's unique and unprecedented attempt to prohibit the manufacture and sale of paraphernalia used with marijuana, hashish or cocaine suffers from similar constitutional infirmities. Because of the wide variety of activities which are swept into the scope of Section 9, it unreasonably interferes with conduct having no connection with drug use. Even in regulating drug use, Section 9 is an ineffective deterrent because there exist other readily available substitutes for expressly outlawed paraphernalia. Accordingly, this provision is an arbitrary and unjustifiable exercise of the state's power to control drugs. Furthermore, like the pipe possession laws, Section 9 is unconstitutionally vague in that it invites selective and discriminatory enforcement, since it provides neither adequate notice to paraphernalia users nor adjudicative guidelines for law enforcers.