

ALASKA LEGISLATURE COMMITTEE FILES DO 2002

1612 HJ HB 338 - HB 356

Submitted by: Chairman of the Assembly  
at the request of the Mayor  
Prepared by: Department of Law  
For Reading: December 15, 1981

ANCHORAGE, ALASKA  
AO NO. 81-219

AN ORDINANCE AMENDING TITLE 8 OF THE ANCHORAGE MUNICIPAL CODE BY THE ADDITION OF A NEW CHAPTER 8.20 RELATING TO DRUG ABUSE AND PARAPHERNALIA; PROHIBITING THE SALE OF DRUG PARAPHERNALIA OR POSSESSION WITH INTENT TO SELL DRUG PARAPHERNALIA AND PROVIDING FOR ENFORCEMENT THEREOF.

THE ANCHORAGE ASSEMBLY ORDAINS:

Section 1. Following are legislative findings of fact upon which the provisions of this ordinance are in part based:

1. There has been a proliferation of devices within the Municipality intended and being offered for sale to facilitate the ingestion and human consumption of dangerous and controlled substances, including marijuana, hashish, cocaine and other illicit drugs; and
2. The said proliferation and distribution of such items constitutes a public nuisance and a threat to the public peace, health, safety, welfare and property of the residents of Anchorage; and
3. The said proliferation as well as the attendant legitimization and glamorization of such items promotes the attraction of illegal and dangerous drug use and illegal and dangerous drug use among adolescent and school age children in the Municipality; and
4. A legitimate concern of local government is to discourage the use of illegal and dangerous drugs and of all controlled substances by all persons in the Municipality, and to protect the public health, safety and welfare of the inhabitants thereof.

Section 2. Title 8 of the Anchorage Municipal Code is hereby amended by the adoption of a new Chapter 8.20 which chapter shall read as follows:

## CHAPTER 8.20

## DRUG ABUSE AND PARAPHERNALIA

Sec. 8.20.010	Definitions
Sec. 8.20.020	Sale of Drug Paraphernalia Unlawful
Sec. 8.20.030	Remedies
Sec. 8.20.040	Severability

Section 8.20.010. Definitions. As used in this chapter, the following terms shall have the meanings as defined herein.

- A. "controlled substance" means a narcotic drug as defined in AS 17.10.230(13) and as supplemented by any regulations adopted under AS 17.10; and a depressant, hallucinogenic, or stimulant drug as defined in AS 17.12.150(3) and as supplemented by any regulations adopted under AS 17.12; and shall also include marijuana, hashish and cocaine.
- B. "drug paraphernalia" means all items, equipment, devices, products and materials of any kind which are used, or intended for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance as defined herein. Drug paraphernalia includes, but is not limited to:
1. Kits used or intended for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;
  2. Kits used or intended for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;
  3. Isomerization devices used or intended for use in increasing the potency of any species of plant which is a controlled substance;

4. Testing equipment used or intended for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances except for use by or under the direction of law enforcement agencies or medical research or treatment facilities;
5. Scales and balances used or intended for use in weighing or measuring controlled substances;
6. Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used or intended for use in cutting controlled substances;
7. Separation gins and sifters used or intended for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;
8. Blenders, bowls, containers, spoons and mixing devices used or intended for use in compounding controlled substances;
9. Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;
10. Containers and other objects used or intended for use in storing or concealing controlled substances;
11. Hypodermic syringes, needles and other objects used or intended for use in parenterally injecting controlled substances into the human body;
12. Objects used or intended for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:
  - a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens,

12-18 5 85

- hashish heads, or punctured metal bowls;
- b. Water pipes;
  - c. Carburetion tubes and devices;
  - d. Smoking and carburetion masks;
  - e. Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
  - f. Miniature cocaine spoons, and cocaine vials;
  - g. Chamber pipes;
  - h. Carburetor pipes;
  - i. Electric pipes;
  - j. Air-driven pipes;
  - k. Chillums;
  - l. Bonges;
  - m. Ice pipes or chillers;

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

1. Statements by the manufacturer, owner or by anyone in control of the object concerning its use;
2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;
3. The proximity of the object, in time and

space, to a direct violation of AS 17.10 or AS 17.12;

4. The proximity of the object to controlled substances;
5. The existence of any residue of controlled substances on the object;
6. Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to use the object to facilitate a violation of AS 17.10 or AS 17.12; the innocence of an owner, or of anyone in control of the object, as to a direct violation of AS 17.10 or AS 17.12 shall not prevent a finding that the object is intended for use as drug paraphernalia;
7. Instructions, oral or written, provided with the object concerning its use;
8. Descriptive materials accompanying the object which explain or depict its use;
9. National and local advertising concerning its use;
10. The manner in which the object is displayed for sale;
11. Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
12. Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;
13. The existence and scope of legitimate uses for the object in the community;
14. Expert testimony concerning its use.

- C. "sell" or "sale" means the commercial transfer of ownership, possession or use of drug paraphernalia in the regular course of a wholesale or retail business for consideration of any type.

Section 8.20.020. Sale of Drug Paraphernalia Unlawful

It is unlawful for any person to sell, or possess with intent to sell, drug paraphernalia, knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance, except as specifically authorized and permitted under the provisions of AS Title 17 and by such rules and regulations as are adopted pursuant thereto.

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Section 8.20.030. Remedies.

- A. person who violates any provision of this chapter shall be subject to a civil penalty of not less than \$50.00 nor more than \$1,000.00 for each offense or injunctive relief to restrain the person from continuing the violation or threat of violation, or both injunctive relief and a civil penalty. Upon application for injunctive relief and a finding that a person is violating or threatening to violate any provision of this chapter, the Superior Court shall grant injunctive relief to restrain the violation.
- B. Each day of violation of any provision of this chapter shall constitute a separate offense.
- C. Any item sold or possessed with the intent to sell by any person after a court has adjudicated such an item to constitute drug paraphernalia as defined by Section 8.20.010 shall be subject to forfeiture of the said paraphernalia to the Municipality upon order of the court entered in any injunction proceedings instituted under the authority of this section or in a separate forfeiture action instituted by the Municipality.

Transfer of  
Paraphernalia

Section 8.20.040. Severability.

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

Section 3. Effective Date. This ordinance shall become effective <sup>up</sup> on      passage     , 1982.

PASSED AND APPROVED by the Anchorage Municipal Assembly, this 12th day of January, 1982.

Don Smith  
Chairman

ATTEST:

Ruby E. Smith  
Municipal Clerk

\*\* Section 8.20.025. - knowingly

In a store whose (principle business) is drug paraphernalia, it is unlawful for minors to purchase items or be on the premises. Legible signs will be posted on the premises stating that no minors are allowed.

Original sponsors: Martin, Abood,  
Adams, et al

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE  
2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 338 (Judiciary)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 TWELFTH LEGISLATURE - SECOND SESSION  
5 A BILL

6 For an Act entitled: "An Act prohibiting access by minors to premises where  
7 drug paraphernalia is offered for sale."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 11.66 is amended by adding a new section to read:

10 ARTICLE 3. DRUGS AND DRUG PARAPHERNALIA.

11 Sec. 11.66.300. MINORS ON PREMISES WHERE DRUG PARAPHERNALIA IS  
12 OFFERED FOR SALE. (a) A person under the age of 18 years may not  
13 knowingly enter or remain on premises in which drug paraphernalia is  
14 sold or offered for sale.

15 (b) An owner, operator, manager, or employee of premises in which  
16 drug paraphernalia is sold or offered for sale may not, with criminal  
17 negligence, allow a person under the age of 18 years to enter and remain  
18 on the premises. [ For purposes of this subsection, a person acts "with  
19 criminal negligence" when he fails to perceive that a person under the  
20 age of 18 years has entered onto the premises, and the failure to per-  
21 ceive constitutes a gross deviation from the standard of care that a  
22 reasonable person would observe in the situation. ]

23 (c) Failure to comply with the provisions of (a) of this section  
24 is a violation. A person who violates (b) of this section is guilty,  
25 upon conviction, of a class A misdemeanor, [ punishable by not less than  
26 120 consecutive hours imprisonment and a fine of not less than \$500. ]

27 (d) In this section, *0-90 \$1,000 A Misd. → Liqueur*

28 (1) "controlled substance" means a narcotic drug as defined  
29 in AS 17.10.230(13) or in a regulation adopted under AS 17.10, or a

Anch. Ordinance  
C. 10.1

1 depressant, hallucinogenic, or stimulant drug as defined in AS 17.12.-  
2 150(3) or a regulation adopted under AS 17.12;

3 (2) "drug paraphernalia" means equipment, products, and  
4 materials of any kind that are used, <sup>designed</sup> [intended] for use or marketed for  
5 use in planting, propagating, cultivating, growing, harvesting, manufac-  
6 turing, compounding, converting, producing, processing, preparing,  
7 testing, analyzing, packaging, repackaging, storing, containing, conceal-  
8 ing, injecting, ingesting, inhaling, or otherwise introducing into the  
9 human body a controlled substance in violation of AS 17.10 or AS 17.12;  
10 "drug paraphernalia" includes, but is not limited to,

11 (A) ~~kits used, intended for use, or marketed for use in~~  
12 ~~planting, propagating, cultivating, growing, or harvesting of any~~  
13 ~~species of plant which is a controlled substance or from which a~~  
14 ~~controlled substance can be derived;~~

15 (B) kits used, intended for use, or marketed for use in  
16 manufacturing, compounding, converting, producing, processing, or  
17 preparing controlled substances;

18 (C) ~~isomerization devices used, intended for use, or~~  
19 ~~marketed for use in increasing the potency of a species of plant~~  
20 ~~which is a controlled substance;~~

21 (D) testing equipment used, intended for use, or marketed  
22 for use in identifying, or in analyzing the strength, effectiveness,  
23 or purity of controlled substances;

24 (E) ~~scales and balances used, intended for use, or~~  
25 ~~marketed for use in weighing or measuring controlled substances;~~

26 (F) diluents and adulterants, such as quinine hydro-  
27 chloride, mannitol, mannite, dextrose and lactose, used, intended  
28 for use, or marketed for use in cutting controlled substances;

29 (G) ~~separation gins and sifters used, intended for use,~~

1 or-marketed for use in removing twigs and seeds from, or in other-  
2 wise cleaning or refining, marijuana;

3 Pharmacist? (H) blenders, bowls, containers, spoons, and mixing  
4 devices used, intended for use, or marketed for use in compounding  
5 controlled substances;

6 (I) capsules, balloons, envelopes, and other containers  
7 used, intended for use, or marketed for use in packaging small  
8 quantities of controlled substances;

9 (J) containers and other objects used, intended for use,  
10 or marketed for use in storing or concealing controlled substances;

11 (K) hypodermic syringes, needles, and other objects  
12 used, intended for use, or marketed for use in parenterally inject-  
13 ing controlled substances into the human body;

14 (L) objects used, intended for use, or marketed for use  
15 in ingesting, inhaling, or otherwise introducing marijuana, cocaine,  
16 hashish, or hashish oil into the human body, such as

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

20 (ii) water pipes;

21 (iii) carburetion tubes and devices;

22 (iv) smoking and carburetion masks;

23 (v) roach clips, meaning objects used to hold  
24 burning material, such as a marijuana cigarette, that has  
25 become too small or too short to be held in the hand;

26 (vi) miniature cocaine spoons and cocaine vials;

27 (vii) chamber pipes;

28 (viii) carburetor pipes;

29 (ix) electric pipes;

1 (x) air-driven pipes;

2 (xi) chillums;

3 (xii) bongs;

4 (xiii) ice pipes or chillers.

5 (e) In determining whether an object is drug paraphernalia, a  
6 court or other authority shall consider, in addition to all other  
7 logically relevant factors, the following:

8 (1) statements by an owner or by a person in control of the  
9 object concerning its use;

10 (2) prior convictions, if any, of an owner, or of a person in  
11 control of the object, under state or federal law relating to a con-  
12 trolled substance;

13 (3) the proximity of the object, in time and space, to a  
14 direct violation of AS 17.10 or AS 17.12;

15 (4) the proximity of the object to a controlled substance;

16 (5) the existence of residue of a controlled substance on the  
17 object;

18 (6) direct or circumstantial evidence of the intent of an  
19 owner, or of a person in control of the object, to deliver it to a  
20 person whom he knows, or should reasonably know, intends to use the  
21 object to facilitate a violation of AS 17.10 or AS 17.12; the innocence  
22 of an owner, or of a person in control of the object, as to a direct  
23 violation of AS 17.10 or AS 17.12 does not prevent a finding that the  
24 object is intended for use, or designed for use as drug paraphernalia;

25 (7) instructions, oral or written, provided with the object  
26 concerning its use;

27 (8) descriptive materials accompanying the object that  
28 explain or depict its use;

29 (9) national and local advertising concerning its use;

1 (10) the manner in which the object is displayed for sale;

2 (11) direct or circumstantial evidence of the ratio of sales  
3 of the object to the total sales of the business enterprise;

4 (12) the existence and scope of legitimate uses for the object  
5 in the community;

6 (13) expert testimony concerning its use.

7 (f) This section does not apply to the premises of a pharmacy or a  
8 hospital, or the offices of a medical doctor, osteopath, dentist, or  
9 optometrist.  
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# 'We just love getting high,' says 15-year-old tough kid

By SCOTT YATES  
Staff Writer

3-22-82  
MINEER

Frank is not a tough-looking kid. He's 15, "going to be 16 next October," and wears his hair in a style reminiscent of Farrah Fawcett's days on "Charlie's Angels."

Garbed in a T-shirt that expounds the virtues of marijuana, he can talk on that subject like a connoisseur of fine wines discussing vintages.

Frank likes to talk about himself. He's moved around quite a bit; spent time in California, Hawaii and Alaska. As for drugs, he started smoking marijuana when he was 12 years old.

"It wasn't peer pressure or anything. Let's put it this way. My dad had a freezer bag full and I took a little out of that. It wasn't the first time actually, but then I had enough to smoke a couple of times a week."

Frank insists he's not a drug user, but admits he's tried cocaine, amphetamines, hash, magic mushrooms and acid.

"I was curious to find out what acid was like. I've only taken it five times. Once I took three hits and went to a movie—'Cheech and Chong—Up In Smoke.'"

Marijuana is another matter. "I'll always be a marijuana smoker unless I catch some disease and I start hacking and coughing. Same with all my friends. We've talked about it before and we love it too much to quit. We just love getting high."

Although he says he won't quit, Frank has slowed down for his mother "in order to stay out of trouble." At school, he admits that he was getting stoned five times a day.

For a while, Frank had a pipeline to cocaine through a friend of his, Paul, a 14-year-old classmate. Paul stole some of his parents' checks and would buy drugs with them. By the time he was caught, he'd spent \$3,000 on drugs—\$750 alone on one quarter-ounce buy of cocaine.

Paul started smoking marijuana in the fourth grade. His babysitter had her boyfriend over and "they asked me if I wanted to try it. I didn't know I was suppose to inhale though and didn't get high."

He first used cocaine when a friend of his discovered some that his mother had bought.

Although Paul says that girls come before drugs, Frank admits that he really doesn't have time for the opposite sex and says he'd be more inclined to spend \$65 on a quarter-ounce of good "Afghan bud" than on a date. "Besides," he said, "I was too stoned to bother with girls."

One time a teacher at school caught Frank and some other boys smoking. "He told us to dump our stash in the trash and that it better be there when we leave. It was."

Another time, a janitor caught him and some friends smoking around the side of the school. "He took the pipe, it was ceramic, and smashed it against the wall. He said we were lucky, that if he wasn't so busy, he'd run us down to the vice principal's office."

What about classes? Isn't school a place to get education?

Frank has turned over a new leaf and agrees that it's important to spend more time hitting the books. But as for his friends, "They know there's a need for education, but right now, they're only 14 or 15 and they don't have to deal with reality so they don't. But that's what school is. It's like putting money in the bank so you can grow up and get a job. It seems like a waste of time now. It's only when they get old they'll realize they've missed something."

## Drug law

Dear Editor:

Presently before the Senate is SB 190, a bill to revise the state's drug laws. Probably about 90 percent of this bill is good, as it makes sense of our present crazy-quilt of law on the subject. But there are problems.

The worst provision, and one all parents should be aware of, hits 18-year-olds. Under the bill an 18-year-old high school student with a "joint" in the glove compartment of his car in the school parking lot faces a felony charge. Probably no judge would give him the maximum five-year penalty, but he could be a convicted felon.

This means loss of civil rights, having to admit being a convicted felon on job and college applications, possibly even being denied enlistment in the armed forces. Do we really want to do this to 18-year-olds?

SB 190 has other features that violate civil liberties. Some are arguably unconstitutional. It should not be passed in its present form.

Rep. Charlie Parr  
Candidate for Lieutenant  
Governor  
Fairbanks

Saturday, March 20, 1982, The Anchorage Times, A-7

## Marijuana problem

Dear Editor:

I am sitting here angry at myself for not speaking up at the March 15 Chamber of Commerce meeting. I would like to comment about Mr. Wagstaff.

While he was obviously a well-trained speaker, I believe he did those attending a real injustice. He asked us to look at the marijuana problem dispassionately. I have spent over three years studying research on marijuana. I challenge any other interested parent who cares about our youth to educate themselves on the Marijuana issue. If anyone can do this dispassionately I guess I question their motive.

Wagstaff stated that we are only talking about adults. How naive. We are talking about an issue already seriously affecting our youth. The line between adults and children in this area is very thin. Would he be shocked at the alcohol consumed by a minor? We all know differently.

And those of us in the real world would certainly question his comment that there is no known crime connected with marijuana. Marijuana affects judgment and creates apathy. There is no way in the world he can be certain of his statement. We are all affected by the judgment of others. He also assumes and stated so casually that marijuana will be used quietly in privacy. Now who's using passion in such an indirect way? Possibly he should take up Lt. Needham's offer and ride in his car one evening.

I am sorry I did not speak up at the meeting. Wagstaff's testimony should have been challenged!

Kathy Snow  
3460 Kachemak Circle

# STATE OF ALASKA THE LEGISLATURE

POUCH Y - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907-465-3800

## LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 2, 1982

SUBJECT: Drug paraphernalia  
(Proposed CSSSHB 338 (Judiciary))

TO: Representative Ramona L. Barnes  
Chairman, House Judiciary Committee

FROM: LHC Linn H. Asper  
Legislative Counsel

You have asked what, if any, statutory language must be included in CSSSHB 338 (Judiciary) to insure that this bill, if enacted, will not invalidate drug paraphernalia ordinances enacted or that may be enacted by municipalities.

The Constitution of the State of Alaska provides that "A home rule borough or city may exercise all legislative powers not prohibited by law or by charter". (Article X, Sec. 11). This is the starting point of an inquiry into the validity of a municipal ordinance on drug paraphernalia. Clearly there is nothing in the law that prohibits municipal regulation in this area. In fact AS 29.48.035 allows a municipality to regulate many different named activities and "other powers and functions affecting the general health, safety, well-being and welfare of its inhabitants" [(AS 29.48.-035(a)(19)]. The Alaska Supreme Court has cited this statutory section in allowing municipal regulation of massage parlors and other such establishments. Hilbers v. the Municipality of Anchorage, 611 P.2d 31 (Alaska 1980). Regulation of establishments selling drug paraphernalia is likewise a permissible exercise of municipal police power under AS 29.48.

If a municipality may enact a drug paraphernalia ordinance the remaining question concerns the relationship of a municipal ordinance to a state law on the same subject. The 1978 Alaska Supreme Court case of City of Kodiak v. Jackson, 584 P.2d 1130, deals directly with this question. In that

case the City of Kodiak enacted an ordinance requiring a mandatory minimum sentence of imprisonment upon conviction of assault on a police officer. State statutes that dealt with assault did not require a mandatory minimum sentence of imprisonment. Citing previous cases the Court held that:

A municipal ordinance is not necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities. The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law. (Emphasis added)

Applying this test, the Court found that the municipality was prohibited by implication from passing a minimum mandatory sentence in conflict with state sentencing law because of the strong state policy at that time in favor of judicial discretion in sentencing.

Applying the Jackson case to the situation that would prevail if a version of HB 338 passes, and comparing the proposed state legislation with the Anchorage drug paraphernalia ordinance, which is the only municipal drug paraphernalia ordinance that is available to me at this time, it seems that the proposed statute and the ordinance are not "so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law". The Anchorage ordinance goes beyond HB 338 in regulating the sale of drug paraphernalia, and the proposed state legislation deals much more specifically with the question of minors on premises where drug paraphernalia is sold than does the Anchorage ordinance. Nevertheless the ordinance and the proposed legislation are not in conflict. It also appears that conflicts that might occur between HB 338 and municipal drug paraphernalia ordinances could be resolved without giving one substantive effect at the expense of the other.

Based on the above, it is my opinion that no additional language is needed in HB 338 to insure that municipalities can continue to enact their own drug paraphernalia ordinances. The first two sentences of \* Sec. 2 of the

Representative Ramona L. Barnes

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April 2, 1982

proposed committee substitute could be left in the bill as an expression of legislative intent that, if possible, a municipal drug paraphernalia ordinance should not be invalidated even if it conflicts with state law. The last sentence of \* Sec. 2 goes beyond what I now understand to be the intent of your committee and should be deleted.

LHA:ljb

# Ban on drug tools upheld

News/3-24-82

By SHEILA TOOMEY  
Daily News reporter

A Superior Court judge Tuesday upheld Anchorage's new ban against the sale of drug paraphernalia, calling all but one section of the controversial municipal ordinance unconstitutional.

Judge Daniel Moore granted the city's motion for a summary judgment and dismissed a suit filed by three head shops seeking to overturn the law. A lawyer for the challengers said Tuesday his clients have not decided whether to appeal Moore's decision to the Supreme Court.

The ordinance was passed by the Anchorage Assembly Jan. 12 and is modeled on similar laws in other states. It

outlaws the sale of dozens of items such as pipes, scales, needles and containers, but only when they are knowingly sold for use in connection with drugs.

The ordinance provides for civil, not criminal, sanctions. Prosecutors are required to collect evidence and seek an injunction against a shop before they can close it. Those found guilty of violating the ban are liable for fines of from \$50 to \$1,000 for each day of violation.

Moore found a section of the ordinance requiring that stores whose principal business is drug paraphernalia post signs banning minors from the premises "too vague and overbroad." He ordered

that one section stricken.

The shop owners had argued that the stricken section would give police access to private sales records as they sought to determine if 51 percent of a shop's sales were for paraphernalia.

Because the ban applies to items commonly not used in connection with drugs, such as baggies, balloons and blenders, opponents have called the ban arbitrary, incomprehensible and unenforceable. Municipal Attorney Allan Tesche agreed that enforcement is going to be tough.

Tesche and plaintiff's attorney Tim MacMillan seem to agree that the law does not outlaw the sale of specific devices as much as it bans the atmosphere glamorizing drugs

that usually surrounds the sale of such items.

For instance, sale of a blender in an appliance store, advertised for chopping vegetables and surrounded on the shelf by irons and toasters, would not be illegal. However, sale of the same blender in a non-appliance store, accompanied by recipes for hashish brownies and surrounded on the shelf by marijuana plants and posters depicting drug-related activities would be illegal under the ordinance.

To proceed against a store owner, police will have to show that items listed as suspect in the ordinance are being sold to people who intend to use them for drugs — and that the seller knew his customers' intent.

## Judge OKs city's drug gear ban

Associated Press

3-24-82  
Times  
A Superior Court judge has upheld an Anchorage ordinance banning the sale of drug paraphernalia.

Owners of three stores selling items such as pipes, scales, spoons and hypodermic needles had challenged the law as unconstitutional. But Judge Daniel Moore found only one section invalid.

That provision that would have required stores whose principal business is drug paraphernalia to post signs barring minors from the premises. Shop owners argued that figuring out which stores did enough business to require a sign meant giving police access to private sales records.

Moore ordered the section deleted because it was "too vague and overbroad."

An attorney for the store owners said Tuesday they haven't decided whether to appeal to the Alaska Supreme Court.

The ordinance prohibits the sale of paraphernalia when the store owner knows the items are to be used in connection with drugs. That includes items not always associated with drug use, such as plastic bags, balloons and appliances. Critics say it is arbitrary, incomprehensible and unenforceable. Municipal Attorney Allan Tesche agreed that enforcement will be difficult.

He said the law does not outlaw the sale of the items as much as it prohibits an atmosphere glamorizing drugs.

For instance, sale of a blender in an appliance store, advertised for chopping vegetables and flanked on the shelf by irons and toasters would not be illegal. But the sale of the same blender at a "head shop," accompanied by recipes for marijuana brownies and surrounded by posters depicting drug-related activities would be illegal.

Police will have to show that items listed as suspect in the ordinance are being sold to people who intend to use them for drugs and that the seller knew the customer's intent.

Civil fines of \$50 to \$1,000 a day could be levied against violators and prosecutors may seek an injunction to close a store found guilty of illegal sales.

# STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

## DEPARTMENT OF PUBLIC SAFETY

DIVISION OF ADMINISTRATIVE SERVICES

POUCH N - JUNEAU 99811

March 30, 1982

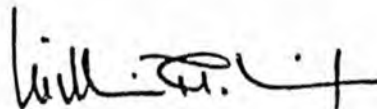
465-4322

The Honorable Ramona Barnes  
Chairman, House Judiciary Committee  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Dear Madam Chairman:

1. Based upon our analysis of HB 338, this Department supports this Bill and its thrust towards protecting minor children from exploitation by commercial drug paraphernalia merchants.
2. Section 11.66.300 (b) and (c) not only places these persons or merchants on notice that not only is there strong public concern in this area, but also provides adequate sanctions.
3. We have also determined that this Bill will have no fiscal impact upon the Department of Public Safety (see attached fiscal note).

Sincerely,



William R. Nix  
Commissioner

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST  
 Bill/Resolution No. HB 338  
 Title An Act Prohibiting Access By Minors to Premises Where Drug Paraphernalia  
 Requested by House Judiciary Date 3/30/82 is Offered  
 or Sold.

II. FISCAL DETAIL  
 Agency Affected \_\_\_\_\_  
 Program Category Affected \_\_\_\_\_  
 BRU, Program, Or Subprogram(s) Affected \_\_\_\_\_  
 (Note: If more than one budget component is affected, separate line-item  
 amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						
POSITIONS	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
FULL TIME						
PART TIME						
TEMPORARY	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No Fiscal Impact

IV. DATE 3/30/82 PREPARED BY W.V. Lawson, Director  
 AGENCY Department of Public Safety  
 Original: Legislative Finance PHONE 465-4336  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)  
 33-001 (Rev. 12/81)

3/24/82

metro/business

Anch

# Ban on drug tools upheld

By SHEILA TOOMEY  
Daily News reporter

A Superior Court judge Tuesday upheld Anchorage's new ban against the sale of drug paraphernalia, calling all but one section of the controversial municipal ordinance constitutional.

Judge Daniel Moore granted the city's motion for a summary judgment and dismissed a suit filed by three head shops seeking to overturn the law. A lawyer for the challengers said Tuesday his clients have not decided whether to appeal Moore's decision to the Supreme Court.

The ordinance was passed by the Anchorage Assembly Jan. 12 and is modeled on similar laws in other states. It

outlaws the sale of dozens of items such as pipes, scales, needles and containers, but only when they are knowingly sold for use in connection with drugs.

The ordinance provides for civil, not criminal, sanctions. Prosecutors are required to collect evidence and seek an injunction against a shop before they can close it. Those found guilty of violating the ban are liable for fines of from \$50 to \$1,000 for each day of violation.

Moore found a section of the ordinance requiring that stores whose principal business is drug paraphernalia post signs banning minors from the premises "too vague and overbroad." He ordered

that one section stricken.

The shop owners had argued that the stricken section would give police access to private sales records as they sought to determine if 51 percent of a shop's sales were for paraphernalia.

Because the ban applies to items commonly not used in connection with drugs, such as baggies, balloons and blenders, opponents have called the ban arbitrary, incomprehensible and unenforceable. Municipal Attorney Allan Tesche agreed that enforcement is going to be tough.

Tesche and plaintiff's attorney Tim MacMillan seem to agree that the law does not outlaw the sale of specific devices as much as it bans the atmosphere glamorizing drugs

that usually surrounds the sale of such items.

For instance, sale of a blender in an appliance store, advertised for chopping vegetables and surrounded on the shelf by irons and toasters, would not be illegal. However, sale of the same blender in a non-appliance store, accompanied by recipes for hashish brownies and surrounded on the shelf by marijuana plants and posters depicting drug-related activities would be illegal under the ordinance.

To proceed against a store owner, police will have to show that items listed as suspect in the ordinance are being sold to people who intend to use them for drugs — and that the seller knew his customers' intent.

Involved Parents Assn.  
9700 Chenega Dr  
Anchorage, Ak. 99507  
Jan. 20, 1982

Representative Ramona Barnes  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, Alaska 99811

Dear Representative Barnes;

The Involved Parents Association requests you consider conducting hearings on a bill introduced by Terry Martin which would prohibit the sale of drug paraphernalia, statewide.

We also urge you to continue your efforts to re-criminalize marijuana in the state of Alaska. We feel that the use of drugs is a threat, not only to our youth, but to all citizens.

A recent news release stated a judge (in another state) found the victim of a rape was partially to blame because she had been hitch-hiking. If a judge can find the placing of temptation to be contributory to a crime, then surely the temptation of availability of drug paraphernalia is equally contributory to the abuse of drugs.

We hope you will consider our request.

Sincerely;

*Joy Hatcher*  
Joy Hatcher  
President, IPA

*Marie Dickey*  
Marie Dickey  
Secretary, IPA

*Chuck Dickey*  
Chuck Dickey  
Chairman, Local Govt. IPA

*H.B. 3100*

# States high on head-shop law

**Associated Press**  
Cleveland — Lawmakers throughout the nation are trying to fight drug abuse by passing laws against the sale of cigarette papers, waterpipes and other drug paraphernalia.

But court rulings threaten to send the laws up in smoke.

Fourteen states and hundreds of communities have adopted laws banning the sale of drug paraphernalia at the behest of anti-drug forces who say distribution of the accessories glamorizes drug use and encourages young people to participate in illegal activities.

And the trend shows no signs of slowing.

The Oklahoma Legislature has passed a "head shop" bill that may go to Gov. George Nigh today. The Kansas Legislature has approved a similar bill.

The Texas House Criminal Jurisprudence Committee — referred to news accounts as the War on Drugs committee — this month recommended a bill that would punish both buyers and sellers of drug-related items.

"The whole intent of the bill is to shut down the head shops," said state Rep. Terral Smith of Austin. The paraphernalia industry is worth an estimated \$500 million to \$3 billion a year.

The federal Drug Enforcement Administration has helped lawmakers by providing a model law based on the legal precedents established under laws to ban the paraphernalia of counterfeiting, gaming, moonshining and tobacco bootlegging.

Some judges, in overturning "head shop" laws, have said these items can have legitimate uses and that the laws give police too much power in deciding whether the items are intended for use with illegal drugs.

Rolling papers for marijuana "blunts," for example, can also be used for tobacco cigarettes. A paper can be used to hold the end of a rolling marijuana cigarette.

The issue of whether the sale of drug paraphernalia can be banned has been headed for the U.S. Supreme Court, possibly from the federal suburb of Parma.

Under the Parma law, making, selling or possessing drug paraphernalia is a second-degree misdemeanor, carrying a fine of \$750 and 90 days in jail. It bans sale of devices such as hashish pipes, waterpipes, pipe spoons, and prohibits the advertising of those and similar items.

Peter Schliewin, owner of Record

Revolution No. 6, challenged the law before it could be applied to him. Schliewin says his legal fees are being paid, in part, by industry groups.

He says most record dealers can't get by simply selling records, which he says have a low profit margin. But he thinks the campaign to rid the country of drug accessories is "ridiculous."

"If I took away shot glasses, that would have nothing to do with whether or not you drank whiskey," he said. "All the items I sell can be bought in a legitimate smoke shop, a complete drug store and a hardware store."

Last December, the 6th U.S. Circuit Court of Appeals overturned a ruling by a federal district court, which held that the ordinance was constitutional. It was the first appeals court test of a law based on the DEA model.

The Cincinnati-based appeals court said the law was too vague and violated the First Amendment free-speech guarantee and the 14th

Amendment due-process protection. Now the city, which modeled its law on the DEA model bill, is asking the high court to review the case.

Similar cases are pending before the 8th U.S. Circuit Court in St. Louis, the 5th U.S. Circuit Court in New Orleans, and 4th U.S. Circuit Court in Richmond, Va.

William Lenck, chief counsel of the DEA, expects the circuit courts to uphold the law.

He claims Parma's version differs from the model act in a technical detail only.

So far, seven state laws based on the DEA model have been upheld in federal district courts, he says.

These states have adopted laws based on the DEA model: Connecticut, Delaware, Florida, Idaho, Indiana, Louisiana, Maryland, Nebraska, New Jersey, New York, Pennsylvania, South Carolina, Arkansas and New Mexico.

In New Mexico, the Legislature recently passed the model act, while a U.S. District Court struck down a similar law approved by Albuquerque

on grounds it was too vague. Meanwhile, some cities, including Ohio and California, have passed laws that ban the paraphernalia to minors. Mothers and manufacturers don't sue those laws.

But DEA officials, whose purpose is to turn children away from using drugs, say

"It still gives the perception of the young person that 'if it's good enough for them (adults), it's good enough for me,'" Lenck said.

S.C. case outcome? } last week ruled it const.  
Lynn Asper }  
2450

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 23, 1982

SUBJECT: Drug paraphernalia legislation  
(SSHB 338)

TO: Representative Ramona L. Barnes  
Chairman, House Judiciary Committee

FROM: *LHA* Linn H. Asper  
Legislative Counsel

You have asked for a brief analysis of SSBH 338 which would prohibit minors from premises where drug paraphernalia is sold or offered for sale. In addition you have asked for the status of court challenges to drug paraphernalia legislation.

SSHB 338 is proposed as an amendment to the criminal laws of the state, and is contained in a single section to be added to AS 11.66. It makes two kinds of conduct criminal. First, in subsection (a), a person under the age of 18 may not knowingly enter or remain on premises where drug paraphernalia is sold or offered for sale. Subsection (b) provides that a person may not, with criminal negligence, allow a minor to stay on premises where drug paraphernalia is sold or offered for sale. "Criminal negligence" is defined as a failure to perceive that a person under 18 has entered onto the premises when that failure to perceive constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. This second category of crime is directed at operators of premises that sell drug paraphernalia, but it could apply to guardians of minors or other persons not involved in the operation of the premises.

AS 11.66.300(c) makes a violation of the section a class A misdemeanor and it should be noted that this penalty applies to a minor who violates AS 11.66.300(a).

Subsection (d) is critical to the operation of the bill. It defines "controlled substances" to be drugs now prohibited under AS 17.10 or 17.12. If the drug legislation that has been passed by the House during this session (SB 190 amH) takes effect, the references will have to be changed to be consistent with that legislation. Most importantly, AS 11.-66.300(d) defines "drug paraphernalia". The definition is extensive, but the key concept is that drug paraphernalia is any paraphernalia that is used or intended for use in connection with illegal drug use.

Subsection (e) excludes pharmacy or hospital premises, or a medical doctor's, dentist's, osteopath's or optometrist's office from the operation of the section, because otherwise it might be illegal for a minor to frequent those places, although it can be argued that since the definition of drug paraphernalia applies only to paraphernalia that is used or intended to be used for illegal activities, the exclusion may not be necessary. Drug paraphernalia available in doctor's offices and similar business premises is not generally used or intended for use in illegal activities.

As states and local jurisdictions have enacted drug paraphernalia laws they have been challenged in court. On March 3rd of this year the United States Supreme Court upheld one such challenged ordinance in the case of Village of Hoffman Estates v. Flipside, Hoffman Estates, U.S. \_\_\_\_\_, 1982. This case determined that a city ordinance that, among other things, prohibited the sale of items "designed or marketed for use" as drug paraphernalia to minors, was not, on its face, overbroad or vague so as to render it unconstitutional. Although the court was somewhat critical of the "designed for use" definition, the majority opinion held that "marketed for use" was sufficiently precise to avoid the overbreadth and vagueness challenges. In spite of the fact that the Village of Hoffman Estates ordinance called for a licensing process and did not actually prohibit the presence of minors on the premises, it is safe to say that the case indicates that carefully drawn drug paraphernalia statutes will be upheld. The Judiciary Committee may want to incorporate the "marketed for use" concept into HB 338 because the present "intended for use" language is similar to the "designed for use" concept that was criticized by the Court in the Hoffman Estates case.

LHA:ljb



# NEW COURT DECISIONS

*Digests of Significant Opinions Not Yet Generally Reported*

*Local ordinance  
upheld*

## Attorneys

### ADMISSION TO PRACTICE—

Alabama bar rules that require bar candidates to be "bona fide" residents and to reside in state for three weeks prior to bar examination violate Article IV's Privileges and Immunities Clause.

For the past three years, the attorney has practiced law in Louisiana. Desiring to practice law in his home state, he applied to take the Alabama bar examination, but was rejected because, as he readily admits, he does not meet the residence requirement. Under Rule IVA of Alabama's bar admissions rules, an eligible candidate is one "who is, at the date of filing of the application, a bona fide resident of the State of Alabama and is in fact a resident of the State of Alabama at the time of certification to sit for the bar examination." Since certification usually issues three weeks prior to commencement of the examination, the state committee on character and fitness established, as an administrative interpretation of Rule IVA, the requirement that an applicant actually reside in Alabama for three weeks prior to the examination.

A rule that denies an applicant the right to take the Alabama bar examination for no reason other than that he does not reside in Alabama fosters economic protectionism and parochial interests in violation of the Privileges and Immunities Clause and thus cannot stand. It is not just the administrative interpretation implementing a three-week residence requirement that this court deems obnoxious; the requirement of Rule IV itself that one certified to take the examination must be a bona fide resident of Alabama without respect to the time period for such residence violates the Privileges and Immunities Clause.

The Alabama State Bar Association has not attempted to justify the residence requirement by asserting that it fosters some compelling state interest. Instead, the bar merely contends that the Alabama residency requirement is one of the most liberal in the country. Perhaps the rule may be classified as "liberal"; however, that does

not prevent it from violating the constitutional rights of nonresidents. The U.S. Supreme Court indicated such to be true in *Hicklin v. Orbeck*, 437 U.S. 518, 46 LW 4773 (1978), where it declared unconstitutional an Alaska statute that favored the hiring of only Alaska residents for work in oil fields in which the state had an interest.

Likewise, there has been no attempt to show that nonresidents pose, in *Hicklin's* words, a "peculiar source of evil" to the ideal of maintaining a bar of qualified attorneys. The requirement that candidates for the bar be residents of Alabama does little to ensure that applicants are qualified, since the bar association does not utilize the period of residency to observe and evaluate candidates. The state bar association employs the nationwide investigatory services of the National Conference of Bar Examiners to obtain information on the character and fitness of nonresident applicants. The use of this service has been often suggested by courts as a less restrictive alternative for determining the fitness of bar applicants. Presumably, the additional expense of the use of this service forms the basis for the extra fee that nonresidents must pay for the privilege of sitting for the Alabama bar examination. The information provided by the National Conference of Bar Examiners provides a much stronger basis for evaluating a nonresident applicant's qualifications to practice law than does a requirement for out-of-state residents to reside in Alabama for any period of time. The invidious discrimination against nonresidents worked by this rule bears no relationship to the legitimate state interest of ensuring the competency and rectitude of members of its bar, and thus fails to meet the test for scrutiny under the Privileges and Immunities Clause.—Guin, J.

—USDC NAla; *Strauss v. Alabama State Bar*, 8/17/81.

## Cities and Counties

### BUSINESS REGULATION—

Retail merchants who admittedly sell drug-related items covered by county drug paraphernalia ordinance lack standing to bring pre-enforcement challenge claiming ordinance would be unconstitutionally vague if applied to their sale of other items susceptible to both legitimate and drug-related uses.

The ordinance makes it a misdemeanor for "any merchant or other person to knowingly sell, offer for sale, or display any cocaine spoon, marijuana pipe, hashish pipe, or any other drug-related paraphernalia." It defines "drug paraphernalia" as "all equipment, products and materials of any kind which are used, intended for use, or designed for use in \*\*\* growing, \*\*\* preparing, testing, \*\*\* [or] ingesting \*\*\* a controlled substance," including, but not limited to, more than a dozen specified items ranging from drug test kits to "ice pipes or chillers."

Owners of two retail stores that include a "smoking accessories" section challenged the ordinance shortly before it was to take effect. They argued that the ordinance is unconstitutionally vague on its face in that it fails to give fair notice of what constitutes "drug paraphernalia." They admitted that at least some of the items they were selling could be used for preparing, testing, or ingesting drugs and that these single-use items were plainly within the ordinance's definition of "drug paraphernalia." But the district court examined the validity of the ordinance in light of the full range of commercial activity that the ordinance forbids and concluded that the ordinance provides an inadequate basis for either a retailer or a law enforcer to determine which multi-use items fall within its coverage. It therefore declared the ordinance unconstitutionally vague and permanently enjoined its enforcement.

A statute is unconstitutionally vague on its face only when it cannot validly be applied to any conduct. If a statute has a core meaning that can reasonably be under-

stood, then it may validly be applied to conduct within the core meaning, and the possibility of such a valid application necessarily means that the statute is not vague on its face. Moreover, under the traditional rule of standing expressed in *Raines v. U.S.*, 362 U.S. 17 (1960), a defendant to whom a statute may validly be applied may not avoid conviction by contending that the statute would be unconstitutional if applied to other persons or other situations.

The crucial procedural issue is whether a district court, having properly rejected a facial challenge to a local ordinance because it would be valid as applied to one activity in which the plaintiff is engaged, should proceed to adjudicate the merits of a claim that the ordinance would be unconstitutionally vague if applied to a second activity currently engaged in by the same plaintiff. The considerations underlying *Raines* include the undesirability of unnecessary, premature, or unduly broad pronouncements on constitutional issues; the intrusiveness of a court's considering all the situations in which a law could possibly be applied; and the possibility of a limiting construction being placed on the law in the event an application of questionable validity is concretely presented.

These considerations apply fully when litigants, like the retailers here, who engage in some conduct that could validly be prosecuted under a statute, challenge the statute's application to other conduct in which they are currently engaged. If the county charged the retailers with violating the ordinance by selling single-use items, the considerations underlying *Raines* would not permit dismissal of the charges on the ground that the ordinance would be vague if applied to their sale of multi-use items. This example underscores the inappropriateness of adjudicating the retailer's challenge to the ordinance as applied to their sale of multi-use items in the context of this pre-enforcement civil suit. Since a prosecution for selling single-use items would be valid, the retailers are no more entitled to prevent that prosecution now than they would be to have such a prosecution dismissed once it was brought. As long as they are selling single-use items to which the ordinance may validly be applied, even an articulated threat of broader enforcement should not enable them to challenge other applications of the ordinance until a broader use of the ordinance is actually initiated.—Newman, J.

—CA 2; *Brache v. County of Westchester*, 8/18/81.

## Courts and Procedure

### COLLATERAL ESTOPPEL—

Judgment adverse to federal government on legal issue of national importance may not be used by nonparties to collaterally estop government from relitigating that issue in different federal circuit.

American Medical International, Inc. (AMI), more than 30 of its hospital subsidiaries, and a hospital it manages, challenged a decision by the Department of Health and Human Services denying reimbursement of certain costs that they allegedly absorbed while furnishing health care to beneficiaries of the Medicare program. The single issue is whether the administrator is collaterally estopped from withholding reimbursement of so-called "stock maintenance costs," the status of which was decided against the federal government in earlier litigation in the Court of Claims.

In *Commissioner v. Sunnen*, 333 U.S. 591 (1948), the U.S. Supreme Court held that so long as the facts in two cases are formally "separable," it is inappropriate to use a judgment in the first to estop a party on a legal point in the second. However, in one of its most recent analyses of collateral estoppel, the Court in *Montana v. U.S.*, 440 U.S. 147, 47 U.S. 147 (1979), allowed a judgment predicated upon one set of contracts to estop litigation of legal issues in another case dealing with a similar, though unrelated, set of contracts, because there had been no "changes in facts essential to judgment."

The issue here is whether the circumstances are so unusual that the administration of justice would best be served by refusing an estoppel in the instant proceeding. Were this a case involving only private litigants or only simple issues of fact, the court would not hesitate to conclude that an estoppel should arise. This is not, however, a typical case. A federal agency, not a private party, lost on an issue of federal law, not an issue of fact, in the first lawsuit. To allow nonparties to the Court of Claims' ruling to win simply on the basis of an estoppel would mean that the court imply and uncritically binds itself to follow another court's interpretation of a federal statute in virtually all cases involving that legislation. The broader and more serious implication of such a holding is that the first court to hear a case raising a public law issue litigable only with the federal government would, if it ruled against the government, rigidify the law to be applied by every court in every case presenting that issue. What makes that both possible and alarming are the Supreme Court's relatively recent estoppel decisions doing away with mutuality, sanctioning application of offensive estoppel, and generally broadening the permissible uses of issue preclusion when questions of law are involved.

It can hardly be gainsaid that complex questions of national import can wholesomely and profitably be explored by more than a single court. And it is a truism that proposed legal rules can be improved through repeated examination by a variety of legal minds. Rigorous analysis of the law, and concomitantly its healthy development, would thus be hampered were an estoppel indulged in a case such as this. By the same token, independent reconsideration of legal issues by the circuits can facilitate Supreme Court review by

highlighting their complications and controversial aspects, and thus make for better informed decisions.

This is not to say that arguments opposing relitigation of issues lose all force in cases like the one at bar. Duplicative litigation has its own irreducible minimum of waste, and there is much to be said in favor of invariable sameness and resulting certainty in the law. That it is more important to have a sure rule than to have the right rule is a dictum noted with such frequency that it has evolved from truism to cliché. And there is an element of inequity in the special rule applicable only in a litigation against the government, particularly since federal agencies are in a better position than most litigants to petition the Supreme Court or Congress to modify what they believe to be erroneous interpretations of national law. But all that these considerations suggest is that the courts should be cautious in declining to apply estoppel to previously litigated questions of law, not that they should never do so.—Per Curiam.

—CA DC; *American Medical International, Inc. v. Secretary of Health, Education, and Welfare*, 8/14/81.

## Criminal Law and Procedure

### FRAUD—

Lawyer's use of mails to further his undisclosed representation of interests that conflicted with those of clients represented by his law firm and that could have caused those clients substantial economic harm constitutes mail fraud in violation of 18 USC 1341.

Bronston's indictment alleged that he fraudulently violated his fiduciary duty as an attorney by helping to further the efforts of Convenience and Safety Corporation (C & S) and Saul Steinberg to obtain a bus stop shelter franchise from the City of New York at a time when his own law firm (Rosenman, Coffin, Freund, Lewis & Cohen) was representing a group of investors in BusTop Shelters, Inc., the then-current holder of the franchise and a participant in the competition for its renewal.

[Text] Bronston's principal contention is that in order to show a violation of the mail fraud statute based on a fraudulent breach of fiduciary duty, the government must prove that the defendant used his breach in some way that would benefit himself or harm the victim of the fraud and that the trial judge erred in failing to instruct the jury accordingly. \*\*\*

Although a mere breach of fiduciary duty, standing alone, may not necessarily constitute a mail fraud, \*\*\* the concealment by a fiduciary of material information which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other is a violation of the statute. \*\*\* [P]roof that the fiduciary relationship was used or manipulated in some way is not necessary. [End Text]

ficient to satisfy the first branch of the plaintiff's proximate cause burden. . . .

In the instant cause the defendants successfully rebutted the presumption. The jury responded in the negative to the following interrogatory: "Do you find from a preponderance of the evidence that Dr. Froehlich was informed by Mrs. Seley of her history of an episode of high blood pressure at the time of her child's birth?" Plaintiffs asserts that the Searle warnings accompanying Ovulen were defective in that they failed to warn that women with a prior history of hypertension associated with pregnancy (toxemia) were subject to a higher risk than other women of experiencing dangerously high blood pressure or stroke as a result of birth control pill use. Because Mrs. Seley failed to disclose to Dr. Froehlich that she had experienced toxemia, even if the warnings had been in the form the Seleys contend to be adequate, Dr. Froehlich could not have related those warnings to her case. Where, as here, an adequate warning would have made no difference in the physician's decision as to whether to prescribe a drug or as to whether to monitor the patient thereafter, the presumption established by Comment j is rebutted, and the required element of proximate cause between the warning and ingestion of the drug is lacking. [End text]—Sweeney, J.

C. Brown and Donofrio, JJ., dissent.

—Ohio Sup Ct; Seley v. G.D. Searle & Co., 7/15/81.

"designed for the purpose" language in §850(2) is impermissibly vague since that phrase refers to unspecified physical characteristics of an item or the intended purpose of its design or manufacture. The state, however, contends that the words "designed" and "purpose" are equivalent to "intent" and therefore that drug-related paraphernalia is defined by the alleged violator's intent for the item to be used for one of the drug-related purposes enumerated in the statute.

Having carefully considered the reasoning of both interpretations as well as the distinctive features of the statute when compared to the Model Act, this court finds that "designed for the purpose" refers to the subjective intent of the alleged violator rather than to the physical characteristics of a particular item. Even though scienter requirements are not as prevalent in civil statutes as in criminal enactments and even though §850 omits the Model Act's 14 enforcement guidelines that clearly focus upon the intent of the alleged violator, the New York statute's definition of drug-related paraphernalia is obviously adapted from the Model Act. Therefore, the following comment of the Model Act's drafters is relevant in determining the intended meaning of the definition adopted by the New York legislature: "To ensure that innocently possessed objects are not classified as drug paraphernalia, Article 1 makes the knowledge or criminal intent of the person in control of an object a key element of the definition."

Although the context of the Model Act "design" may have been intended to refer to the subjective intent of a manufacturer of drug paraphernalia, in the context of the statute, which does not seek directly to regulate the activities of manufacturers, the conclusion that "designed for the purpose" refers to the subjective intent of the person charged with the violation is consistent with the ordinary meaning of "design." Moreover, the statute does not utilize "designed for the purpose" in the disjunctive with "intended for the purpose" or "intended to be used," which might have suggested that "designed" was used in a sense other than in referring to subjective intent.

[Text] Unfortunately, notwithstanding the conclusion that §850(2)'s definition of drug-related paraphernalia is not vague since an element thereof is the alleged violator's drug-related purpose for the item's use, the Court finds that the protection afforded thereby is vitiated by §851's standard of liability. Under section 851, a violation occurs when a person possesses with intent to sell, offers for sale, or purchases drug-related paraphernalia "under circumstances evincing knowledge that the paraphernalia is possessed, sold or purchased" for one of the drug-related purposes listed in §850(2). Plaintiffs and defendants agree that a person is liable under this standard if the circumstances indicate that a "reasonable person" would know the drug-related purpose of the item's sale or purchase. Therefore, unlike the definition of

drug-related paraphernalia which depends upon the alleged violator's subjective intention that the item be used for a drug-related purpose, a violation occurs if the circumstances of the sale indicate that the individual reasonably should have known of the item's drug-related purpose. Since a violation does not depend upon the alleged violator's subjective awareness of his own drug-related purpose and the statute does not include enforcement guidelines which define the "circumstances" in which a person reasonably should know the drug-related purpose of an item's sale or purchase, for the reasons stated below, the court is constrained to find that §851's standard of liability is void for vagueness. . . .

The court has no doubts that in enacting Article 39 the legislature sought to achieve the legitimate goal of discouraging drug use through constitutional means. No court, however, state or federal, can disregard the clear meaning of statutory language. While the definition of drug paraphernalia focuses on the intent of the individual charged, thereby giving him notice of the prohibited conduct, a violation of Article 39 depends upon undefined circumstances that leave enforcement officials and courts free to find violations on an ad hoc basis. Since drug paraphernalia legislation of necessity must seek to regulate the sale of items that have both legitimate and drug-related uses, such legislation must specify the limited circumstances in which the sale of such items is unlawful. The court reluctantly concludes that Article 39 has not done so. [End Text]—Cannella, J.

—USDC SNY; Franza v. Carey, 7/17/81.

## States

### BUSINESS REGULATION—

New York statute that proscribes sale or purchase of drug paraphernalia "under circumstances evincing knowledge" that paraphernalia is sold or purchased for drug-related purpose is unconstitutionally vague.

This action presents the latest judicial challenge to the constitutionality of legislation adapted from the Drug Enforcement Administration's Model State Drug Paraphernalia Act. The Model Act defines drug paraphernalia as anything "used, intended for use, or designed for use" in growing, processing, or ingesting a controlled substance. The general definition is followed by twelve specific examples, each described by the phrase "used, intended for use, or designed for use."

New York's drug paraphernalia law Article 39 of the General Business Law §§850-853 (McKinney Supp. 1980-1981), which unlike the Model Act, imposes only civil liability, contains a definition of drug-related paraphernalia that is less comprehensive than the Model Act. The statute omits any general definition and adopts only eight of the Model Act's 12 specific examples. Each example is described by the phrase "used or designated for the purpose of" growing, processing, or ingesting controlled substances. According to the business owners challenging the statute, the

## Taxation

### GROSS ESTATE—

Homestead rights created under Texas law serve to reduce value of homestead property included in decedent's gross estate.

When the decedent died, she owned an undivided one-half interest in a tract of land (the other half being owned by her brother) and the entire fee interest in another tract in Texas. These properties, although separately owned by the decedent, constituted the homestead of the decedent and her husband. After the decedent's death, her surviving husband asserted his right to continue to occupy both tracts as his homestead property.

This court faced the issue — whether the value of homestead property included in gross estate should be reduced on account of homestead rights created under Texas law — in Hinds Estate v. Commissioner, 11 TC 314 (1948), aff'd on another issue, 180 F.2d 930 (CA5 1950). Hinds Estate involved the valuation for estate tax purposes of the decedent's community half interest in homestead property. This court found "nothing particularly unusual about the laws of Texas with respect to the surviving

# STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES  
OFFICE OF THE COMMISSIONER

JAY S. HAMMOND, GOVERNOR

PC UCH H 01  
JUNEAU, ALASKA 99811  
PHONE: 465-3030

February 2, 1982

Document# 26-82

The Honorable Ramona L. Barnes  
Representative  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Dear Representative Barnes:

Recently you requested statistics regarding:

- (1) Summary of our Current Correctional Bed Capacity;
- (2) Summary of our Funded and Requested Correctional Construction Projects; and,
- (3) Projection of Inmate Population.

If you have questions, please do not hesitate to contact me.

Sincerely,



Helen D. Beirne  
Commissioner

Enclosure

DIVISION OF ADULT CORRECTIONS  
CAPACITY OF CORRECTIONAL CENTERS  
FEBRUARY 1982

STATE INSTITUTIONS	NORMAL OPERATING CAPACITY	EMERGENCY OPERATING CAPACITY	01/27/82 PRISONER COUNTS
Anchorage - 3rd Ave.	70	80	81
Anchorage - 6th Ave.	100	115	133
Eagle River	80	100	112
Alaska Women's Fac/ER	28	30	21
Palmer	113	113	107
Ridgeview Post #6	50	50	46
Fairbanks	110	118	164
Juneau	90	100	111
Ketchikan	22	30	21
Nome	30	34	32
<hr/>			
DAC Inst. Capacity			
* Totals In-State	693	770	828
<hr/>			
Alaska Prisoners in Federal Institutions			190
Prisoners Housed in Contract Community Facilities (Halfway Houses)			63
<hr/>			
Total Number of Prisoners In-State & Federal Institutions			1081

\*In March 1982 additional beds will be available as follows:

Ridgeview Post #6 - 40 new beds for a 90 bed capacity  
Palmer (existing facility) - 24 new beds for a 137 bed capacity  
Palmer Addition (new facility) - 100 new beds

In-State confinement capacity by March 1982:

<u>NORMAL OPERATING CAPACITY</u>	<u>EMERGENCY OPERATING CAPACITY</u>
857	934

DIVISION OF ADULT CORRECTIONS

SUMMARY OF CAPITAL PROJECTS AFFECTING BED SPACE  
(DOES NOT INCLUDE CORRECTIONAL INDUSTRIES, CODE UPGRADE OR RELATED PROJECTS)

FUNDED PROJECTS:

<u>Bed Space Increase</u>	<u>Project</u>
-0-	<u>Ketchikan Correctional Center</u> - Scheduled Completion 9-1-82. New Institution, 30 single rooms. Current Status - ahead of schedule - Contractor's estimated completion - 4-30-82. Staffing Available to operate 9-1-82. Since this is a replacement facility no system increase will result.
180	<u>Anchorage Pre-Trial</u> - Scheduled Completion - 12-31-82. New Institution, 180 single rooms. Current Status - ahead of schedule - Contractor's estimated completion 12-1-82.
60	<u>Eagle River Correctional Center Expansion</u> - Scheduled Completion 7-31-82. New single rooms = 80 - Post Construction Capacity = 180. Current Status - ahead of schedule - Contractor's estimated completion - 7-1-82. Upon completion of this project, it will be necessary to remove 20 inmates from 3rd Avenue in order to approach compliance. Therefore, the system capacity in August will only increase by 60, rather than by a full 80 beds.
100	<u>Palmer Addition</u> - Scheduled Completion - 3-1-82. New Institution, 100 single rooms. Current Status - nearly completed - Contractor's estimated completion date - 3-1-82.
40	<u>Juneau Expansion</u> - Scheduled Completion - October 1983. New single rooms = 56, Post Construction Capacity = 130 Current Status - on schedule - In design development stage.
67	<u>Fairbanks Expansion</u> - Scheduled Completion - October 1983. New single rooms = 77, Post Construction Capacity = 177.
Between 4 and 22	<u>Nome Replacement</u> - Scheduled Completion - Fall of 1983. New Institution, 32-50 single rooms, Post Construction Capacity = 32-50. Now in design phase. This project replaces 28 beds, so system increase will be minimal.
-0-	<u>Bethel Jail</u> - Scheduled Completion - Fall of 1983. New Institution, 40 single rooms, Post Construction Capacity = 40. Current Status - Now in design phase. While Bethel beds will be new to the DOAC system, we will also be assuming the current local jail function. No system increase will be realized.

FY'83 PROJECT REQUESTS AFFECTING BED SPACE:

<u>Bed Space Increase</u>	<u>Project</u>
300	<u>Long-Term Facility</u> - Secure institution for sentenced male felons to be located in Southcentral Alaska. \$41 million has been requested for this 300 bed facility with a core capacity enabling future expansion to not more than 400 beds. Through P.F.P.F. funds, an architectural firm has been selected to begin planning and preliminary design. Completion is projected for early 1985.
80	<u>Fairbanks Addition</u> - Minimum to medium custody facility to be located adjacent to the existing Fairbanks Correctional Center. This facility would be similar to the new Palmer Addition and would permit those requiring less secure conditions of confinement to remain in the Northern Region.

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SUMMARY OF BED SPACE INCREASES

- 51 Beds - Funded projects under design or construction
- 380 Beds - FY'83 Capital Request
- 831 Beds - Funded or Requested

INSTATE BED CAPACITY COMPARED WITH PROJECTED PRISONER POPULATION

<u>Facility</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>
Ketchikan	30	30	30	30	50
Juneau Men's	90	130	130	130	130
Juneau Women's	3	3	3	3	3
Fairbanks	110	177	177	177	177
3rd Avenue	50	50	50	50	50
6th Ave. Men's & Women's	100	100	100	100	100
Ridgeview Men's	90	-0-	-0-	-0-	-0-
Eagle River Men's	160	160	160	160	160
Eagle River Women's	28	28	28	43	43
Palmer	237	237	237	237	237
Post Road	-0-	180	180	180	180
Nome	28	32	32	32	32
Bethel	-0-	40	40	40	40
Long Term Fac. Southcentral	-0-	-0-	-0-	300	300
Fairbanks Addition	-0-	-0-	-0-	80	80
<b>INSTATE BED TOTAL</b>	<b>896</b>	<b>1,167</b>	<b>1,167</b>	<b>1,562</b>	<b>1,582</b>
Projected Inmate Populations	1,112	1,281	1,450	1,620	1,790
Range of Expected High/Low	to	to	to	to	to
Counts	1,022	1,191	1,360	1,530	1,700

Summary: The difference between "Instate Bed Totals" and "Projected Inmate Populations" is that number that must be addressed through placement in the Federal Prison System, placement in contract community facilities, or by additional construction.



## OPINIONS ANNOUNCED MARCH 3, 1982

### The Supreme Court decided:

#### CITIES AND COUNTIES—Business Regulation

Ordinance that requires businesses to obtain license if they sell any items that are "designed or marketed for use with illegal cannabis or drugs" does not infringe on First Amendment free speech rights of either businesses or their customers; nor is ordinance facially vague when applied to store that marketed merchandise such as drug-related publications, "roach clips," and specially designed pipes used to smoke marijuana. (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, No. 80-1681)..... page 4267

#### CRIMINAL LAW AND PROCEDURE—Habeas Corpus

Federal district court must dismiss habeas corpus petition that contains any claim as to which state remedies have not been exhausted, even if exhaustion requirement has been met as to other claims asserted in petition. (*Rose v. Lundy*, No. 80-846)..... page 4272

### Full Text of Opinions

No. 80-1681

#### VILLAGE OF HOFFMAN ESTATES, ET AL., APPELLANTS, v. FLIPSIDE, HOFFMAN ESTATES, INC.

#### APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

#### Syllabus

No. 80-1681. Argued December 9, 1981—Decided March 3, 1982

An ordinance of appellant village requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Guidelines define the items (such as "roach clips," which are used to smoke cannabis, "pipes," and "paraphernalia"), the sale of which is required to be licensed. Appellee, which sold a variety of merchandise in its store, including "roach clips" and specially designed pipes

used to smoke marijuana, upon being notified that it was in possible violation of the ordinance, brought suit in Federal District Court, claiming that the ordinance is unconstitutionally vague and overbroad, and requesting injunctive and declaratory relief and damages. The District Court upheld the ordinance and awarded judgment to the village defendants. The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face.

**Held:** The ordinance is not facially overbroad or vague but is reasonably clear in its application to appellee.

(a) In a facial challenge to the overbreadth and vagueness of an enactment, a court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications. Pp. 4-5.

(b) The ordinance here does not violate appellee's First Amendment rights nor is it overbroad because it inhibits such rights of other parties. The ordinance does not restrict speech as such but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose and thus does not embrace noncommercial speech. With respect to any commercial speech interest implicated, the ordinance's restriction on the manner of marketing does not appreciably limit appellee's communication of information, except to the extent it is directed at commercial activity promoting or encouraging illegal drug use, an activity which, if deemed "speech," is speech proposing an illegal transaction and thus subject to government regulation or ban. It is irrelevant whether the ordinance has an overbroad scope encompassing other persons' commercial speech, since the overbreadth doctrine does not apply to commercial speech.

(c) With respect to the facial vagueness challenge, appellee has not shown that the ordinance is impermissibly vague in all of its applications. The ordinance's language "designed . . . for use" is not unconstitutionally vague on its face, since it is clear that such standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, i. e., features designed by the manufacturer. Thus, the "designed for use" standard is sufficiently clear to cover at least some of the items that appellee sold, such as "roach clips" and the specially designed pipes. As to the "marketed for use" standard, the guidelines refer to the display of paraphernalia and to the proximity of covered items to otherwise uncovered items, and thus such standard requires scienter on the part of the retailer. Under this test, appellee had ample warning that its marketing activities required a license, and by displaying a certain magazine and certain books dealing with illegal drugs physically close to pipes and colored rolling paper, it was in clear violation of the guidelines, as it was in selling "roach clips." Pp. 9-13.

(d) The ordinance's language is sufficiently clear that the speculative danger of arbitrary enforcement does not render it void for vagueness in a pre-enforcement facial challenge. 609 F. 2d 373, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, FERNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment. STEVENS, J., took no part in the consideration or decision of the case.

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is uncon-

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released . . . at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 209 U.S. 321, 337.

stitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Village of Hoffman Estates Ordinance No. 969-1978. The United States Court of Appeals for the Seventh Circuit held that the ordinance is vague on its face. 639 F. 2d 373 (1980). We noted probable jurisdiction, — U. S. —, and now reverse.

## I

For more than three years prior to May 1, 1978, appellee The Flipside, Hoffman Estates, Inc. (Flipside) sold a variety of merchandise, including phonographic records, smoking accessories, novelty devices and jewelry, in its store located in the village of Hoffman Estates, Illinois (the village).<sup>1</sup> On February 20, 1978, the village enacted an ordinance regulating drug paraphernalia, to be effective May 1, 1978.<sup>2</sup> The ordinance makes it unlawful for any person "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." The license fee is \$150.00. A business must also file affidavits that the licensee and its employees have not been convicted of a drug-related offense. Moreover, the business must keep a record of each sale of a regulated item, including the name and address of the purchaser, to be open to police inspection. No regulated item may be sold to a minor. A violation is subject to a fine of not less than \$10.00 and not more than \$500.00, and each day that a violation continues gives rise to a separate offense. A series of licensing guidelines prepared by the village attorney define "Paper," "Roach Clips," "Pipes" and "Paraphernalia," the sale of which is required to be licensed.<sup>3</sup>

After an administrative inquiry, the village determined that Flipside and one other store appeared to be in violation

<sup>1</sup>More specifically, the District Court found:

"[Flipside] sold literature that included 'A Child's Garden of Grass,' 'Marijuana Grower's Guide,' and magazines such as 'National Lampoon,' 'Rolling Stone,' and 'High Times.' The novelty devices and tobacco-related items plaintiff sold in its store ranged from small commodities such as clamps, chain ornaments and earrings through cigarette holders, scales, pipes of various types and sizes, to large water pipes, some designed for individual use, some which as many as four persons can use with flexible plastic tubes. Plaintiff also sold a large number of cigarette rolling papers in a variety of colors. One of plaintiff's displayed items was a mirror, about seven by nine inches with the word 'Cocaine' painted on its surface in a purple color. Plaintiff sold cigarette holders, 'alligator clips,' herb sifters, vials, and a variety of tobacco snuff." 455 F. Supp. 400, 403 (ND Ill. 1980).

<sup>2</sup>The text of the ordinance is set forth in the Appendix to this opinion.

The Guidelines provide:

**LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKED 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; otherwise, covered.

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

of the ordinance. The village attorney notified Flipside of the existence of the ordinance, and made a copy of the ordinance and guidelines available to Flipside. Flipside's owner asked for guidance concerning which items were covered by the ordinance; the village attorney advised him to remove items in a certain section of the store "for his protection," and he did so. App. 71. The items included, according to Flipside's description, a clamp, chain ornaments, an "alligator" clip, key chains, necklaces, earrings, cigarette holders, glove stretchers, scales, strainers, a pulverizer, squeeze bottles, pipes, water pipes, pins, an herb sifter, mirrors, vials, cigarette rolling papers, and tobacco snuff. On May 30, 1978, instead of applying for a license or seeking clarification via the administrative procedures that the village had established for its licensing ordinances,<sup>4</sup> Flipside filed this lawsuit in the United States District Court for the Northern District of Illinois.

The complaint alleged, inter alia, that the ordinance is unconstitutionally vague and overbroad, and requested injunctive and declaratory relief and damages. The District Court, after hearing testimony, declined to grant a preliminary injunction. The case was tried without a jury on additional evidence and stipulated testimony. The court issued an opinion upholding the constitutionality of the ordinance, and awarded judgment to the village defendants.

The Court of Appeals reversed, on the ground that the ordinance is unconstitutionally vague on its face. The court reviewed the language of the ordinance and guidelines and found it vague with respect to certain conceivable applications, such as ordinary pipes or "paper clips sold next to *Rolling Stone* magazine." 639 F. 2d, at 382. It also suggested that the "subjective" nature of the "marketing" test creates a danger of arbitrary and discriminatory enforcement against those with alternative lifestyles. *Id.*, at 384. Finally, the court determined that the availability of administrative review or guidelines cannot cure the defect. Thus, it concluded that the ordinance is impermissibly vague on its face.

## II

In a facial challenge to the overbreadth and vagueness of a law<sup>5</sup>, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.<sup>6</sup> If it does not, then the overbreadth chal-

<sup>4</sup>Ordinance No. 932-1977, the Hoffman Estates Administrative Procedure Ordinance, was enacted prior to the drug paraphernalia ordinance, and provides that an interested person may petition for the adoption of an interpretive rule. If the petition is denied, the person may place the matter on the agenda of an appropriate village committee for review. The village attorney indicated that no interpretive rules had been adopted with respect to the drug paraphernalia ordinance because no one had yet applied for a license. App. 68.

<sup>5</sup>A "facial" challenge, in this context, means a claim that the law is "invalid in toto—and therefore incapable of any valid application." *Steffel v. Thompson*, 415 U. S. 452, 474 (1974). In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered. *Grayned v. City of Rockford*, 408 U. S. 104, 110 (1972).

<sup>6</sup>In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked." *Begott v. Bolton*, 357 U. S. 360, 372 (1958), quoting *Speiser v. Randall*, 357 U. S. 513, 526 (1958); see *Grayned, supra*, at 109; cf. *Young v. American Mini Theatres*, 427 U. S. 50, 58-61 (1976).

lenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.<sup>7</sup> A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

The Court of Appeals in this case did not explicitly consider whether the ordinance reaches constitutionally protected conduct and is overbroad, nor whether the ordinance is vague in all of its applications. Instead, the court determined that the ordinance is void for vagueness because it is unclear in some of its applications to the conduct of Flipside and of other hypothetical parties. Under a proper analysis, however, the ordinance is not facially invalid.

### III

We first examine whether the ordinance infringes Flipside's First Amendment rights or is overbroad because it inhibits the First Amendment rights of other parties. Flipside makes the exorbitant claim that the village has imposed a "prior restraint" on speech because the guidelines treat the proximity of drug-related literature as an indicium that paraphernalia are "marketed for use with illegal cannabis or drugs." Flipside also argues that because the presence of drug-related designs, logos, or slogans on paraphernalia may trigger enforcement, the ordinance infringes "protected symbolic speech." Brief for Appellee 25.

These arguments do not long detain us. First, the village has not directly infringed the noncommercial speech of Flipside or other parties. The ordinance licenses and regulates the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs." Guidelines, n. 2, *supra*, but does not prohibit or otherwise regulate the sale of literature itself. Although drug-related designs or names on cigarette papers may subject those items to regulation, the village does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose. The scope of the ordinance therefore does not embrace noncommercial speech.

Second, insofar as any commercial speech interest is implicated here, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires. We doubt that the village's restriction on the manner of marketing appreciably limits Flipside's communication of information—with one obvious and telling exception. The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is

<sup>7</sup> "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U. S. 544, 556 (1975). See *United States v. Powell*, 423 U. S. 87, 92-93 (1975); *United States v. National Dairy Product Corp.*, 372 U. S. 29, 32-33, 36 (1963). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U. S. 733, 756 (1974). The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is 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." *Conley v. City of Cincinnati*, 402 U. S. 611, 614 (1971). Such a provision simply has no core." *Smith v. Goguen*, 415 U. S. 566, 575 (1974).

Flipside explained that it placed items that the village considers drug paraphernalia in locations near a check-out counter because some are "point of purchase" items and others are small and apt to be shoplifted. App. 43. Flipside did not assert that its manner of placement was motivated in any part by a desire to communicate information to its customers.

deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely. *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 447 U. S. 557, 563-564 (1980); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U. S. 376, 388 (1973). Finally, it is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech. *Central Hudson, supra*, at 565, n. 8.<sup>9</sup>

### IV

#### A

A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications. Flipside makes no such showing.

The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U. S. 104, 108 (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 applications." (footnotes omitted).

These standards should not, of course, be mechanically applied. The 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. Thus, economic regulation is subject to a less strict vagueness test because its subject-matter is often more narrow,<sup>10</sup>

<sup>9</sup> Flipside also argues that the ordinance is "overbroad" because it could extend to "innocent" and "lawful" uses of items as well as uses with illegal drugs. Brief for Appellee 10, 33-35. This argument seems to confuse vagueness and overbreadth doctrines. If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness. We find that claim unpersuasive in this pre-enforcement facial challenge. See *infra*, at —. If Flipside is objecting that the ordinance would inhibit innocent uses of items found to be covered by the ordinance, it is complaining of denial of substantive due process. The latter claim obviously lacks merit. A retailer's right to sell smoking accessories, and a purchaser's right to buy and use them, are entitled only to minimal due process protection. Here, the village presented evidence of illegal drug use in the community. App. 37. Regulation of items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use. See *Essex Corp. v. Governor of Maryland*, 437 U. S. 117, 124-125 (1978).

The hostility of some lower courts to drug paraphernalia laws—and particularly to those regulating the sale of items that have many innocent uses, see, e. g., 829 F. 2d at 351-353; *Record Revolution No. 6, Inc. v. City of Parma*, 638 F. 2d 916, 928 (CA6 1980), vacated and remanded, — U. S. — (1981)—may reflect a belief that these measures are ineffective in stemming illegal drug use. This perceived defect, however, is not a defect of clarity. In the unlikely event that a state court construed this ordinance as prohibiting the sale of all pipes, of whatever description, then a seller of corn-cob pipes could not complain that the law is unduly vague. He could, of course, object that the law was not intended to cover such items.

<sup>10</sup> *Papachristou v. City of Jacksonville*, 405 U. S. 156, 162 (1972) (dictum; collecting cases).

and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.<sup>12</sup> The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.<sup>13</sup> And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.<sup>14</sup>

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.<sup>15</sup>

## B

This ordinance simply regulates business behavior and contains a scienter requirement with respect to the alternative "marketed for use" standard. The ordinance nominally imposes only civil penalties. However, the village concedes that the ordinance is "quasi-criminal," and its prohibitory and stigmatizing effect may warrant a relatively strict test.<sup>16</sup> Flipside's facial challenge fails because, under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside.

The ordinance requires Flipside to obtain a license if it sells "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes." Flipside expresses no uncertainty about which drugs this description encompasses; as the District Court noted, 485 F.Supp. at 406, Illinois law clearly defines cannabis and numerous other controlled drugs, including cocaine. Ill. Rev. Stat., ch. 56 1/2, §§ 703 and 1102(g) (1977). On the other hand, the words "items, effect, paraphernalia, accessory or thing" do not identify the type of merchandise that the village desires to regulate.<sup>17</sup> Flipside's challenge thus appropriately focuses on the language "designed or marketed for use." Under either the

"designed for use" or "marketed for use" standard, we conclude that at least some of the items sold by Flipside are covered. Thus, Flipside's facial challenge is unavailing.

### 1. "Designed for use"

The Court of Appeals objected that "designed . . . for use" is ambiguous with respect to whether items must be inherently suited only for drug use; whether the retailer's intent or manner of display is relevant; and whether the intent of a third party, the manufacturer, is critical, since the manufacturer is the "designer." 639 F.2d, at 380-81. For the reasons that follow, we conclude that this language is not unconstitutionally vague on its face.

The Court of Appeals' speculation about the meaning of "design" is largely unfounded. The guidelines refer to "paper of colorful design" and to other specific items as conclusively "designed" or not "designed" for illegal use.<sup>18</sup> A principal meaning of "design" is "To fashion according to a plan." Webster's New International Dictionary of the English Language 707 (2d ed. 1957). Cf. *Lanzetta v. New Jersey*, 306 U.S. 451, 454, n. 3 (1939). It is therefore plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer. It is also sufficiently clear that items which are principally used for nondrug purposes, such as ordinary pipes, are not "designed for use" with illegal drugs. Moreover, no issue of fair warning is present in this case, since Flipside concedes that the phrase refers to structural characteristics of an item.<sup>19</sup>

The ordinance and guidelines do contain ambiguities. Nevertheless, the "designed for use" standard is sufficiently clear to cover at least some of the items that Flipside sold. The ordinance, through the guidelines, explicitly regulates "roach clips." Flipside's co-operator admitted that the store sold such items, see Tr. 26, 30, and the village Chief of Police testified that he had never seen a "roach clip" used for any purpose other than to smoke cannabis. App. 52. The chief also testified that a specially-designed pipe that Flipside marketed is typically used to smoke marijuana. App. 52. Whether further guidelines, administrative rules, or enforcement policy will clarify the more ambiguous scope of the standard in other respects is of no concern in this facial challenge.

### 2. "Marketed for use"

Whatever ambiguities the "designed . . . for use" standard

"The guidelines explicitly provide that 'white paper . . . may be displayed,' and that 'Roach Clips' are 'designed for use with illegal cannabis or drugs and therefore covered' (emphasis added). The Court of Appeals criticized the latter definition for failing to explain what a 'roach clip' is. This criticism is unfounded because that technical term has sufficiently clear meaning in the drug paraphernalia industry. Without undue burden, Flipside could easily determine the meaning of the term. See American Heritage Dictionary of the English Language 1122 (1975) (defining 'roach' as 'The butt of a marijuana cigarette'); R. Lingeman, *Drugs from A to Z: A Dictionary* 213-214 (1969) (defining 'roach' and 'roach holder'). Moreover, the explanation that a retailer may display certain paper "not necessarily designed for use" clarifies that the ordinance at least embraces items that are necessarily designed for use with cannabis or illegal drugs.

"It is readily apparent that under the Hoffman Estates scheme, the 'designed for use' phrase refers to the physical characteristics of items deemed *per se* fashioned for use with drugs; and that, if any intentional conduct is implicated by the phrase, it is the intent of the 'designer' (i.e. patent holder or manufacturer) whose intent for an item or 'design' is absorbed into the physical attributes, or structural 'design' of the finished product." Brief for Appellee 32-33. Moreover, the village president described drug paraphernalia as items "to be manufactured for that purpose and marketed for that purpose." App. 52 (emphasis added).

<sup>12</sup> See, e.g., *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963). Cf. *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

<sup>13</sup> See *Joseph E. Seagram & Sons v. Hostetter*, 354 U.S. 35, 49 (1966); *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

<sup>14</sup> See *Barenblatt v. United States*, 360 U.S. 109, 137 (1959) (Justice Black, with whom Chief Justice Warren and Justice Douglas join, dissenting); *Winters v. New York*, 333 U.S. 507, 515 (1948).

<sup>15</sup> See, e.g., *Colaniti v. Franklin*, 339 U.S. 379, 395 (1957); *Boyer Motor Lines v. United States*, 342 U.S. 337, 342 (1952); *Screws v. United States*, 325 U.S. 91, 101-103 (1945) (plurality opinion). See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 87, n. 95 (1960).

<sup>16</sup> See, e.g., *Papachristou*, *supra*; *Grayned*, *supra*, at 109.

<sup>17</sup> The village stipulated that the purpose of the ordinance is to discourage use of the regulated items. App. 33. Moreover, the prohibitory and stigmatizing effects of the ordinance are clear. As the Court of Appeals remarked, "few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of signing their names and addresses to a register available to the police." 639 F.2d, at 377. The proposed register is entitled, "Retail Record for Items Designed or Marketed for Use with Illegal Cannabis or Drugs." Complaint, App. B. At argument, counsel for the village admitted that the ordinance is "quasi-criminal." Tr. of Oral Arg. 4-5.

<sup>18</sup> The District Court apparently relied principally on the growing vernacular understanding of "paraphernalia" as drug-related items, and therefore did not separately analyze the meaning of "designed or marketed for use." 485 F.Supp. at 405-407. We agree with the Court of Appeals that a regulation of "paraphernalia" alone would not provide much warning of the nature of the items regulated. 639 F.2d, at 380.

may engender, the alternative "marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items. A retail store therefore must obtain a license if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use. The standard requires scienter, since a retailer could scarcely "market" items "for" a particular use without intending that use.

Under this test, Flipside had ample warning that its marketing activities required a license. Flipside displayed the magazine "High Times" and books entitled "Marijuana Grower's Guide," "Children's Garden of Grass," and "The Pleasures of Cocaine," physically close to pipes and colored rolling papers, in clear violation of the guidelines. As noted above, Flipside's co-operator admitted that his store sold "roach clips," which are principally used for illegal purposes. Finally, in the same section of the store, Flipside had posted the sign, "You must be 18 or older to purchase any head supplies."<sup>2</sup> Tr. 30.

## V

The Court of Appeals also held that the ordinance provides insufficient standards for enforcement. Specifically, the court feared that the ordinance might be used to harass individuals with alternative lifestyles and views. 639 F. 2d, at 384. In reviewing a business regulation for facial vagueness, however, the principal inquiry is whether the law affords fair warning of what is proscribed. Moreover, this emphasis is almost inescapable in reviewing a pre-enforcement challenge to a law. Here, no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech. The language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness. Cf. *Papachristou v. City of Jacksonville*, 405 U. S. 156, 168-171 (1972); *Coates v. City of Cincinnati*, 402 U. S. 611, 614 (1971).

We do not suggest that the risk of discriminatory enforcement is insignificant here. Testimony of the village attorney who drafted the ordinance, the village president, and the police chief revealed confusion over whether the ordinance applies to certain items, as well as extensive reliance on the "judgment" of police officers to give meaning to the ordinance and to enforce it fairly. At this stage, however, we are not prepared to hold that this risk jeopardizes the entire ordinance.<sup>3</sup>

Nor do we assume that the village will take no further steps to minimize the dangers of arbitrary enforcement. The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope. We also find it significant that the village, in testimony below, primarily relied on the "marketing" aspect of the standard, which does not require the more ambiguous item-by-item analysis of whether paraphernalia are "designed for" illegal drug use.

<sup>2</sup> The American Heritage Dictionary of the English Language 696 (1969) gives the following alternative definition of "head": "Slang. One who is a frequent user of drugs."

<sup>3</sup> The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to *Rolling Stone* magazine, 639 F. 2d, at 380, is of no due process significance unless the possibility ripens into a prosecution.

and which therefore presents a lesser risk of discriminatory enforcement. "Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." *Seagram & Sons v. Hostetter*, 384 U. S. 35, 52 (1966).<sup>4</sup>

## VI

Many American communities have recently enacted laws regulating or prohibiting the sale of drug paraphernalia. Whether these laws are wise or effective is not, of course, the province of this Court. See *Ferguson v. Skrupa*, 372 U. S. 726, 728-730 (1963). We hold only that such legislation is not facially overbroad or vague if it does not reach constitutionally protected conduct and is reasonably clear in its application to the complainant.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS took no part in the consideration or decision of this case.

## APPENDIX

### Village of Hoffman Estates Ordinance No. 969-1978

#### AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

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 princi-

<sup>4</sup> The Court of Appeals also referred to potential Fourth Amendment problems resulting from the record-keeping requirement, which "implies that a customer who purchases an item 'designed or marketed for use with illegal cannabis or drugs' intends to use the item with illegal cannabis or drugs. A further implication could be that a customer is subject to police scrutiny or even to a search warrant on the basis of the purchase of a legal item." 639 F. 2d, at 384. We will not address these Fourth Amendment issues here. In a pre-enforcement challenge it is difficult to determine whether Fourth Amendment rights are seriously threatened. Flipside offered no evidence of a concrete threat below. In a post-enforcement proceeding Flipside may attempt to demonstrate that the ordinance is being employed in such an unconstitutional manner, and that it has standing to raise the objection. It is appropriate to defer resolution of these problems until such a showing is made.

pal, 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 thing 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 item, 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 the 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 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.

JUSTICE WHITE, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. I do not, however, believe it necessary to discuss the overbreadth problem in order to reach this result. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. That opinion should be reversed simply because it erred in its analysis of the vagueness problem presented by the ordinance.

I agree with the majority that a facial vagueness challenge to an economic regulation must demonstrate that "the enactment is impermissibly vague in all of its applications." *Infra*, at 5. I also agree with the majority's statement that the "marketed for use" standard in the ordinance is "sufficiently clear." There is, in my view, no need to go any further: If it is "transparently clear" that some particular conduct is re-

stricted by the ordinance, the ordinance survives a facial challenge on vagueness grounds.

Technically, overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others, not presently before the Court. *Broadrick v. Oklahoma*, 413 U. S. 601, 612-615 (1973). Whether the appellees may make use of the overbreadth doctrine depends, in the first instance, on whether or not they have a colorable claim that the ordinance infringes on constitutionally protected, noncommercial speech of others. Although appellees claim that the ordinance does have such an effect, that argument is tenuous at best and should be left to the lower courts for an initial determination.

Accordingly, I concur in the judgment reversing the decision below.

RICHARD N. WILLIAMS, Hoffman Estates, Ill., for appellants; MICHAEL L. PRITZKI R. Chicago, Ill. (R. BRENT DANIEL and MARK F. SULLIVAN, with him on the brief) for appellee.

No. 80-846

JIM ROSE, WARDEN, PETITIONER v. NOAH HARRISON LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Syllabus

No. 80-846. Argued October 14, 1981—Decided March 3, 1982

Title 28 U. S. C. §§ 2254(b) and (c) provide that a state prisoner's application for a writ of habeas corpus in a federal district court based on an alleged federal constitutional violation will not be granted unless the applicant has exhausted the remedies available in the state courts. After respondent was convicted of certain charges in a Tennessee state court and his convictions were affirmed, he unsuccessfully sought postconviction relief in a state court. He then filed a petition in Federal District Court for a writ of habeas corpus under § 2254, alleging four specified grounds of relief. The District Court granted the writ, notwithstanding that the petition included both claims that had not been exhausted in the state courts and those that had been. The Court of Appeals affirmed.

*Held:* The judgment is reversed and the case is remanded.

624 F. 2d 1100, reversed and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, III-A, III-B, and IV, concluding that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims. A rule requiring exhaustion of all claims in state courts promotes comity and furthers the purposes underlying the exhaustion doctrine, as codified in §§ 2254(b) and (c), of protecting the state courts' role in the enforcement of federal law and preventing disruption of state judicial proceedings.

JUSTICE O'CONNOR, joined by CHIEF JUSTICE BURGER, JUSTICE POWELL, and JUSTICE REHNQUIST, concluded in Part III-C that the total exhaustion rule will not impair the state prisoner's interest in obtaining speedy federal relief on his claims, since, rather than returning to state court to exhaust all of his claims, he can always amend the petition to delete the unexhausted claims, although by doing so he would risk dismissal of subsequent federal petitions.

O'CONNOR, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II, III-A, III-B, and IV, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, and REHNQUIST, JJ., joined, and an opinion with respect to Part III-C, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined. WHITE, J., filed an opinion concurring in part and dissenting in part. STEVENS, J., filed a dissenting opinion.

JUSTICE O'CONNOR delivered the opinion of the Court except as to Part III-C.

In this case we consider whether the exhaustion rule in 28

MODEL DRUG PARAPHERNALIA ACT

Drafted by the

Drug Enforcement Administration

of the

United States Department of Justice

August, 1979

With

Prefatory Note and Comments

## MODEL DRUG PARAPHERNALIA ACT

### Prefatory Note

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

This Model Act was drafted, at the request of state authorities, to enable states and local jurisdictions to cope with the paraphernalia problem. ~~The Act takes the form of suggested amendments to the Uniform Controlled Substances Act.~~ The Uniform Act is extremely well-organized. It contains a definitional section, an offenses and penalties section, a civil forfeiture section, as well as miscellaneous sections on administration and enforcement. Instead of creating separate, independent paraphernalia laws, it seems desirable to control Drug Paraphernalia by amending existing sections of the Uniform Controlled Substances Act.

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

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

Article III provides for the civil seizure and forfeiture of Drug Paraphernalia. Civil forfeiture can be an effective deterrent, particularly to commercial suppliers whose capital is invested in inventory. Civil forfeiture can also be utilized in circumstances where criminal penalties seem unjustified.

ARTICLE I

(Definitions)

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

5 "( ) The term 'Drug Paraphernalia' means all equip-  
6 ment, products and materials of any kind which are used,  
7 intended for use, or designed for use, in planting,  
8 propagating, cultivating, growing, harvesting, manufac-  
9 turing, compounding, converting, producing, processing,  
10 preparing, testing, analyzing, packaging, repackaging,  
11 storing, containing, concealing, injecting, ingesting,  
12 inhaling, or otherwise introducing into the human body  
13 a controlled substance in violation of this Act (mean-  
14 ing the Controlled Substances Act of this State). . It  
15 includes, but is not limited to:

16 (1) Kits used, intended for use, or designed for  
17 use in planting, propagating, cultivating, growing or  
18 harvesting of any species of plant which is a con-  
19 trolled substance or from which a controlled substance  
20 can be derived;

21 (2) Kits used, intended for use, or designed for  
22 use in manufacturing, compounding, converting, pro-  
23 ducing, processing, or preparing controlled substances;

24 (3) Isomerization devices used, intended for use,  
25 or designed for use in increasing the potency of any  
26 species of plant which is a controlled substance;

27 (4) Testing equipment used, intended for use, or  
28 designed for use in identifying, or in analyzing the  
29 strength, effectiveness or purity of controlled sub-  
30 stances;

31 (5) Scales and balances used, intended for use,  
32 or designed for use in weighing or measuring controlled  
33 substances;

34 (6) Diluents and adulterants, such as quinine  
35 hydrochloride, mannitol, mannite, dextrose and lactose,  
36 used, intended for use, or designed for use in cutting  
37 controlled substances;

38 (7) Separation gins and sifters used, intended  
39 for use, or designed for use in removing twigs and  
40 seeds from, or in otherwise cleaning or refining,  
41 marihuana;

42 (8) Blenders, bowls, container, spoons and  
43 mixing devices used, intended for use, or designed  
44 for use in compounding controlled substances;

45 (9) Capsules, balloons, envelopes and other con-  
46 tainers used, intended for use, or designed for use  
47 in packaging small quantities of controlled substances;

48 (10) Containers and other objects used, intended  
49 for use, or designed for use in storing or concealing  
50 controlled substances;

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

55 (12) Objects used, intended for use, or designed  
56 for use in ingesting, inhaling, or otherwise intro-  
57 ducing marihuana, cocaine, hashish, or hashish oil  
58 into the human body, such as:

59 (a) Metal, wooden, acrylic, glass, stone,  
60 plastic, or ceramic pipes with or without  
61 screens, permanent screens, hashish heads, or  
62 punctured metal bowls;

63 (b) Water pipes;

64 (c) Carburetion tubes and devices;

65 (d) Smoking and carburetion masks;

66 (e) Roach clips: meaning objects used to  
67 hold burning material, such as a marihuana  
68 cigarette, that has become too small or too  
69 short to be held in the hand;

70 (f) Miniature cocaine spoons, and cocaine  
71 vials;

72 (g) Chamber pipes;

73 (h) Carburetor pipes;

74 (i) Electric pipes;

75 (j) Air-driven pipes;

76 (k) Chillums;

77 (l) Bongs;

78 (m) Ice pipes or chillers;

79 "In determining whether an object is Drug parapher-  
80 nalia, a court or other authority should consider, in  
81 addition to all other logically relevant factors, the  
82 following:

83 (1) Statements by an owner or by anyone in con-  
84 trol of the object concerning its use;

85 (2) Prior convictions, if any, of an owner, or  
86 of anyone in control of the object, under any State  
87 or Federal law relating to any controlled substance;

88 (3) The proximity of the object, in time and  
89 space, to a direct violation of this Act;

90 (4) The proximity of the object to controlled  
91 substances;

- 92 (5) The existence of any residue of controlled  
93 substances on the object;
- 94 (6) Direct or circumstantial evidence of the  
95 intent of an owner, or of anyone in control of the  
96 object, to deliver it to persons whom he knows, or  
97 should reasonably know, intend to use the object to  
98 facilitate a violation of this Act; the innocence of  
99 an owner, or of anyone in control of the object, as  
100 to a direct violation of this Act shall not prevent  
101 a finding that the object is intended for use, or  
102 designed for use as Drug paraphernalia;
- 103 (7) Instructions, oral or written, provided with  
104 the object concerning its use;
- 105 (8) Descriptive materials accompanying the object  
106 which explain or depict its use;
- 107 (9) National and local advertising concerning its  
108 use;
- 109 (10) The manner in which the object is displayed  
110 for sale;
- 111 (11) Whether the owner, or anyone in control of  
112 the object, is a legitimate supplier of like or related  
113 items to the community, such as a licensed distributor  
114 or dealer of tobacco products;
- 115 (12) Direct or circumstantial evidence of the ratio  
116 of sales of the object(s) to the total sales of the  
117 business enterprise;
- 118 (13) The existence and scope of legitimate uses  
119 for the object in the community;
- 120 (14) Expert testimony concerning its use."

## ARTICLE II

### (Offenses and Penalties)

1 SECTION (designation of offenses and penalties section)  
2 of the Controlled Substances Act of this State is amended  
3 by adding the following after (designation of last sub-  
4 stantive offense):

1 "SECTION (A) (Possession of Drug Paraphernalia)  
2 It is unlawful for any person to use, or to  
3 possess with intent to use, drug paraphernalia to  
4 plant, propagate, cultivate, grow, harvest, manu-  
5 facture, compound, convert, produce, process, pre-  
6 pare, test, analyze, pack, repack, store, contain,  
7 conceal, inject, ingest, inhale, or otherwise  
8 introduce into the human body a controlled substance  
9 in violation of this Act. Any person who violates

10 this section is guilty of a crime and upon con-  
11 viction may be imprisoned for not more than ( ),  
12 fined not more than ( ), or both."

1 "SECTION (B) (Manufacture or Delivery of Drug  
2 Paraphernalia)

3 ~~It is unlawful for any person to deliver,~~  
4 ~~possess with intent to deliver, or manufacture~~  
5 ~~with intent to deliver, drug paraphernalia,~~  
6 ~~knowing, or under circumstances where one rea-~~  
7 ~~sonably should know, that it will be used to~~  
8 ~~plant, propagate, cultivate, grow, harvest, manu-~~  
9 ~~facture, compound, convert, produce, process,~~  
10 ~~prepare, test, analyze, pack, repack, store, con-~~  
11 ~~tain, conceal, inject, ingest, inhale, or other-~~  
12 ~~wise introduce into the human body a controlled~~  
13 ~~substance in violation of this Act. Any person~~  
14 ~~who violates this section is guilty of a crime~~  
15 ~~and upon conviction may be imprisoned for not~~  
16 ~~more than ( ), fined not more than ( ), or both."~~

1 "SECTION (C) (Delivery of Drug Paraphernalia to  
2 a Minor)

3 Any person ~~18 years of age or over who~~  
4 ~~violates Section (B) by delivering drug parapher-~~  
5 ~~nalial to a person 18 years of age who is at~~  
6 ~~least 3 years his junior is guilty of a special~~  
7 ~~offense and upon conviction may be imprisoned for~~  
8 ~~not more than ( ), fined not more than ( ), or~~  
9 ~~both."~~

1 "SECTION (D) (Advertisement of Drug Paraphernalia)

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

ARTICLE III

(Civil Forfeiture)

1 SECTION (insert designation of civil forfeiture section)  
2 of the Controlled Substances Act of this State is amended

3 to provide for the civil seizure and forfeiture of drug  
4 paraphernalia by adding the following after paragraph  
5 (insert designation of last category of forfeitable  
6 property):  
7 "( ) all drug paraphernalia as defined by Section  
8 ( ) of this Act."

ARTICLE IV

(Severability)

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



## ARGUMENTS HEARD

### DRUG PARAPHERNALIA — LICENSING STATUTES — VAGUENESS ▶213.30

*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, No. 80-1681; argued 12/9/81.

During the last few years, a number of local and state governments have adopted "head shop" laws regulating the sale of drug "paraphernalia." Some of these statutes have faced broad-based constitutional challenges. Recently an Illinois community urged the Court to overturn a ruling by the U.S. Court of Appeals for the Seventh Circuit holding its paraphernalia law — one of the first adopted in the country — unconstitutional. Finding the ordinance unconstitutionally vague, the Seventh Circuit granted declaratory relief to a boutique that sells cigarette rolling paper, water pipes and other items that might fall within the reach of the law.

Arguing for the appellant, Richard N. Williams, of Hoffman Estates, Illinois, told the Justices that the claimed vagueness of the ordinance, which licenses the sale of drug paraphernalia, is the only issue before the Court. Even if the Court does consider other challenges to the ordinance, counsel said that it does not infringe on any constitutionally protected rights.

Grayned v. City of Rockford, 408 U.S. 104, supplies the appropriate standard for judging whether the ordinance suffers from unconstitutional vagueness, Williams explained. Grayned requires that a law give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and that it also must provide explicit standards to govern the actions of those who must enforce the law.

The paraphernalia licensing ordinance, counsel stressed, does not involve criminal penalties; it requires payment of a fine for a violation.

Justice White: What is the fine?

A violator may be fined up to \$500.

Justice White: Does that fine make the offense criminal?

No, it doesn't, counsel responded.

Justice White: Did the Seventh Circuit find the ordinance vague in that a person couldn't identify any article that fell within its reach? What if there is one article that clearly falls within the statutory reach?

Then this case should be remanded.

### LITIGATION EXPLOSION

Since this case began, counsel noted, there has been an "explosion" of litigation dealing with drug paraphernalia laws. That explosion has been furthered by the Drug Enforcement Administration's "Model Act," which creates criminal penalties for mere possession of drug paraphernalia. That Act has been adopted by a number of jurisdictions and has withstood constitutional challenges in the Eighth and Tenth Circuits.

The village's ordinance, which predates by 18 months the Model Act, requires that businesses retailing any "item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" must obtain a license to do so, Williams stated. The words "marketed for use" with illegal drugs eliminate the need to identify item-by-item what paraphernalia is prohibited. The ordinance also bans the sale of any proscribed article to a juvenile.

However, we decided not to regulate the advertising of paraphernalia, counsel observed, because of possible First Amendment implications, even though we believed that the First Amendment did not protect such items.

The Chief Justice: How do you draw a distinction between advertising for sale and holding out for sale at the retail establishment?

Advertising goes to the public generally and raises possible First Amendment issues, but we do not think that the First Amendment protects the marketing or display of drug paraphernalia, Williams said.

Justice O'Connor: Has the statute been previously interpreted to include a scienter requirement?

Before the federal lawsuit, there had been no judicial interpretation of the ordinance.

Justice O'Connor: Do you infer intent from the design and the manner of display of the articles?

Yes, we do.

### SUFFICIENT WARNING

This ordinance provides sufficient warning of the proscribed conduct, Williams continued. The appellee may go to the dictionary to find the common meaning of the conduct that the statute proscribes. This Court should not "strain" to find a legislative enactment, such as this one, unconstitutional, he stressed. This ordinance applies only to retailers. If there are marginal areas, a

For full text of U.S. Supreme Court opinions in criminal cases, see Section 3.

prudent businessman can find out the requirements of the law by contacting village officials. Moreover, the village has provided guidelines for interpreting the ordinance, and the local administrative procedures act affords hearings to aggrieved parties.

The appellees don't sell rolling tobacco or medicine or other lawful goods for which the paraphernalia might lawfully be used, counsel added. They know that their products will more likely than not be used with illegal drugs. The Court should find no problem with the Leary [*v. U.S.*, 412 U.S. 837] presumption that the ordinance creates. It may be true that an item marketed in the manner that the ordinance proscribes may be used innocently, but this Court has never required that a presumption be accurate in every imaginable situation, Williams emphasized, again citing Leary.

The Seventh Circuit feared that the ordinance would have an effect on certain kinds of lifestyles. But we have a right to legislate against lifestyles that can affect the public safety and welfare, counsel argued. Drug abuse has become rampant in our society, and the marketing of drugs and paraphernalia has become big business.

Justice Blackmun: Have you changed your ordinance?

Not a word of it has been changed, Williams responded. The village, however, has had some concerns over civil liability problems associated with the ordinance as worded.

Counsel pointed out that the statute also requires that a person purchasing objects deemed to be paraphernalia sign a register as he would for certain controlled substances, such as paregoric. If a person buys a lot of paraphernalia, we may take a look at him.

#### ESTIMATING FATE

Counsel for appellee, Michael L. Pritzker, of Chicago, told the Justices that the village has narrowed its argument to the vagueness issue, and thus has overlooked the other constitutional problems. Moreover, the village talks about "paraphernalia" as though it has clearly defined the word, but it hasn't done so, Pritzker said. The record makes clear that the objectionable goods that the appellee carries are not paraphernalia per se.

Justice Rehnquist: What do you do with one of our cases that suggests that a man's fate may sometimes turn on his estimating the meaning of a statute?

But the language of this statute does not lend itself to the degree of precision that the Constitution requires, counsel replied. There are no real standards in the ordinance. Under it, you may be able to sell blue rolling paper, but not brown paper. At trial, even the appellants' witnesses had problems adequately describing the items reached by the ordinance, counsel said.

The community may actually be legislating against certain lifestyles, and thereby imposing a village morality on the citizenry. A recent Columbia University law review article deals with the lifestyle implications of drug paraphernalia laws.

Justice White: Suppose that a customer says that he uses marijuana and asks a retailer for specific items to help him use the drug and the retailer then sells him certain items. Would there be any question as to the use for which the items would be intended?

Under this ordinance, the items would have to be designed and marketed for use with illegal drugs.

Justice White: Then how can this ordinance be vague?

It can be so because the example that you offered isn't this case.

Justice Rehnquist: Doesn't a retailer have some knowledge of his own business?

Yes, but the appellee has maintained that none of the items that it sells are paraphernalia.

Justice White: The Seventh Circuit said that the ordinance was vague.

The Seventh Circuit said that the ordinance fails to provide the appellee with fair notice of the proscribed conduct. That court found no standards for enforcing the ordinance or even adjudicating rights under it.

The Chief Justice: What about bonges?

Bong is a word for a waterpipe. The statute seems to make brass waterpipes lawful, but not those made of other types of materials, even though there's no difference in the design. This points up the confusion and notice problems that the ordinance creates.

Justice Rehnquist: What if the ordinance had regulated the sale of hypodermic needles?

That would depend. In some urban areas, hypodermic needles are associated with unlawfulness, and there might be a need for some type of regulation. But there's no ready association of unlawfulness with the products at issue here.

Justice Rehnquist: If an ordinance made the sale of hypodermic needles unlawful, would it suffer from vagueness problems?

Most people can readily identify a hypodermic so any vagueness problem would be different from the situation here. However, there might be some overbreadth problems with such an ordinance.

#### MAKING MIRRORS UNLAWFUL

Justice White: What "expression" is involved in this case?

Under the ordinance, a mirror displayed with a NORML poster and a copy of a book about Freud's cocaine use might become unlawful — because of the manner of display — even though the "essence" of the mirror has not been changed.

Justice Rehnquist: If you think morphine should be lawful and express that view, does that make a statute regulating morphine unconstitutional or unlawful?

No, it doesn't. But here we are talking about the sale of concededly lawful objects.

The Chief Justice: Would an ordinance that prohibited the advertising of a pistol be unlawful?

In that case, the merchant would presumably know what conduct the ordinance proscribes, unlike the situation here. For instance, we do not know what the words "designed for use" mean. Even the courts construing the DEA Model Act have split on the definition of that phrase.

Justice O'Connor: Assume that the statute requires intent to violate its provisions. If the statute requires intent, why doesn't that save it?

Intent doesn't provide standards for enforcement or adjudication.

Justice O'Connor: What would be the situation if the ordinance defined intent to mean a sale of an object with an intent that it be used with illegal drugs?

The question still remains: How would intent be inferred?

Justice O'Connor: Intent would certainly seem to affect the vagueness problem.

But it doesn't in the context of this ordinance.

There is a major problem of establishing a nexus between the sale of concededly lawful goods and their subsequent use with illegal drugs, counsel also stressed.

Justice White: Do your contentions apply to the Model Act?

The resolution of this case does not require any consideration of the Model Act. This case raises issues separate from those involved in that legislation.

## SUMMARIES OF DOCKETED CASES

### 81-828 CRUDE CO. v. U.S.

Appeals — Jurisdiction of Temporary Emergency Court of Appeals — Preemptive effective of Emergency Petroleum Allocation Act — False statements.

Ruling below (U.S. v. Uni Oil, Inc., CA5, 646 F2d 946):

Claim by defendants charged with racketeering, mail fraud, and other Title 18 offenses on basis of alleged scheme whereby "old" oil was certified and sold as "new" oil, that their defenses raised issues under Emergency Petroleum Allocation Act (EPAA), 15 USC 754, and that jurisdiction over government's appeal from dismissal order rested in Temporary Emergency Court of Appeals, is rejected; nor does Temporary Emergency Court of Appeals have jurisdiction over their claim that EPAA preempts application of criminal statutes to conduct regulated by EPAA: statements made by defendants to private purchaser and charged as false statements under 18 USC 1001 were made on matter within jurisdiction of government agency and were thus covered by that statute; it is of no importance that those statements came to agency indirectly rather than directly; defendants' other arguments are without merit; indictments in these cases were sufficient; and dismissal orders are reversed.

Question presented: (1) Does exclusive jurisdiction of Temporary Emergency Court of Appeals over appeals from district courts in cases and controversies "arising under" Emergency Petroleum Allocation Act (EPAA) encompass appeal from dismissal of indictment on grounds that (a) criminal provisions of EPAA preempt application of federal false statement, mail fraud, and RICO statutes to alleged violations of regulation promulgated under EPAA, and (b) regulation that defendants are alleged to have violated does not give fair notice and therefore cannot constitutionally be basis of criminal prosecution? (2) Does regulation promulgated under EPAA requiring certification of "old" and "new" oil give fair notice of conduct that it requires? (3) Do criminal provisions of EPAA preempt application of federal false statement, mail fraud, and RICO statutes to alleged violation of regulation promulgated under that Act? (4) Is statement made by one private party to another brought within ambit of federal false statement statute because party to whom statement is made relies on it in report filed with federal government?

Petition for certiorari filed 11/2/81, by Vincent J. Fuller, Robert L. Weinberg, Kendra E. Heymann, and Williams & Connolly, all of Washington, D.C.

### 81-846 TAVELMAN v. U.S.

Entrapment — Miranda violations — Right to counsel — Search and seizure.

Ruling below (CA9, 650 F2d 1133):

Sufficient evidence supports defendant's cocaine conviction; record supports finding that government did not entrap defendant, who had predisposition to commit cocaine offense; defendant consented to entry of law enforcement agents into his room for purposes of questioning him.

Questions presented: (1) Is Due Process Clause violated by creation of fictional criminal scenario which is created by government agents not acting in concert with defendants, inviting defendants to participate, and then prosecuting them for conspiracy to commit same criminal acts that agents provoked, conceptualized and created? (2) Was defendant's privilege

against compelled self-incrimination infringed upon by failure of law enforcements officers to advise defendant of his Miranda rights when he had been targeted as suspect and seized by objective standards? (3) Were defendant's Fifth Amendment rights scrupulously honored when there was continued interrogation after defendant's unsuccessful attempts to garner counsel? (4) Did seizure of defendant render statements he made prior to formal arrest inadmissible and violative of Fourth Amendment? (5) Did defendant's assertion of right to counsel and subsequent unsuccessful attempts to obtain counsel render his consent to search per se violative of Fourth Amendment?

Petition for certiorari filed 11/3/81, by Andrew M. Zanger and Philip M. Schreiber, both of Los Angeles, Calif.

### 81-879 U.S. v. GILLESPE

Search and seizure — Arrest — Exclusionary rule — Retroactivity of Steagald v. U.S.

Ruling below (CA7, 650 F2d 127):

Non-exigent, nonconsensual entries of defendants' homes by officers who had arrest warrants for third parties, but no search



## THE CRIMINAL LAW REPORTER

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POSITION PAPER

HOUSE BILL NO. 338

"An Act relating to drug paraphernalia."

The bill makes it illegal to use, possess, manufacture or deliver drug paraphernalia. Violation of this proposed law would be a misdemeanor. Delivery of paraphernalia to a minor would be a felony. This may be intended to act as a deterrent to drug use.

House Bill No. 338 relates to the concerns of the Department of Health and Social Services in the areas of prevention, particularly with youth.

The State Office of Alcoholism and Drug Abuse talk about this area in their 1979-1980 State Plan. They point out that "Drug related deaths of youth ages 15 to 19 seem to be rising and are overrepresented relative to their share of the population, especially among females. Drug treatment clients aged nineteen and younger account for 13% of total admissions. Most of these young clients (about 50%) were primarily involved with marijuana; the next most significant drug problems are synthetic opiates and alcohol. Juveniles represented about one-half of drug-related arrests in 1977; again marijuana accounted for the majority of these arrests."

As a goal, the plan states "The occurrence of new substance abuse and related negative consequences will decrease." Seemingly House Bill 338 focuses on this end too.

In this regard House Bill 338 may be seen as a prevention strategy and in accord with the State Office of Alcoholism and Drug Abuse policy which places a high priority on primary prevention of substance abuse. This includes "activities designed to address the needs of potential substance abusers before abuse begins and its negative consequences occur."

Viewed as a prevention strategy House Bill 338 is also in accord with a departmental policy guideline establishing primary prevention as first priority in service provision.

The bill as it is now drafted, however, may be too wide in focus and, so, have problems with enforceability.

This bill will have no specific impact on existing treatment programs.

Recommendation - Support in concept.

Recommended by: Robert L. Cole  
Robert L. Cole, Coordinator  
Office of Alcoholism and  
Drug Abuse

Date: 03/16/81

Approved by: Helen D. Beirne  
Helen D. Beirne  
Commissioner

Date: 3/24/81

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 338

Title An Act prohibiting access by minors to premises where drug paraphernalia is sold

Requested by Helen D. Beirne Date 3/18/81

II. FISCAL DETAIL

Agency Affected Department of Health & Social Services

Program Category Affected Corrections, Alcoholism and Drug Abuse

BRU, Program, or Subprogram(s) Affected \_\_\_\_\_

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES	0	0	0	0	0	0
200 TRAVEL	0	0	0	0	0	0
300 CONTRACTUAL	0	0	0	0	0	0
400 COMMODITIES	0	0	0	0	0	0
500 EQUIPMENT	0	0	0	0	0	0
600 LAND & STRUCTURES	0	0	0	0	0	0
700 GRANTS, CLAIMS, ETC.	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER (Specify Fund Source)	0	0	0	0	0	0

POSITIONS

FULL TIME	0	0	0	0	0	0
PART TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

As currently drafted, this bill appears to have a zero impact

IV. DATE 3/18

PREPARED BY Gail Shortell

AGENCY Health & Social Services

Original: Legislative Finance

PHONE 465-3030

cc: Budget and Management

Prime Sponsor (First Legislator Named) M&B Approval M. Hubbard

Date 3/18/81

H

B

3

3

9

Original sponsors: Metcalfe, Abood,  
Barnes, et al

Offered: 1/25/82  
Referred: Judiciary

1 IN THE HOUSE

BY THE STATE AFFAIRS COMMITTEE

2 CS FOR HOUSE BILL NO. 339 (State Affairs)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the judicial review of adminis-  
7 trative regulations."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1, AS 44.62.030 is amended to read:

10 Sec. 44.62.030. CONSISTENCY BETWEEN REGULATION AND STATUTE. If,  
11 by express or implied terms of a statute, a state agency has authority  
12 to adopt regulations to implement, interpret, make specific or otherwise  
13 carry out the provisions of the statute, no regulation adopted is valid  
14 or effective unless consistent with the statute and there is a clearly  
15 demonstrated need for the regulation [REASONABLY (NECESSARY)] to carry out  
16 the purpose of the statute.

17 \* Sec. 2. AS 44.62.300 is amended by adding a new subsection to read:

18 (b) In an action under (a) of this section brought on the ground  
19 that there is no clearly demonstrated need for the regulation as  
20 required by AS 44.62.030, the state has the burden of proving that

21 (1) the burdens imposed on the public by the regulation are  
22 outweighed by the benefits accruing to the public from the regulation;  
23 and

24 Petersen (2) there is no less restrictive means available to achieve  
25 the purpose of the regulation.

26 Act Petersen - AG. ~~AG.~~

alaska  
state  
hospital  
association

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Alternate Trustee Delegate  
to American Hospital  
Association  
Robert Jensen  
Central Peninsula Hospital  
Soldotna

President  
Dennis L. DeWitt  
Juneau

January 26, 1982

The Honorable Ramona L. Barnes  
State Capitol  
Pouch V  
Juneau, AK 99811

Dear Representative Barnes:

SUBJECT: CSHB 339

The Alaska State Hospital Association wishes to indicate its support for CSHB 339 which is before the Judiciary Committee for consideration.

We believe that regulations are an important and justifiable activity and do in most cases protect the public. As an industry which as institutions must abide by licensure regulations developed by the Department of Health and Social Services, as employers must respond to the Department of Labor, as employers of nurses must abide by regulations promulgated by the Department of Commerce and Economic Development, and so forth, we believe we have some feeling for interaction with the regulatory process. We are finding, however, that regulators are beginning to regulate, not because of a public need, but because the regulator believes the regulation is a nice idea. One supported by the regulator and not precluded by law.

This Association believes that CSHB 339 will return regulation to its proper role, that of protecting the public by responding to demonstrated need. It will preclude the use of regulation to foster the ideology of the regulator.

In this time of concern about health care costs it is important that government not unnecessarily increase costs through unnecessary regulation. We believe CSHB 339 will help achieve that goal.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis L. DeWitt", with a long horizontal flourish extending to the right.

Dennis L. DeWitt  
President

DLD:jp

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. CSHB 339

Title "An act relating to the judicial review of administrative regulations."

Requested by Rep. Barnes, House Judiciary Date 2/5/82

II. FISCAL DETAIL

Agency Affected Department of Law

Program Category Affected General Government

BRU, Program, Or Subprogram(s) Affected Legal Services

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME	0	0	0	0	0	0
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No fiscal impact is anticipated by the department through the enactment of this bill.

IV. DATE February 8, 1982

PREPARED BY Richard I. Peques, (Director, Admin. Svcs.)

AGENCY Department of Law

Original: Legislative Finance

PHONE 465-3672

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

FISCAL NOTE

I. REQUEST HB 339  
 Bill/Resolution No. \_\_\_\_\_  
 Title RELATING TO JUDICIAL REVIEW OF ADMINISTRATIVE REGULATIONS  
 Requested by Representative Barnes Date February 5, 1982

II. FISCAL DETAIL  
 Agency Affected Administration  
 Program Category Affected \_\_\_\_\_  
 BRU, Program, Or Subprogram(s) Affected \_\_\_\_\_  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)  
 HB 339 will have no fiscal impact on the Department of Administration

IV. DATE 2/5/82 PREPARED BY Robert L. Rehfeld  
 AGENCY Administration  
 PHONE 465-2200  
 Original: Legislative Finance  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named) Metcalfe, Abood, Barnes et al  
 33-001 (Rev. 11/78) of the Governor: Keith Specking

I. REQUEST  
 Bill/Resolution No. CS for HB 339  
 Title Judicial Review of Administrative Regulations  
 Requested by House Judiciary Date 2/5/82

II. FISCAL DETAIL  
 Agency Affected Alaska Court System  
 Program Category Affected Administration of Justice  
 BRU, Program, Or Subprogram(s) Affected \_\_\_\_\_  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
<b>TOTAL</b>		-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

IV. DATE 2/9/82 PREPARED BY Richard P. Barrier  
 AGENCY Alaska Court System  
 PHONE 264-0546  
 Original: Legislative Finance  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)  
 33-001 (Rev. 12/81)

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. CS for HB 339  
 Title Judicial Review of Administrative Regulations  
 Requested by House Judiciary Date 2/5/82

II. FISCAL DETAIL

Agency Affected Alaska Court System  
 Program Category Affected Administration of Justice  
 BRU, Program, Or Subprogram(s) Affected \_\_\_\_\_  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
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600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
<b>TOTAL</b>		-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

IV. DATE 2/9/82 PREPARED BY Richard P. Barrier  
 AGENCY Alaska Court System  
 Original: Legislative Finance PHONE 264-0546  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)  
 33-001 (Rev. 12/81)

*Ramona*

*this Bill has undergone  
extensive hearings  
it is now in your  
committee, same what I by a*

Original sponsors: Metcalfe, Abood,  
Barnes, et al

Offered: 1/25/82  
Referred: Judiciary

*Miss assignment*

*I would appreciate a waiver.*

*Ray*

1 IN THE HOUSE

BY THE STATE AFFAIRS COMMITTEE

2 CS FOR HOUSE BILL NO. 339 (State Affairs)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - SECOND SESSION

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7 trative regulations."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 44.62.030 is amended to read:

10 Sec. 44.62.030. CONSISTENCY BETWEEN REGULATION AND STATUTE. If,  
11 by express or implied terms of a statute, a state agency has authority  
12 to adopt regulations to implement, interpret, make specific or otherwise  
13 carry out the provisions of the statute, no regulation adopted is valid  
14 or effective unless consistent with the statute and there is a clearly  
15 demonstrated need for the regulation [REASONABLY NECESSARY] to carry out  
16 the purpose of the statute.

17 \* Sec. 2. AS 44.62.300 is amended by adding a new subsection to read:

18 (b) In an action under (a) of this section brought on the ground  
19 that there is no clearly demonstrated need for the regulation as  
20 required by AS 44.62.030, the state has the burden of proving that

21 (1) the burdens imposed on the public by the regulation are  
22 outweighed by the benefits accruing to the public from the regulation;  
23 and

24 (2) there is no less restrictive means available to achieve  
25 the purpose of the regulation.

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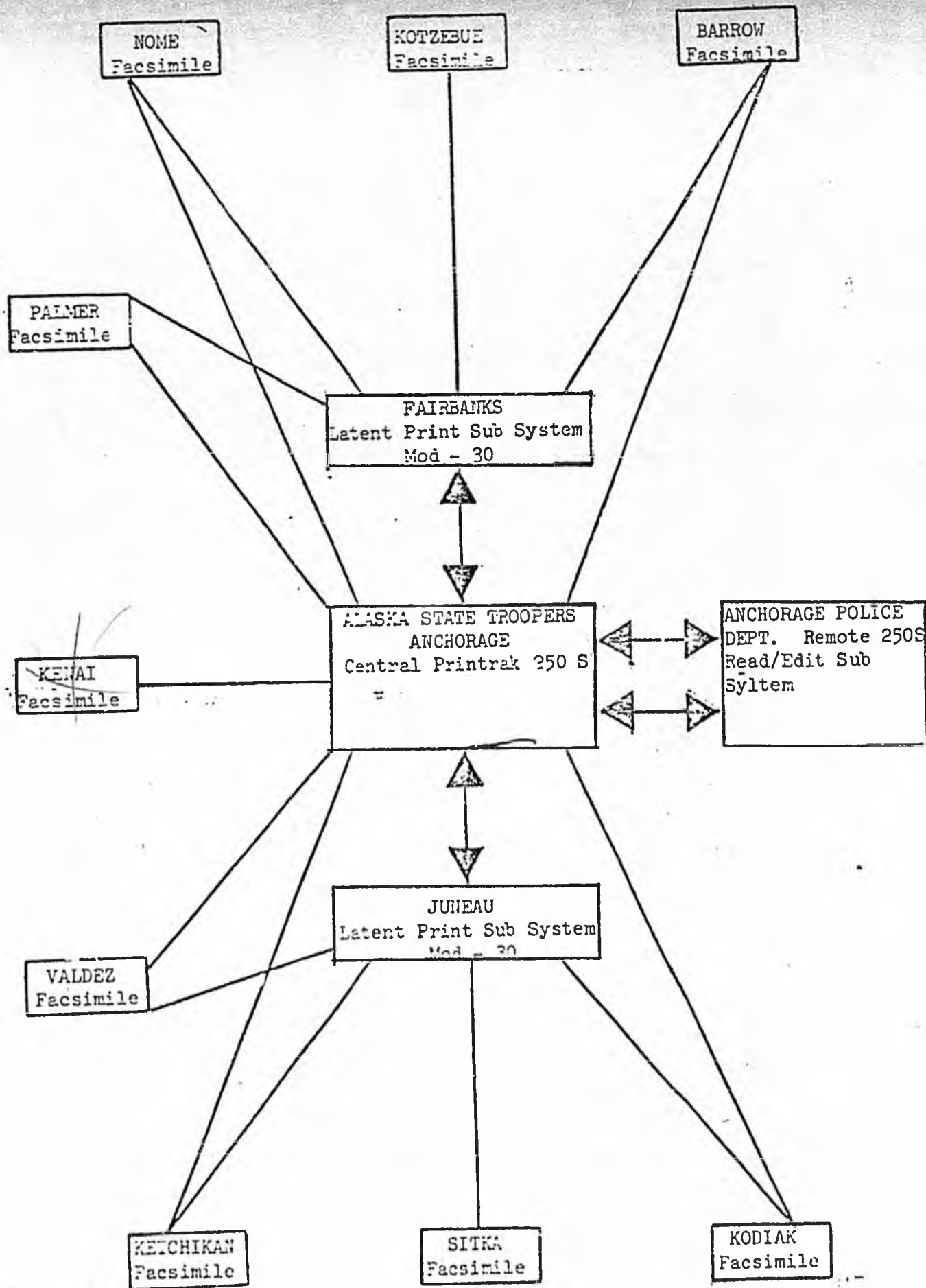
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AUTOMATED FINGERPRINT IDENTIFICATION NETWORK OF ALASKA

COST ANALYSIS

250S Central System	unit cost including air shipment	\$	1,700,000.00
	Maintenance Fiscal (82-83) 9 mos.	\$	204,300.00
250S Subsystem (A.P.D.)	unit cost including air shipment	\$	696,000.00
	Maintenance Fiscal (82-83) 9 mos.	\$	35,487.00
250S Latent Sybsystem Juneau and Fairbanks	Unit #1	\$	126,000.00
	Unit #2	\$	122,000.00
	Maintenance Fiscal (82-83) 9 mos.	\$	20,880.00
	Unit #2	\$	18,435.00
Facsimile Bush Systems	unit cost @ 11,137 x 13	\$	144,781.00
	Maintenance Fiscal (82-83) 12 mos. @ \$1,480 x 13	\$	19,240.00
Facsimile Main Units	Anchorage P.D., Anchorage AST		
	Fairbanks & Juneau AST @ 32,112 x 4	\$	128,448.00
	Maintenance Fiscal (82-83) 12 mos. \$5,300 x 4	\$	21,200.00

Installation cost 250S and Facsimile	\$	200,000.00
Conversion of Fingerprint Files	\$	200,000.00
250S System Cost Total	\$	2,840,000.00
Facsimile System Cost Total	\$	320,000.00
Maintenance Fiscal (82-83)	\$	338,900.00
Miscellaneous Cost	\$	<u>300,000.00</u>
TOTAL	\$	4,282,900.00
Maintenance Fiscal (83-84)	\$	412,540.00
Miscellaneous Cost (83-84)	\$	100,000.00



I. REQUEST

Bill/Resolution No. House Bill No. 344  
 Title Special Appropriation for a Computerized Fingerprint Identification System  
 Requested by Various Date 3/16/81

II. FISCAL DETAIL

Agency Affected Department of Public Safety  
 Program Category Affected Administration of Justice  
 BRU, Program, or Subprogram(s) Affected Laboratory Services

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES			95,695			
200 TRAVEL		18,755	35,081			
300 CONTRACTUAL		34,699	691,029			
400 COMMODITIES		4,817	211,754			
500 EQUIPMENT	2	297,570	893,500			
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
<b>TOTAL</b>		<b>2,355,841</b>	<b>1,927,059</b>			

FUNDING (Thousands of Dollars): 2,355,841 1,927,059

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
FULL TIME	-		2			
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The proposed legislation would create the Automated Fingerprint Identification Network which would utilize a Rockwell 250 S Printak Central System in AST Headquarters with a Read/Edit Subsystem in the Anchorage Police Department. Juneau and Fairbanks AST would utilize remote later subsystems. In acquiring this tested, proven and highly reliable system, law enforcement agencies can automatically search their already existing extensive fingerprint files to locate matches and print out identities of respondents. Search time will be reduced and match rate increased by at least 15%.

No personnel costs are expected to be incurred in FY82 while the system is being installed. In FY83 two Range 19A's, would be hired to operate the system. Total establishment costs expected to be incurred during FY82 and FY83 is \$4,282,900. Operating costs in subsequent year are expected to be approximately \$120,000 each year.

See attached sheet for further fiscal support.

IV. DATE March 25, 1981 PREPARED BY Francis Allan  
 AGENCY Administrative Services/AST  
 PHONE 269-5691

Original: Legislative Finance  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)

Automated Fingerprint Identification Network  
Capital Project Cost Estimate

Code	Description	FY 82	FY 83	Total
100	Personnel Services			
	111 Reg. Comp. (2x19AGGU)		68088	68088
	121 Overtime (180 hrs x 26.19)		4714	4714
	121 Shift Differential (19Ax3.75)		1277	1277
	sub total		74079	74079
	VAR. Benefits (17.67%)		13090	13090
	184 FICA (6.65%)		4926	4926
	185 Group Medical (1800x2)		3600	3600
	100 TOTALS	-0-	95695	95695
200	Travel and Moving			
	211 In State Travel	2243	9348	11591
	212 In State Per Diem	2878	6460	9338
	223 Out of State Travel	4544	6223	10767
	224 Out of State Per Diem	4820	13050	17870
	291 Transportation	2255	-	2255
	292 Technician Per Diem	2015	-	2015
	200 TOTALS	18755	35081	53836
300	Contractual Services			
	311 Phone	625	5130	5755
	314 Postage	-	420	420
	326 Subscription & Info	-	141	141
	339 Space/Sight Preparation	-	177390	177390
	349 Main. Contract & File Conversion	20220	494743	514963
	389 Training	3254	-	3254
	394 Conference Registration	325	-	325
	397 Freight	10275	13205	23480
	300 TOTALS	34699	691029	725728
400	Supplies & Materials			
	425 Janitorial Supplies	855	855	1710
	469 Spare Parts Inventory	-	207295	207295
	481 Stationary & Supplies	3962	-	3962
	483 Computer Commodities	-	3604	3604
	400 TOTALS	4817	211754	216571
500	Equipment			
	522 Data Proc. (70%-82 & 30-83)	1988000	852000	2840000
	522 Power Stabilizer	-	41500	41500
	522 Facsimile	309570	-	309570
	500 TOTALS	2297570	893500	3191070
	PROJECT TOTALS	2355841	1927059	4282900

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Introduc: 3/18/81  
Referred: Judiciary

1 IN THE HOUSE

BY MALONE

2 HOUSE BILL NO. 356

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to unlawful practices in the sale or  
7 rental of real property."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 18.80.240 is amended to read:

10 Sec. 18.80.240. UNLAWFUL PRACTICES IN THE SALE OR RENTAL OF REAL  
11 PROPERTY. It is unlawful for the owner, lessee, manager or other  
12 person having the right to sell, lease or rent real property

13 (1) to refuse to sell, lease or rent the real property to a  
14 person because of sex, marital status, changes in marital status,  
15 pregnancy, parenthood, race, religion, color or national origin [; HOW-  
16 EVER, NOTHING IN THIS PARAGRAPH PROHIBITS THE SALE, LEASE OR RENTAL OF  
17 CLASSES OF REAL PROPERTY COMMONLY KNOWN AS HOUSING FOR "SINGLES" OR  
18 "MARRIED COUPLES" ONLY]; ]

19 (2) to discriminate against a person because of sex, marital  
20 status, changes in marital status, pregnancy, parenthood, race,  
21 religion, color or national origin in a term, condition or privilege  
22 relating to the use, sale, lease or rental of real property [; HOWEVER,  
23 NOTHING IN THIS PARAGRAPH PROHIBITS THE SALE, LEASE OR RENTAL OF  
24 CLASSES OF REAL PROPERTY COMMONLY KNOWN AS HOUSING FOR "SINGLES" OR  
25 "MARRIED COUPLES" ONLY]; ] → McConghy Leaving this section out → nit right

26 (3) to make a written or oral inquiry or record of the sex,  
27 marital status, changes in marital status, parenthood, race, religion,  
28 color or national origin of a person seeking to buy, lease or rent real  
29 property;

Delete language

Vic, x1, 3, 27

1 (4) to offer, solicit, accept, use or retain a listing of  
2 real property with the understanding that a person may be discriminated  
3 against in a real estate transaction or in the furnishing of facilities  
4 or sources in connection therewith because of a person's sex, marital  
5 status, changes in marital status, pregnancy, parenthood, race,  
6 religion, color, national origin or age;

7 (5) to represent to a person that real property is not  
8 available for inspection, sale, rental, or lease when in fact it is so  
9 available, or to refuse a person to inspect real property because of  
10 the race, religion, color, national origin, age, sex, marital status,  
11 change in marital status, parenthood, or pregnancy of that person or of  
12 any person associated with that person;

13 (6) to engage in blockbusting;

14 (7) to make, print or publish, or cause to be made, printed  
15 or published, any notice, statement or advertisement, with respect to  
16 the sale or rental of real property that indicates any preference,  
17 limitation, or discrimination based on race, color, religion, sex,  
18 parenthood, or national origin, or an intention to make the preference,  
19 limitation or discrimination.  
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ALASKA LANDLORD & PROPERTY MANAGERS ASSOCIATION

March 3, 1981

Representative Fred Brown  
Pouch V  
Interdepartmental Mail Stop 3100  
Juneau, Alaska 99811

Dear Representative Brown:

I am writing in regard to HB 356, "An act relating to unlawful practices in the sale or rental of real property". ALPMA is opposed to this bill. To our knowledge there are no abuses occurring in this area of discrimination and there is no demand that we know of for this type of legislation. Members of ALPMA will be testifying at the teleconference on Wednesday, April 9, 1981.

It seems to ALPMA that this legislation is not needed, nor is it practical. Keep in mind that the landlord's first objective is to find tenants for his apartments, or he has no income. He will give preference to those who are most likely to be stable, and pay the rent. Families with children are generally the best risks.

Apartments are usually constructed with a particular type of tenant in mind. Efficiencies are designed for single persons, one-bedroom units for couples, two and more bedrooms for families with children. Most landlords will resist renting to families too large for the unit being rented. On the other hand, a landlord would be foolish to insist on couples with no children for two-bedroom apartments.

Some complexes are designed specifically for families with children. They have playgrounds with swings and slides. Other complexes are designed for adults, with tennis courts and saunas. The notion of government stepping into this free enterprise system with regulations somehow designed to prevent discrimination is ludicrous. Children will always be welcome in family-oriented complexes, and will be discouraged in adults-only complexes.

I have some specific comments about the bill. The bill may be in conflict with itself if it includes the language on line 18, allowing "MARRIED COUPLES ONLY". On line 14 there is existing language prohibiting discrimination on account of marital status. Perhaps the intent in HB 356 is to permit "ADULTS ONLY" rental complexes.

The second comment is that HB 356 covers all rental property, yet the language of the bill deals only with residential property. How could this prohibition relate to office rental, or ground rental?

Lastly, HB 356 seems to conflict with local health and housing codes that limit the number of persons that may occupy sleeping quarters. The bill apparently would force a landlord to accept more children than the number of bedrooms in the apartment would accommodate.

Sincerely,

Bernard L. Marsh  
Executive Secretary, ALPMA

BLM:mj



May 1980

P.O. BOX 5877 SANTA MONICA, CA. 90405 (213) 39 1093

0801 02 EES

Questions & Answers about "No Children" Housing in California

*Q: Is there really a shortage of housing for families with children?*

A: Yes. A 1979 survey found that 71% of apartment units in Los Angeles allowed no children of any age, 15% allowed children of certain ages, and only 14% allowed children with no age restrictions. Similar patterns of exclusion have been documented in Fresno, San Jose, San Diego, Oakland, Mountain View, and Campbell. In addition, census data show that even when family size and income are the same, renters with children are inadequately housed more often than their childless counterparts.

*Q: Isn't the solution to build more apartments?*

A: This "solution" ignores the fact that most new buildings (74% in the Los Angeles survey) also ban children. Also, there is nothing to prevent buildings which now accept children from becoming "adults only" in 30 days, the time it takes for legal notice of eviction, thereby intensifying the housing crisis for families.

*Q: Who is hurt the most by "adults only" housing?*

A: Women and minorities. In California, women with children make up 62% of the state's female renter population. Similarly, 41% of Black renters and 54% of Hispanic renters have children. This means that years after the federal government and California outlawed housing discrimination based on sex, race, color, ancestry, or national origin, a large segment of the female and minority renter population can be refused housing or evicted because they have children.

*Q: Don't landlords have a right to refuse tenants they don't want?*

A: They have that right to a certain extent, but they are limited by our civil rights laws which prohibit arbitrary discrimination. A landlord may not want to rent to a divorced woman, or a renter may decide that he doesn't want to live next to a Black, but the Unruh Civil Rights Act does not permit such discrimination based on stereotypes about people. Parents -- who may be Black or divorced -- need and deserve the same degree of protection as other classes of renters.

*Q: Aren't maintenance costs higher when you rent to families with children?*

A: According to a New York company which supplies the insurance industry with nationwide statistics on damages, there is no empirical data to prove that the presence of families results in greater destruction to property than the presence of "singles."

*Q: Don't insurance companies charge higher rates for buildings that allow children?*

A: No. Agents for Prudential, Safeco, Aetna, Republic, Northwestern, and Continental Insurance Companies say that it is the condition of the building -- not the age of its tenants -- that determines insurance rates. (It is important to note that if tenant age were a factor in setting accident liability rates, the heaviest burden might fall on the elderly.)

*Q: Wouldn't fair housing laws force landlords to accept children in buildings that are not safe for them?*

A: This issue is misleading. According to our state and local building codes, any building which is unsafe for a child is also unsafe for adults. The real safety issue is that anti-child rental policies force many families to live in the most dilapidated, unsafe, overcrowded, and crime-ridden neighborhoods because they are deprived of choice.

Q: *Aren't adult buildings quieter than family buildings?*

A: Tenants who live in age-integrated buildings say there is little or no difference. Some believe their buildings are quieter than neighboring "singles" complexes, especially at night. But unfortunately, most families don't live in age-integrated buildings, and noise can become a problem in "children's ghettos" where the concentration of children is unnaturally high. Many of the problems caused by age segregation could be solved if children were dispersed throughout the rental housing market. A mixture of age groups in a building can be mutually helpful and humane for all tenants, young and old.

Q: *Wouldn't fair housing laws force landlords to rent to unqualified tenants just because they have children?*

A: No. As with other fair housing laws, landlords can require identical proof of financial responsibility and references from all prospective tenants, with or without children, and apply the same standards when choosing tenants. The only restriction would be that denial of housing cannot be based solely on the fact that the prospective tenant has a child or is pregnant. Fair housing laws do not prevent the eviction of irresponsible or destructive tenants. Fair housing means equal treatment, not special treatment.

Q: *Are there any precedents for this type of fair housing law?*

A: Laws to protect renters with children from housing discrimination have been enacted in Michigan, Arizona, Illinois, New Jersey, New York, Delaware, \* Massachusetts, Connecticut, ~~Michigan~~, and the District of Columbia, as well as the California cities of San Francisco, Berkeley, Davis, Santa Monica, Los Angeles (1980), Oakland (1980), and the County of Santa Clara. The City of Fresno has incorporated some family housing protections into its zoning codes, and California statewide legislation has been proposed by Senator David A. Koberti (State Capitol, Sacramento, CA 95814, Area Code 916 - 445-8390).

Q: *Who should I call to report a case of age discrimination?*

A: Check your phone book for a Legal Aid office, Fair Housing Congress or Council, Human Rights Commission, or Consumer Affairs agency. If your city or county doesn't have a protective ordinance, ask your City Council or Board of Supervisors if they plan to introduce one.

\* \* \* \* \*

If you have other questions about housing discrimination against children, please write to us at P. O. Box 5877, Santa Monica, CA 90405, or call (213) 393-1093. If you would like to obtain a copy of our 52-page report on the extent and effects of no-children rentals in five California cities, please enclose \$5 with your letter.

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\* Correction on line 3: Substitute "Minnesota" for "Michigan."

# MEMORANDUM

## State of Alaska

TO: Commissioners

DATE: January 23, 1980

FILE NO:

TELEPHONE NO:

*[Handwritten signature]*  
FROM: Niel Thomas  
Executive Director  
Human Rights Commission

SUBJECT: Parenthood Discrimination in Housing

The 1975 legislature added the word "Parenthood" as one of the bases for filing a discrimination complaint with the Commission. This basis was not included in every section of the Human Rights Law. I recall informal discussions as to whether it should be included in the housing section. That would prohibit a landlord, for instance, from refusing to rent to someone simply because he or she had children.

As I remember the discussion -- and no formal proposal to this effect was ever included in drafts of the bill -- the thinking of the sponsors was that landlords should be free to determine whether they want to have their property suffer the kind of wear and tear which people traditionally associate with having children in an apartment. Since the idea never gained much momentum one way or the other, it was never squarely before the Legislature and therefore these discussions do not begin to rise to any level of legislative history.

The idea has now surfaced with perhaps more enthusiasm, as you can see from the letter of inquiry which appears under this memo. The specific request is that you advise the Legislature as to your preference for or against legislation. To provide you with a balanced view of the issue, I have shown that letter to Ben Marsh, who heads the Landlords Association and asked for the viewpoint of his organization. That letter is also attached.

*not received  
as of  
meeting  
date  
2/1/81  
not*

SEATTLE OPEN HOUSING ORDINANCE

ORDINANCE 104839

AS AMENDED BY ORDINANCE 106476 AND ORDINANCE 108205

AN ORDINANCE relating to and prohibiting unfair practices involving real property, establishing an "Open Housing Ordinance"; providing for enforcement procedures and prescribing penalties; and repealing Chapter 12A.44 "Unfair Housing Practices" of the Seattle Criminal Code (Ordinance 102843).

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. SHORT TITLE AND PURPOSES. This ordinance shall be known as and may be cited as the "Open Housing Ordinance". The general purposes of this ordinance are to promote the availability and accessibility of housing and real property to all persons; to prohibit discriminatory practices in real property transactions, whether direct or indirect, which inexcusably and unjustifiably deny those persons equal rights and opportunities in acquiring or disposing of real property; and to provide enforcement mechanisms for the accomplishment of such purposes; and to these ends the provisions of this ordinance shall be liberally construed.

Section 2. DEFINITIONS. Definitions as used in this ordinance, unless additional meaning clearly appears from the context, shall have the meanings subscribed:

- (1) "Charging Party" means any person alleging an unfair housing practice under this ordinance.
- (2) "Commission" means the Seattle Human Rights Commission or the Seattle Women's Commission, as the context requires.
- (3) "Department" means the Department of Human Rights of the City of Seattle.
- (4) "Director" means the Director of Human Rights or the Director of the Office of Women's Rights as the context requires.
- (5) "Discriminate" means any conduct, whether by single act or as part of a practice, the effect of which is to adversely affect or differentiate between or among individuals or groups of individuals, because of race, color, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation or political ideology.
- (6) "Dwelling" includes any building containing one or more dwelling units.
- (7) "Dwelling unit" includes a suite of rooms for occupancy by one family containing space for living, sleeping and preparation of food and containing toilet and bathing facilities.
- (8) "Housing accommodations" shall include any dwelling or dwelling unit, rooming unit, rooming house, lot or parcel of land in the City of Seattle which is used, intended to be used, or arranged or designed to be used as, or improved with, a residential structure for one or more human beings.
- (9) "Lender" includes any bank, insurance company, or savings or building and loan association, credit union, trust company, mortgage company, or other person or agent thereof, engaged wholly or partly in the business of lending money for the financing or acquisition, construction, repair or maintenance of real property.
- (10) "Occupant" includes any person who has established residence or has the right to occupancy of real property.
- (11) "Owner" includes persons who own, lease, sublease, rent, operate, manage, have charge of, control or have the right of ownership, possession, management, charge, or control of real property on their own behalf or on behalf of another.
- (12) "Party" shall include the person charging or making a complaint or upon whose behalf a complaint is made alleging an unfair practice, the person alleged or

found to have committed an unfair practice, the Department of Human Rights and the Office of Women's Rights.

→ "Parental status" means being a parent, step-parent, adoptive parent, guardian, foster parent or custodian of a minor child or children, which child or children shall permanently or temporarily occupy the real estate.

(13) "Person" includes one or more individuals, partnerships, organizations, trade or professional associations, corporations, legal representatives, trustees, trustees in bankruptcy and receivers; it includes any owner, lessee, proprietor, manager, agent or employee, whether one or more natural persons, and further includes any political or civil subdivision or agency or instrumentality of the City of Seattle.

(14) "Political ideology" means any idea or belief, or coordinated body of ideas or beliefs, relating to the conduct, organization, function or basis of government and related institutions and activities, whether or not characteristic of any political party or group. This term includes membership or participation in the activities of a group with shared political ideology, provided such membership or participation does not involve force or violence or produce or incite imminent force or violence toward persons or property.

(15) "Prospective borrower" includes any person who seeks to borrow money to finance the acquisition, construction, repair, or maintenance of real property.

(16) "Prospective occupant" includes any person who seeks to purchase, lease, sublease or rent real property.

(17) "Real estate agent, salesperson or employee" includes any person employed by, associated with or acting for a real estate broker to perform or assist in the performance of any or all of the functions of a real estate broker.

(18) "Real estate broker" includes any person who for a fee, commission, or other valuable consideration, lists for sale, sells, purchases, exchanges, leases or sub-leases, rents, or negotiates or offers or attempts to negotiate the sale, purchase, exchange, lease, sublease or rental of real property of another, or holds themselves out as engaged in the business of selling, purchasing, exchanging, listing, leasing, subleasing, or renting real property of another, or collects the rental for use of real property of another.

(19) "Real Property" includes housing accommodations, buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(20) "Respondent" means any person who is alleged to have committed an unfair practice prohibited by this ordinance.

(21) "Rooming unit" includes one or more rooms within a dwelling unit or rooming house containing space for living and sleeping.

(22) "Sexual orientation" means male or female heterosexuality, bi-sexuality or homosexuality, and includes a person's attitudes, preferences, beliefs and practices pertaining to sex, but shall not include conduct which is unlawful under city, state or federal law.

### Section 3. UNFAIR PRACTICES FORBIDDEN

(1) Unfair practices as hereinafter defined regarding real property are contrary to the public peace, health, safety and general welfare and are hereby prohibited by the City of Seattle in the exercise of its police power.

(2) No owner, assignee, real estate broker, real estate agent, salesperson or employee, or other person having the right to sell, rent, lease, sublease, assign, transfer, or otherwise dispose of real property shall discriminate by undertaking or refusing to sell, rent, lease, sublease, assign, transfer or otherwise deny to or withhold from any person or group of persons such real property, or segregate the use thereof, or represent that such real property is not available for inspection, when in fact it is so available, or expel or evict an occupant from real property because of the race, color, religion, ancestry, national origin, age, sex, marital status, sexual orientation, parental status

or political ideology of such a person or persons, or discriminate against or segregate any person because of such person's race, color, religion, ancestry, national origin, age, sex, marital status, sexual orientation, parental status or political ideology in the terms, conditions or privileges of the sale, rental, lease, sublease, assignment, transfer or other disposition of any such real property, including but not limited to the setting of rates for rental or lease, or establishment of damage deposits, or other financial conditions for rental or lease, or in the furnishings of facilities or services in connection therewith.

(3) No real estate broker or real estate agent, salesperson or employee shall because of race, color, religion, ancestry, national origin, age, sex, marital status, sexual orientation, parental status or political ideology of an occupant, purchaser, prospective occupant, or prospective purchaser:

(a) Refuse or intentionally fail to list or discriminate in listing real property for sale, rent, lease or sublease.

(b) Refuse or intentionally fail to show a prospective occupant real property listed for sale, rental, lease or sublease.

(c) Refuse or intentionally fail to accept and/or transmit to an owner any reasonable offer to purchase, lease, rent or sublease real property.

(d) Otherwise discriminate against an occupant, prospective occupant, purchaser or prospective purchaser of real property.

(4) No lender, or any agent or employee thereof, to whom application is made for financial assistance for the purchase, lease, acquisition, construction, rehabilitation, repair or maintenance of any real property shall:

(a) Discriminate against any person, prospective occupant or tenant of real property in the granting, withholding, extending, modifying or renewing, or in the rates, terms, conditions or privileges of any such financial assistance, or in the extension of services in connection therewith; or

(b) Use any form of application for such financial assistance or make any record of inquiry in connection with applications for such financial assistance which expresses, directly or indirectly, any limitation, specification, or discrimination because of race, color, religion, ancestry, national origin, sex, marital status, sexual orientation or political ideology, unless required or authorized by local, state or federal laws or agencies for the purpose of preventing discrimination in real property; provided that nothing in this provision shall prohibit any party to a credit transaction from requesting designation of marital status for the purpose of considering application of community property law to the individual case or from taking reasonable action thereon.

(5) No owner, real estate agent, salesperson or employee, real estate broker, or any other person, shall:

(a) Require any information, make or keep any record, or use any form of application containing questions or inquiries concerning race, color, religion, ancestry, national origin, sex, marital status, sexual orientation or political ideology in connection with the sale, rental, lease or sublease of any real property unless used solely for making reports required by agencies of the federal, state or local government for the purposes of preventing and eliminating discrimination or of overcoming its effects or for other purposes authorized by federal, state or local agencies or laws or rules adopted thereunder, and as to "marital status," for the purpose of determining applicability of community property law to the individual case.

(b) Publish, circulate, issue or display or cause to be published, circulated, issued or displayed, any communication, notice, advertisement, or sign of any kind relating to the sale, rental, lease, sublease, assignment, transfer, or listing of real property which indicates any preference, limitation or specification based on race, color, religion, ancestry, national origin, age, sex, marital status, sexual orientation, parental status or political ideology.

(c) Aid, abet, incite, compel or coerce the doing of any act defined in this ordinance as an unfair practice; or intimidate, harass, retaliate, obstruct

or discriminate against a person in any manner because such person has complied or proposes to comply with provisions of this ordinance or has filed a complaint, testified, or assisted in any proceeding under this ordinance, or any order issued thereunder, or attempt, either directly or indirectly, to commit any act defined in this ordinance to be an unfair practice or apply any economic sanctions or deny any membership privileges because of compliance with the provisions of this ordinance.

(6) No owner, real estate agent, salesperson or employee, real estate broker, or any other person, shall for profit:

(a) Promote, induce or attempt to promote or induce any person to sell or rent any real property by representations regarding the entry or prospective entry into the neighborhood or area of a person or persons of a particular race, color, religion, ancestry, national origin, age, sex, marital status, sexual orientation, parental status or political ideology.

(b) Show or otherwise take any action, the design or effect of which is to steer a person or persons to any section of the city or to particular real property in a manner tending to segregate or maintain segregation on the basis of race, color, religion, ancestry, national origin, age, sex, marital status, sexual orientation, parental status or political ideology.

(7) No person, whether or not acting for profit, shall harass, intimidate, or otherwise abuse or discriminate against any person or any person's friends or associates because of the race, color, religion, ancestry, national origin, age, sex, marital status, sexual orientation, parental status or political ideology of such person or persons or their friends or associates with the purpose or effect of denying to such person or persons the rights granted in this ordinance or the right to quiet or peaceful possession or enjoyment of any real property.

#### Section 4. ENFORCEMENT PROCEDURES

(1) A complaint alleging an unfair housing practice shall be in writing and signed by the charging party, describing the unfair housing practice complained of, and must be filed within six (6) months of the occurrence of the alleged unfair housing practice by:

(a) Any person, or the person's attorney, when the person claims to be aggrieved by an unfair housing practice.

(b) Any Commission or Director, as defined in Section 2, whenever any such Commission or Director has reason to believe that an unfair housing practice has been or is being committed.

(c) A state or federal agency or private organization concerned with discrimination in housing, whenever it has reason to believe that an unfair housing practice has been or is being committed.

Complaints pertaining solely to race, color, creed, religion, ancestry, national origin, age or political ideology shall be filed with the Department of Human Rights which shall have primary enforcement responsibility with respect thereto; and complaints pertaining solely to sex, marital or parental status or sexual orientation shall be filed with the Office of Women's Rights which shall have primary enforcement responsibility with respect thereto; provided that a complaint alleging more than one or a combination of such factors may be filed with the department or office having jurisdiction over any one of such factors. In such case the receiving office or department shall, promptly and before investigation, notify any other office or department wherein the complaint could have been filed that the complaint has been received and provide a copy thereof upon request.

(2) A complaint shall not be rejected as insufficient because of failure to include all required information so long as it substantially satisfies the information requirements necessary for processing. The charging party may amend a complaint in any respect before notice of hearing on the matter, and thereafter may amend a complaint only with permission of the Hearing Examiner, which permission shall be granted when justice will be served thereby, and all parties are allowed time to prepare their case with respect to additional or expanded charges which they did not and could not have reasonably foreseen would be in issue at the hearing.

(3) After the filing of a complaint, the Director or in case of joint enforcement responsibility, the Director of Human Rights jointly with the Director of the Office of Women's Rights as the complaint requires, shall serve notice of the complaint (including the date, place and circumstances of the alleged unlawful practice) on the respondent and shall make an investigation thereof. The results of the investigation shall be reduced to written findings of fact, and a finding shall be made that there is or is not reasonable cause for believing that an unfair practice has been or is being committed.

(4) If a finding is made that there is no reasonable cause, said finding shall be furnished to the charging party and to the respondent. Within thirty (30) days after receipt of the finding, the charging party shall have the right to appeal such finding to the Commission having hearing responsibility by filing a written statement of appeal with it. In the event that no appeal is taken or such appeal is unsuccessful, the complaint shall be dismissed.

(5) If the finding is made initially or on appeal that reasonable cause exists to believe that an unfair housing practice has occurred, the Director shall endeavor to eliminate the unfair practice by conference, conciliation and persuasion which may include as a condition of settlement the elimination of the unfair housing practice, rent refunds or credits, reinstatement to tenancy, affirmative recruiting or advertising measures or such other requirements as may lawfully be agreed upon by the parties and the Director. Any settlement agreement shall be reduced to writing and signed by the respondent. An order shall then be entered by the Director setting forth the terms of the agreement. Copies of such order shall be delivered to all affected parties and the original thereof filed with the City Clerk. If no agreement can be reached, a finding to that effect shall be made and reduced to writing, with a copy thereof furnished to the charging party and the respondent.

(6) In case of failure to reach an agreement for the elimination of such unfair practice, and upon the entry of a finding to that effect, the complaint and any and all findings made shall be certified by the Director to the Office of the Hearing Examiner for hearing. The Director shall then cause to be issued and served in the name of the Commission or Commissions having hearing responsibilities written notice of hearing to all parties as provided by law.

A hearing shall be conducted by a Hearing Examiner from the Office of Hearing Examiner, or by a deputy hearing examiner or by a hearing examiner pro tempore appointed by the Hearing Examiner. In order to promote uniformity of rules and procedures for hearings, the Hearing Examiner shall, with the advice of the Director of the Department of Human Rights and the Director of the Office of Women's Rights, and with the approval of their respective Commissions, within 60 days passage of this ordinance, present to the City Council written rules and procedures for the conduct of hearings consistent with this ordinance and the Administrative Code of the City of Seattle (Ordinance 102228). Until such formal rules are adopted, the Hearing Examiner may use such rules as may be approved by the appropriate Director(s).

The President of the Commission, or where joint enforcement responsibility is involved, the President of the Human Rights Commission jointly with the President of the Women's Commission as the case requires, may appoint a hearing panel of not more than three (3) persons, with the majority determined by the nature of the complaint, who may attend the hearing but not participate in the proceedings.

In selecting the hearing panel, the President will not appoint persons who are current members of the Commission or who are employees or agents of any department or agency involved in the case. Care must also be exercised to determine that no member of the hearing panel has a conflict of interest or has exhibited any bias or prejudice in the case.

Within such period as may be fixed by rule, the Hearing Examiner presiding at the hearing shall prepare a written decision if there is no hearing panel, or a written recommendation if a panel has been appointed. The decision or recommendation shall be filed as a public record and copies thereof mailed to each party and to other interested persons. Such decision or recommendation shall contain a brief summary of the evidence considered and shall state the Hearing Examiner's findings of fact and conclusions of law upon which such decision or recommendation is based, together with a brief statement of the Hearing Examiner's reasons therefor. If the Hearing Examiner has prepared a recommendation, it shall be in the form of a proposed decision which may be adopted by the hearing panel as its

When a hearing panel has been appointed they will make the final decision within thirty (30) days after receipt of, and upon full consideration of, the proposed decision of the Hearing Examiner as provided in the Administrative Code of the City of Seattle (Ordinance 102228). The hearing panel shall set a date for consideration of the proposed decision, and shall give notice thereof to all parties not later than ten (10) days prior to such date. The Hearing Examiner's findings of fact shall not be set aside by the hearing panel unless clearly contrary to the weight of the evidence.

(7) In the event the Hearing Examiner or the hearing panel shall determine that a respondent has been engaged in or is engaged in any unfair housing practice, the Director shall issue in the name of the Commission and cause to be served on the parties an order setting forth its decision and reasons therefor and requiring the respondent to cease and desist from such unfair practice or practices and to take such appropriate affirmative action, including but not limited to, rent refund, or credit, reinstatement to tenancy, affirmative recruiting and advertising measures, or to take such other action as in the judgment of the hearing panel will effectuate the purposes of this ordinance which may include the requirement for report on the matter of compliance. In the event the Hearing Examiner or the hearing panel finds that the respondent intentionally or knowingly committed any unfair housing practice, the Director in the name of the Commission may further order the respondent to pay a civil penalty of up to Five Hundred Dollars (\$500), which penalty shall be paid to the City Treasurer for deposit in the City General Fund.

(8) In the event the respondent refuses or fails to comply with any order of the Director, the Director shall certify the case and entire record of its proceeding to the City Attorney, who shall invoke the aid of the appropriate court to secure enforcement or compliance with the order, or to impose the penalties as set forth in this ordinance, or both; provided that in any case in which the order is directed to the City, or to any department, division, board or agency thereof, a copy of such order shall be transmitted to the Mayor who shall take appropriate action to secure compliance therewith.

(9) The Department and the Office of Women's Rights in the performance of their functions may enlist the aid of all departments of City government, and all said departments are hereby directed to fully cooperate therewith.

Section 5. EFFECT OF OTHER LAWS. Nothing in this ordinance shall invalidate or restrict any right or remedy of any charging party or respondent under state or federal law, nor preclude such party from seeking judicial review of any final administrative decision or order made hereunder.

Section 6. COOPERATIVE AGREEMENTS. Nothing in this ordinance shall be interpreted to prevent the receiving, referring, or other processing of complaints, in accordance with a cooperative agreement with the Washington State Human Rights Commission as authorized and mandated by RCW 49.60.226 or with other agencies concerned with the enforcement of laws against discrimination.

Section 7. EXCLUSIONS. Nothing in this ordinance shall:

(1) Apply to the renting, subrenting, leasing or subleasing of a single family dwelling, duplex or any dwelling in an RS or RD zone converted to multiple use prior to 1957, wherein the owner or person entitled to possession thereof normally maintains, or intends to maintain, a permanent residence, home or abode.

(2) Be interpreted to prohibit any person from making a choice among prospective purchasers or tenants of real property on the basis of factors other than race, color, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation or political ideology where such factors are not designed, intended or used to discriminate.

(3) Prohibit a religious organization, association, or society, or any non-profit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.

(4) Prohibit any person from limiting the rental or occupancy of housing accommodations in any YWCA, YMCA, sorority, fraternity, school dormitory, or similar residential hall to persons of one sex.

(5) Prohibit any person from limiting the rental or occupancy of housing accommodations to persons who are elderly or handicapped in any housing facility designed, constructed or substantially rehabilitated and operated exclusively for the elderly or the handicapped.

(6) Require any person to rent or lease a housing accommodation to an unemancipated minor.

(7) Require any person to rent or lease a housing accommodation in violation of the Housing Code (Ordinance 106319).

Section 8. PENALTIES. Any person who shall knowingly or wilfully engage in an unfair practice under this ordinance or who shall knowingly and wilfully resist, prevent, impede or interfere with a Director, Hearing Examiner or Hearing Panel in the performance of duties pursuant to this ordinance, or who shall fail, refuse, or neglect to comply with any lawful decision or order of a Director, Hearing Examiner or Hearing Panel, shall be liable for a civil penalty of up to Five Hundred Dollars (\$500) for each such violation in addition to any other penalty, sanction, injunction or remedial decree imposed by order of any court.

Section 9. REPEALER. Sections 12A.44.010 through 12A.44.060 (Chapter 12A.44) of Ordinance 102843 (Seattle Criminal Code) are hereby repealed; provided, that such repeal shall not affect any right accrued, any duty imposed, or any penalty incurred under or by virtue of the provisions of said Chapter 12A.44 of the Seattle Criminal Code or of Ordinance 96619 repealed thereby and the procedural provisions of this ordinance shall apply to all complaints and proceedings pending under said Chapter 12A.44 or said Ordinance 96619.

Passed by the City Council on the 4th day of August, 1975.

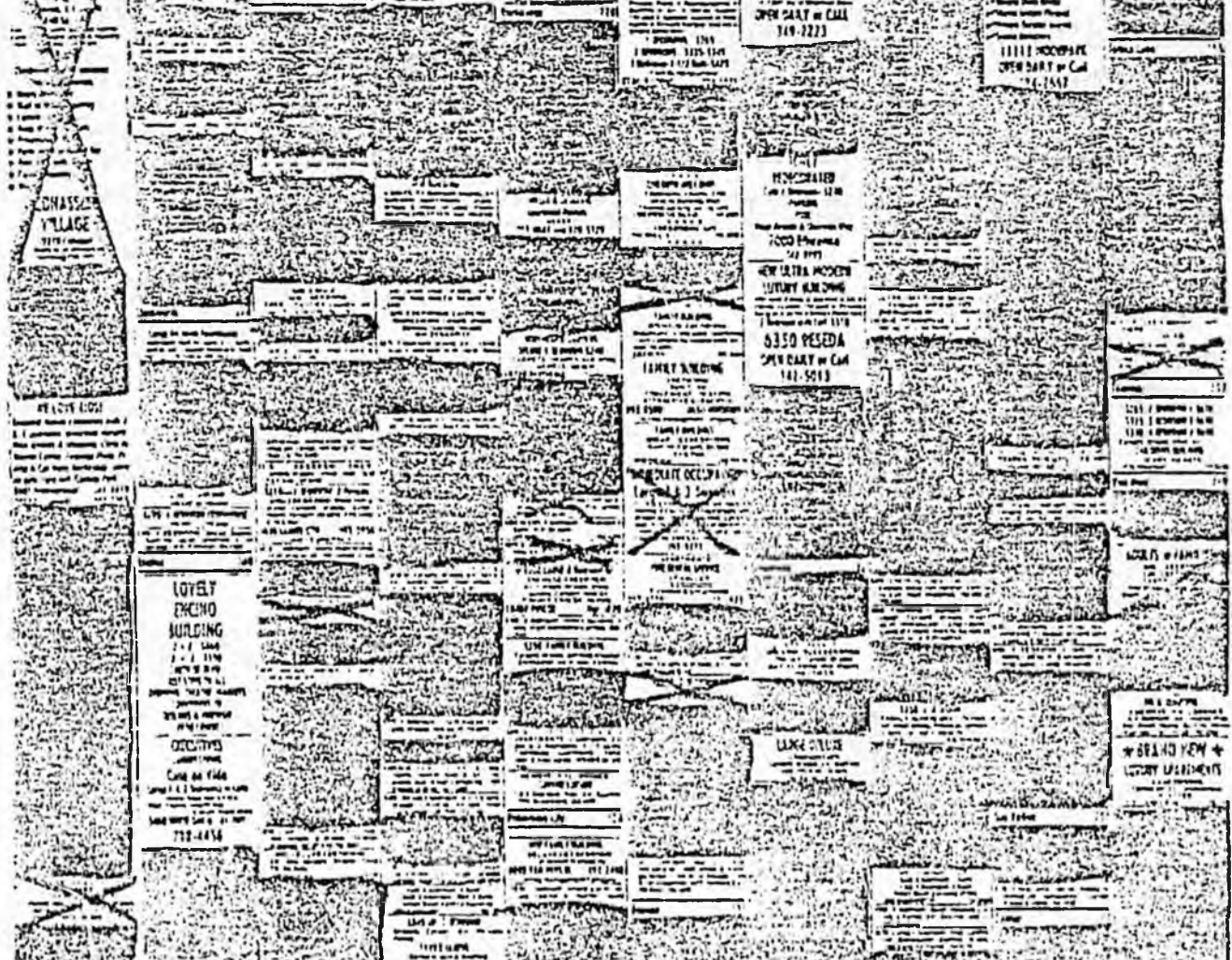
Approved by the Mayor of the City of Seattle on the 15th day of August, 1975.

Filed by the City Comptroller and the City Clerk on the 15th day of August, 1975.

# The Extent and Effects of

# Discrimination against Children in Rental Housing

## A Study of Five California Cities



Dora J. Ashford  
Berta Estro

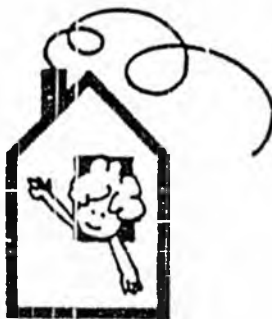
## The Fair Housing Project

December, 1979

This report was prepared under a grant from the Rosenberg Foundation.

Cover by Vanann Allen  
Maps by Maurice Herman

*Cover: Ads are shaded to indicate those which state in print they will not accept children--full shading means no children of any age, diagonal shading indicates a portion of the complex excludes children, "X's" indicate age restrictions such as "infants only." Section was taken from a 1978 Los Angeles newspaper survey. Follow-up phone calls to the remaining ads (unshaded) revealed an additional 50% would not accept children.*



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*The Extent and Effects of*

***Discrimination against Children in Rental Housing***

***A Study of Five California Cities***

*Dora J. Ashford  
Perla Eston*

***The Fair Housing Project***

*December 1979*

PREFACE

In 1977, the following "action item" appeared in the California Statewide Housing Plan, a publication of the California Department of Housing and Community Development:

The Fair Housing Act and the Unruh Civil Rights Act should be amended so that they contain identical lists of the factors upon which discrimination is prohibited, and to add to those lists at least "families with children."

Statewide attention was turning to the plight of renters who are denied housing solely because they have children.

This interest prompted a state senator from Hollywood, David A. Roberti, to introduce three consecutive pieces of legislation designed to extend fair housing protections to renters with children.<sup>1</sup> Several local governments also passed ordinances to protect renters with children from discrimination.<sup>2</sup> However, during extensive public hearings on these laws it became apparent that there was little statewide or multi-city data available on the extent and effects of anti-child rental policies.

This report attempts to supply some of that information. We hope it will encourage others to examine the housing problems of families with children and to re-evaluate public and private policies that exclude children from shelter.

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<sup>1</sup> SB-440, the last of these bills, was narrowly defeated in January 1980 in the California State Senate. On March 19, 1980, Sen. Roberti introduced SB-2024 which prohibits all arbitrary housing discrimination based on age. In addition to families with children, SB-2024 also protects other tenants from age discrimination, e.g., single young adults in their twenties, who may be stereotyped as "swinging singles."

<sup>2</sup> Ordinances have been adopted in San Francisco (1975), Berkeley (1975), Davis (1979), Santa Monica (1979), Los Angeles (1980), and the County of Santa Clara (1979).

## SUMMARY

The findings of this study are as follows:

1. The percent of families with children who are renters ranged from 28 percent in San Jose, to 55 percent in San Francisco, in every case a significant percentage of all families. For the state as a whole, 30 percent of families with children are renters.

2. A sample survey of newspaper advertisements for available apartments in Los Angeles found that only 14 percent surveyed allowed children with no age restrictions, and 15 percent allowed only certain ages. Thus, 71 percent of the apartment units surveyed allowed no children of any age.

Surveys in Fresno, San Diego, and San Jose found that 53 percent, 65 percent, and 70 percent, respectively, of units surveyed would not allow children of any age.

In contrast, the same type of survey in San Francisco, which has an ordinance prohibiting "no-kid." rentals, found that only 12 percent of units surveyed banned all children.

3. In all cities except San Francisco, the child-exclusion rate was significant even among larger units. In the 4 cities where child discrimination is legal, only 17 to 32 percent of two-bedroom units, and between 24 and 45 percent of three-bedroom units accept children.

4. Exclusion of families with children is being perpetuated in newly constructed rentals. Seventy-four percent of new rental units surveyed in Los Angeles exclude children. By comparison, only 10 percent of new units surveyed in San Francisco exclude children.

5. In every city studied except San Francisco, median rents are higher for equivalent sized units that allow children as compared to those which exclude children.

6. Renter families with children are inadequately housed significantly more often than renters without children. This tendency is true in all of the cities studied as well as for the state as a whole (45 percent of renters with children are inadequately housed, compared to 32 percent of renters without children).