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Bongs Away!

How the crusade against drug paraphernalia punishes controversial speech

[Jacob Sullum](#) | February 2009 [Print Edition](#)

A few weeks before Barack Obama was elected president, Mary Beth Buchanan, the U.S. attorney for western Pennsylvania, filed criminal charges against the makers of the Whizzinator, a fake penis used to deliver clean urine for drug tests. The strap-on phallus, which comes in assorted “natural, lifelike skin tones,” is connected by a tube to a hidden bladder containing urine (sold separately) that is untainted by marijuana metabolites. According to its manufacturer, Puck Technology of Signal Hill, California, the Whizzinator is so realistic that “we can’t show you the whole thing,” which is why ads for it in publications such as *High Times* had to be censored, with a marijuana leaf obscuring a photograph of the product in action.

Puck openly sold the Whizzinator and a companion product aimed at women, Number 1, through its website for several years. Its president, Gerald Wills, and vice president, Robert Catalano, did not believe they were violating any laws. But Buchanan argued that Wills and Catalano were selling illegal drug paraphernalia, a federal crime punishable by up to three years in prison and a \$250,000 fine. A 1986 amendment to the Controlled Substances Act of 1970 defines drug paraphernalia as any item “primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.” After some research (presumably focused on possible interpretations of *concealing*), Puck’s attorney concluded that Buchanan might have a case, so Wills and Catalano decided to plead guilty.

It was fitting that one of Buchanan’s last prosecutions before the election involved drug paraphernalia disguised as a penis. Taking up causes championed by the Bush administration in response to the demands of social conservatives, she has shown a conspicuous enthusiasm for attacking both paraphernalia and pornography, areas that were of little interest to the Clinton administration and are not likely to be high priorities under President Obama. In addition to taking down the Whizzinator and investigating the manufacturer of Urine Luck, a drug-masking product, Buchanan spearheaded a highly publicized 2003 operation that resulted in drug paraphernalia charges against dozens of defendants, including comic actor Tommy Chong, nabbed for selling bongs. That same year, she charged Robert and Janet Zicari, operators of the porn studio Extreme Associates, with 10 obscenity violations that carry penalties of up to 50 years in prison. After being dismissed by the trial judge and reinstated by an appeals court, the Extreme Associates case is finally scheduled to be heard by a jury in March.

It’s no coincidence that Buchanan and her former bosses, John Ashcroft and Alberto Gonzales, are known for worrying about pornography as well as drug devices. At bottom, both kinds of prosecutions aim to punish offensive speech. Just as pornography implicitly endorses recreational sex, drug paraphernalia implicitly endorses recreational drug use. Both are an affront to the moral values of the officials who choose to crack

down on them.

Like obscenity prosecutions, paraphernalia cases often target people for conduct they believed was legal. The law in both areas is fuzzy, and drug paraphernalia, like obscenity, tends to be judged by the “I know it when I see it” method. When they go beyond gut reactions, police and prosecutors often focus on the expression of opinions about drug use or the drug laws: A pipe is more likely to be deemed illegal, for example, if it is sold next to *High Times* or a “Legalize It” T-shirt. It makes a kind of perverse sense that antiprohibitionist speech can earn you a conviction on paraphernalia charges, since it was the message sent by drug paraphernalia that led governments to ban it in the first place.

“These shops sell a dangerous lie about drugs and drug use,” declared an Immigration and Customs Enforcement agent after raiding five South Florida head shops in March 2006. “It is obvious they want people to think it’s OK to take drugs. This is simply unacceptable.” The message that “it’s OK to take drugs” offends drug warriors in the same way that *Hustler* offended Jerry Falwell or Janet Jackson’s nipple offended Brent Bozell.

Because so much hinges on people in power taking offense, enforcement of local, state, and federal paraphernalia laws, like enforcement of obscenity laws, is sporadic and spotty. A business can operate openly for years before being identified as a criminal enterprise, even while competitors continue selling the same stuff unmolested. That is especially true nowadays, when drug paraphernalia, like pornography, is readily available online from both domestic and international sources. In both cases, this conspicuous online presence allows prosecutors to invoke the specter of the unregulated Internet, which brings bad influences into every home, while holding businesses based anywhere in the country to the standards of the most conservative communities. At the same time, the Internet complicates the only goal crusaders like Buchanan reasonably can expect to accomplish: not to eliminate the messages that offend them but to make them a little less visible.

‘We Will Eliminate the Demand’

“By enforcing the drug paraphernalia laws,” Buchanan tells me, “we will...eliminate the demand for illegal substances by eliminating those products that are used to ingest and inhale illegal substances.” Yet if the war on drugs seems futile, the war on drug paraphernalia seems doubly so. Even if bongs, vaporizers, and carburetors became more difficult to obtain, it’s hard to believe the result would be fewer marijuana users. After all, there’s no shortage of alternatives for pot smokers to choose from, whether dual-fuse products such as rolling papers and corn cob pipes or equipment improvised from everyday materials such as aluminum foil, soda bottles, and apples (see “You Can Put Your Weed in There,” page 34).

To get a sense of how realistic Buchanan’s expectations are, consider Operation Pipe Dreams, the big paraphernalia crackdown she led in 2003. Together with Operation Headhunter, a companion investigation run by the U.S. attorney in Des Moines, it nabbed more than 50 people, including Chong, who was swept up because of his involvement with Chong Glass, a business started by his son that produced multicolored, hand-blown pipes. The results of these operations could generously be described as mixed.

At the February 2003 press conference where he announced the indictments, then-Attorney General Ashcroft said the government “has taken decisive steps to dismantle the illegal drug paraphernalia industry by attacking their physical, financial, and Internet infrastructures.” John B. Brown, acting head of the Drug Enforcement Administration (DEA), made it sound as if the entire industry had been shut down: “These criminals operate a multimillion-dollar enterprise, selling their paraphernalia in head shops, distributing out of huge warehouses, and using the worldwide web as a worldwide paraphernalia market. With Operations Pipe Dreams and Headhunter, these criminals are out of business.” John P. Walters, director of the Office of National Drug Control Policy, called the arrests “a devastating blow to the drug paraphernalia business.”

Six years after that press conference, the drug paraphernalia business seems to be doing pretty well. Ads for marijuana accessories in *High Times*, which dipped sharply right after the 2003 arrests, have rebounded, although the mix is noticeably different nowadays (fewer pipes and more vaporizers, which heat dried plant material to release the active ingredients rather than burning it). In Google searches for “bong,” “vaporizer,” and “chillum” (a funnel-shaped pipe), the top results are dominated by online head shops based in California, Canada, the U.K., and the Netherlands that also sell various other kinds of dry and wet pipes, screens, rolling papers, grinders, roach clips, scales, and stash containers.

Similar merchandise is available across the country from brick-and-mortar retailers, which occasionally are raided by the feds or local police, seemingly at random. One telling example was a 2005 federal investigation in Montana, which yielded results similar to those of Operation Pipe Dreams.

Operation Heads Up involved raids on five businesses, including a Missoula store, The Vault, whose owner, David Sil, had gone to considerable lengths to stay within the law. In 1997 Sil wrote a letter to the DEA, informing it of his plans to open a shop selling “smoke delivery systems.” He said he wanted to make sure he was complying with federal law. “If there be any questions as concerns legal compliance,” he wrote, “please let me know.” Sil received no response until May 2005, when DEA agents swooped down on The Vault, seizing his merchandise and records. At that point he had been in business for eight years without any complaints from local, state, or federal authorities. In fact, even though The Vault sold unconventional pipes of the sort commonly used to smoke marijuana, the local prosecutor’s office had told Sil his business was legal.

The DEA saw things differently. So did the U.S. Attorney’s Office in Billings, Montana, which charged Sil with selling drug paraphernalia. Indignant at being accused of a felony after openly running what everyone seemed to think was a legitimate business, Sil refused to plead guilty. At his trial in February 2006, he was able to bring as a witness for the defense Missoula County Chief Deputy County Attorney Mike Sehestedt, who said he did not consider The Vault’s merchandise to be drug paraphernalia because there was no drug residue or other concrete evidence it was used to consume illegal substances. The jury also heard about the measures Sil had taken to obey the law, including signs announcing “All pipes are for tobacco use only” and a statement on the store’s receipts that customers had to sign, promising to use their purchases legally. But Assistant U.S. Attorney Joshua Van de Wetering successfully argued that none of these precautions mattered under federal law.

At his sentencing in June 2006, Sil emphasized that he had not behaved like a criminal. “There was nothing clandestine about this operation,” he noted. “Nobody was hiding out in the bushes. This stuff is sold over the Internet.” Presiding U.S. District Judge Don Molloy expressed dismay at the case, suggesting that such prosecutions of legal-seeming enterprises undermine respect for the law. He sentenced the then-61-year-old retailer to six months of home arrest and two years of probation. “This case will have all the effectiveness of a single solitary snowflake falling on the bosom of the Potomac,” Molloy said. “I don’t think cases like this deter anyone.” U.S. Attorney Bill Mercer took a different view. “I am confident,” he declared in a press release, “this prosecution will deter others from engaging in the commercial distribution of drug paraphernalia in Montana.”

Molloy’s prediction proved to be more accurate. Operation Heads Up was supposed to put Montana retailers on notice that disclaimers and discretion were no longer enough to avoid prosecution for selling drug paraphernalia. To some extent, it worked: At least two Montana shops pulled glass pipes from their shelves after Sil’s conviction. But others continued selling them, including Zoo Town Glass, a hand-blown pipe shop that took over the very same space once occupied by Sil’s store.

‘Do-Drug Messages’

The roots of the campaign against drug paraphernalia lie in the anti-drug activism of parents who were

alarmed by adolescent pot smoking in the late 1970s, the peak period for marijuana use by American teenagers. Those anxieties were echoed and amplified by anti-pot polemicists such as Peggy Mann, who between 1979 and 1981 published three widely read *Reader's Digest* articles warning parents about the dangers of marijuana. Mann, whose work won an award from the National Federation of Parents for Drug-Free Youth, expanded those articles into the 1985 book *Marijuana Alert*, described in the foreword by first lady Nancy Reagan as “a true story about a drug that is taking America captive.” In *Marijuana Alert*, Mann identified paraphernalia sales as a major source of “do-drug messages,” along with peer pressure and rock music. She complained that “drug paraphernalia may be purchased by teenagers not only in headshops, but also in numerous record shops, boutiques, smoke shops, card shops, and novelty shops in posh suburban shopping malls....In some areas, full-fledged headshops can be found only a few blocks away from the local high school.”

As with pornography, it was the in-your-face aspect of paraphernalia sales, especially in locations frequented by minors, that really upset people like Mann. Allen St. Pierre, executive director of the National Organization for the Reform of Marijuana Laws (NORML), recalls that “up until the late 1970s you could literally win a bong at the county fair.” Since selling drug paraphernalia was legal in most places, store owners did not post disclaimers or eject indiscreet customers. “There was no need to be self-conscious about it,” recalls Jon Gettman, a former NORML director who managed a shop called Earthworks in the Dupont Circle area of Washington, D.C., during the '70s. Its slogan: “Everything You Need but the Weed.”

Such openness was intolerable to drug warriors, who saw themselves as fighting the libertinism of the '60s counterculture. “We’re telling young people it’s against the law to use drugs yet we’re providing them with things to violate the law,” a Louisiana district attorney complained to UPI in 1981. UPI also quoted Harry Myers, the DEA attorney who in 1979 had written a model anti-paraphernalia act for states to adopt. “You can put drug education programs on TV until they outnumber cat food commercials,” Myers said. “But you can’t do that and still have legal [paraphernalia] sales. It sends a dual message to the kids.”

“Not in front of the kids!” quickly became a demand for complete prohibition. The first paraphernalia law to be considered by the U.S. Supreme Court, adopted by the Illinois town of Hoffman Estates in 1978, required paraphernalia dealers to obtain a license and refrain from selling to minors but permitted them to continue operating (albeit with recordkeeping requirements that might have intimidated customers). By the time the Supreme Court upheld the law in 1982, more than 20 states had passed versions of the DEA’s model statute, which bans products “used, intended for use, or designed for use” in consuming illegal drugs. Today every state has a drug paraphernalia ban except West Virginia, which requires a license.

The attorney for Hoffman Estates conceded the cultural nature of the anti-paraphernalia campaign, telling the Supreme Court during oral arguments, “We have a right to legislate against lifestyles.” Justice Thurgood Marshall, who wrote the majority opinion rejecting the argument that the town’s paraphernalia law was unconstitutionally vague, also dismissed a First Amendment claim. “The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use,” he wrote. “If that activity is deemed ‘speech,’ then it is speech proposing an illegal transaction, which a government may regulate or ban entirely.” Yet as evidence that the defendant, a record store called The Flipside, had violated the ordinance by selling drug paraphernalia without a license, Marshall noted that it had “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.” He seemed untroubled by the prospect that a store could in effect be punished for selling material protected by the First Amendment, referring dismissively to “the theoretical possibility that the village will enforce its ordinance against a paper clip placed next to *Rolling Stone* magazine.”

Four year later, at the height of Ronald Reagan’s war on drugs, Congress banned products “primarily intended or designed for use” with illegal intoxicants. When the Supreme Court upheld the federal ban against a vagueness challenge in 1994, it interpreted the law as requiring an “objective” definition of

paraphernalia, based on “a product’s likely use,” as opposed to a “subjective” definition, based on “the defendant’s state of mind.” Writing for the majority, Justice Harry Blackmun said it was not necessary to show “knowledge on the defendant’s part that a particular customer actually will use an item...with drugs. It is sufficient that the defendant be aware the customers in general are likely to use the merchandise with drugs.”

This standard is stricter than, say, the rule for hardware or software that can be used to make unauthorized copies of copyrighted material, under which selling the item is legal as long as there are substantial non-infringing uses for it. Robert Vaughn, a Nashville defense attorney specializing in drug paraphernalia cases, sums up the federal intent requirement for drug paraphernalia this way: “Did you intend to sell those items? Well, obviously [you did]. OK, we’ve got that intent to sell out of the way. ‘Now, ladies and gentlemen of the jury, look at these items we’re setting in front of you, and you decide whether or not they’re drug paraphernalia. And oh, by the way, how many of you remember your grandfather sitting on the porch rocker smoking from one of these four-foot-tall acrylic things?’ ”

‘For Tobacco Use Only’

The federal ban lists specific examples of drug paraphernalia, including “water pipes,” “carburetion tubes,” “smoking masks,” “electric pipes,” “chillums,” “chillers,” “wired cigarette papers,” and “metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens.” But it includes an exception for any item “traditionally intended for use with tobacco products.” In practice, then, the “objective” standard is often subjective, based on a prosecutor’s idea of what drug paraphernalia looks like. The same sort of thing happens in state cases, where courts consider an item’s appearance in judging its intended use.

It is easy to mock the transparent subterfuges of head shop owners who insist their merchandise is “for tobacco use only.” The satirical Comedy Central debate show *Crossballs* once featured a merchant who insisted with a straight face that “there are a lot of people in society who enjoy smoking tobacco in very elaborate ways.” Mary Beth Buchanan becomes audibly angry when she talks about “those absurd, disingenuous advertising statements that people who want to violate the law make when they try to sell this product that is clearly illegal.”

Still, paraphernalia bans do raise serious definitional issues. “Anything can have a dual use,” notes New Orleans defense attorney Bill Rittenberg. “There’s nothing that can be used as a smoking or snuff accessory for tobacco that can’t be used for marijuana.” While a giant plastic bong may seem like an obvious example of drug paraphernalia, people do use other sorts of water pipes, as well as dry pipes made from materials other than the conventional briar, meerschaum, or corncob, to smoke tobacco. Buchanan maintains that an item listed in the federal ban is illegal “regardless of what you do with it, regardless of whether some idiot actually goes and puts tobacco in it.” But that interpretation would make hookahs—water pipes traditionally used to smoke sweet, fruity tobacco mixtures—illegal. Even Buchanan concedes that rolling papers, which can be used to make cigarettes as well as joints, are not necessarily drug paraphernalia. The targets of Operation Pipe Dreams did not include any convenience stores that sold rolling papers, even though many of those end up wrapped around marijuana. Likewise, vaporizers, which are not listed in the federal ban, can be used with marijuana or with legal medicinal herbs (not to mention the fact that in California and 12 other states marijuana *is* a legal medicinal herb).

Law enforcement officials themselves can have trouble telling the difference between legitimate smoking accessories and illegal drug paraphernalia, as illustrated by the travails of the Smoke Signals Pipe and Tobacco Shop in Dover, New Hampshire. Police first raided the store in October 2001, seizing various items they identified as drug paraphernalia. The store’s manager, Susan Hargrove, ultimately pleaded guilty to a single charge of selling drug paraphernalia, resulting in a suspended \$1,000 fine. As part of the plea agreement, the government returned most of the seized merchandise, including glass pipes, a glass chillum, various water pipes, and metal one-hitters (small, narrow pipes), saying they were OK to sell.

In March 2004, less than two months after the plea agreement, the same police department raided the same store and seized several of the same items prosecutors had just given back. After the government filed new paraphernalia charges against Smoke Signals, a judge acquitted the company in a bench trial, concluding that Hargrove and her mother, Kelly, the store's owner, could not knowingly have possessed drug paraphernalia, a requirement for conviction under state law, since the items had been returned by the government. But when Smoke Signals filed a motion asking for the merchandise back, the judge said no. Despite the fact that the government had told Susan and Kelly Hargrove the items were not drug paraphernalia, the judge concluded they were, based mainly on the testimony of a detective who conceded he was not an expert on the subject and could not explain the methods he used to identify paraphernalia.

Smoke Signals' lawyer, Jonathan Cohen, took the case to the New Hampshire Supreme Court, arguing that the state paraphernalia law was so vague that people could not reasonably be expected to know when they had violated it. In April 2007, the court rejected that argument but ordered the return of Smoke Signals' merchandise, saying it could not be considered contraband in light of the store's acquittal on paraphernalia charges and the government's earlier assurances that it was legal.

Despite experiences like the Hargroves', defendants in state paraphernalia cases have some advantages over those facing federal paraphernalia charges. For one thing, the feds tend to come down a lot harder. In addition to paraphernalia charges, each of which carries a penalty of up to three years in prison plus a \$250,000 fine, federal prosecutors can bring money laundering and racketeering charges based on the same actions. If you deposit the proceeds from paraphernalia sales in the bank, that's money laundering; if you make more than one sale or deposit, that's a "pattern of racketeering activity." The penalties add up fast, creating tremendous pressure for a guilty plea. "The doo-doo gets deep," says Vaughn. "I can show you theoretically how you could get life in prison." And then there's the uncomfortable fact that the government is apt to seize all your assets before you can hire a lawyer.

Assuming you nevertheless choose to go to trial, the government's burden is pretty easy to meet, thanks to the Supreme Court's interpretation of the federal paraphernalia ban. In a federal trial, says Vaughn, "They don't really give a shit if you have a sign in there that says, 'Not intended for illegal use.'" He describes the government's attitude this way: "We don't care about the way you displayed it. We don't care about the way you marketed it. It was illegal sitting there."

'You Have to Leave Here Right Away'

Under state laws, by contrast, the defendant's state of mind is relevant, so such disclaimers can make a difference. So can the sale of tobacco or legal herbs alongside smoking equipment and the avoidance of marijuana leaf decorations and other countercultural signifiers. It does not help your case if you advertise in *High Times*, sell it or other drug-related magazines in your store, or distribute NORML literature. In 1981 NORML unsuccessfully challenged Virginia's drug paraphernalia ban in federal court, arguing that it infringed on freedom of speech by encouraging police to seize the group's leaflets as evidence of a merchant's intent.

Retailers also have to be careful about what they let customers say. "If somebody comes in and says, 'Sell me a dope pipe,' and [he's] body wired and you sell it to him," Vaughn says, "you're screwed." Jon Gettman, who never had to worry about such things when he was running a head shop in the '70s, says he recently visited a store in Miami that was "selling what I recognized to be bongs, and they had to be very, very careful about the language anyone used in the store in referring to these things. In fact, I...made some reference [to marijuana], and they politely asked me to leave." At a similar store in San Diego, Allen St. Pierre offered the clerk his NORML business card. "He looks at it," St. Pierre recalls, "and he goes, 'Holy shit, you've got to get out of here. You have to leave here right away.'"

Maybe those clerks were excessively cautious. But it's clear that pipes coupled with controversial

drug-related speech can get a business into trouble when the pipes alone would not. In February 2006, police in Middletown, Pennsylvania, filed paraphernalia charges against the manager of the Spencer's Gift store at the Oxford Valley Mall and the CEO of the company that owns the chain. The crime ostensibly was selling water pipes, but according to the *Trentonian* police also objected to posters, T-shirts, hats, and other items "depicting marijuana themes," some of which were seized as evidence. "When you combine the various above items depicting marijuana usage with the hookahs or water bongs," said a police detective, "it is apparent that the company is creating the appearance that the hookahs are for marijuana use. The message on all these items being sold is certainly pro-drug use."

Richard Cowan, publisher of *Marijuana News*, has proposed a sales tactic that would highlight the speech-suppressing aspect of paraphernalia laws. He urges head shop owners to "undermine the enforcement of the marijuana laws" by selling legal herbs alongside pipes and encouraging customers to smoke the stuff openly as an act of protest. There would be "no subterfuge, no pretense," he wrote in a 2002 essay on his website. "This is an explicitly political action." It would be interesting to see the government's response to such a campaign. Along similar lines, **reason** considered including rolling papers labeled "For Marijuana Use Only" in each copy of this issue to illustrate the silliness of paraphernalia laws but decided against it because of legal concerns.

One of the clearest recent examples of how these laws punish speech was the case against Tommy Chong, famous for playing a clueless stoner alongside Cheech Marin in movies such as *Up in Smoke* and on his own in the sitcom *That '70s Show*. Chong's publicist initially argued that the colorful, elaborate pipes produced by Chong Glass were not marijuana smoking devices but works of art. This claim was not as disingenuous as it sounds: Many of the pipes were too pricey for casual use, and some had been featured in a Los Angeles art exhibit. But Chong quickly dropped that argument, presumably after getting legal advice. Under federal law, Vaughn explains, "the bottom line is this: If it's a cylindrical tube with a base on it with a stem projecting from the side with a bowl on it that you face over to smoke, that's a bong... It's per se illegal. I don't care if you say that it's for your mantle. I don't care if you say that it's art for art's sake."

In the end, Chong never got the chance to try any sort of defense. To avoid charges against his son and his wife (who co-signed the loan used to start Chong Glass), he pleaded guilty and was sentenced to nine months in prison, which he completed in July 2004. He also paid a \$20,000 fine and forfeited \$120,000 in assets. The sentence, one of the more severe punishments received by defendants charged in Operation Pipe Dreams, was imposed after Assistant U.S. Attorney Mary Houghton urged the judge not to let Chong off lightly. In a pre-sentencing brief, she complained that "the defendant has become wealthy throughout his entertainment career through glamorizing the illegal distribution and use of marijuana. Feature films that he made with his longtime partner Cheech Marin, such as 'Up in Smoke,' trivialize law enforcement efforts to combat drug trafficking and use."

It was a remarkable concession that the government wanted to punish Chong at least partly for making fun of drug warriors and mocking prohibition. "This was the government's payback for all the Cheech and Chong movies that ridiculed the hypocrisy of the government's War on Drugs," Chong wrote in his 2006 memoir *The I Chong*. "The DEA... hated the way we portrayed them in movies... The Feds took a fictional movie and prosecuted the actor and writer for exercising his freedom of expression." When I ask Buchanan, Houghton's boss, about the prosecution's references to the Cheech & Chong *oeuvre*, she says one of the factors the judge considered at sentencing was whether Chong had followed through on a post-indictment promise to educate children about the dangers of drugs. When I ask what bearing the films he made years before his arrest had on that question, she says, "The court had a number of factors to consider."

As for "glamorizing" drug use, it hardly seems an apt description of movies featuring two stoned doofuses. "I've seen every Cheech & Chong movie," says *High Times* Associate Publisher Rick Cusick, "and *glamour* is not a word I've ever attached to that experience. I've never walked away from a Cheech & Chong movie saying to myself, 'Gee, I want to be more like those guys.' "

In a weird coda to the Chong prosecution, the comic told the *Pittsburgh Post-Gazette* that federal agents seized 8,000 to 10,000 copies of *a/k/a Tommy Chong*, a documentary about his case that's highly critical of Buchanan, when they raided the Newport, Kentucky, offices of Spectrum Labs in May. The raid was part of Buchanan's investigation of the company for selling drug-test-beating products such as Urine Luck. Margaret Philbin, a spokeswoman for Buchanan's office, says Chong's claim of a mass DVD seizure is "completely false," though "we may have taken one."

'They're All Over the Country'

Federal prosecutors were not alone in resenting Tommy Chong's high profile. In 2002, shortly after being busted on federal paraphernalia charges in Florida, the pipe manufacturer Chris Hill complained to the *Drug War Chronicle* that he had been unfairly singled out. Describing the Contemporary Tobacco Trade Association's annual show in Las Vegas, he said, "They've got Tommy fucking Chong selling bongs there.... I boycotted that show because I thought it was too close to the edge."

Hill prided himself on running his company, Chills, conservatively, eschewing the more flamboyant head shops in favor of tobacconists. "We were a company that was pushing paraphernalia for legitimate uses," he told *High Times* in 2004, after serving a 14-month sentence in a federal prison for selling drug paraphernalia. "Obviously we know people are smoking pot with it, but we strived to stay in compliance." He again contrasted Chills with Chong Glass, saying Tommy Chong "was asking for it." Chong being who he was, he couldn't have avoided the cannabis connotations of his business even if he had wanted to, but neither was there ever any real question that pot smokers were Chills' target market.

Still, Hill's bitterness is not hard to understand. While serving his sentence, he recalled, he was "leased out" to do grounds maintenance at the Pensacola Naval Air Station. "Every day," he said, "on the way to work and on the way back to prison, I had to pass at least one head shop and two billboards for other head shops selling the same pipes I went to prison for selling. They're all over the country. So is it illegal? I guess so. I went to federal prison for it."

Yet he also was honored for it by the National Republican Congressional Committee, which gave him a business award in 2001. Two years before that, *Inc.* recognized Chills as one of the country's 500 fastest-growing businesses. Hill went to sleep the night before his arrest a respected entrepreneur, and he woke up an accused felon, based on the same actions that had won him accolades.

Vault owner David Sil experienced a similar transformation when his Missoula store was raided in the 2005 Operation Heads Up. So did Steve Andriakos, whose hippie accessory emporium in Bozeman, The Grateful Shed, had been around for 15 years. Like Sil, Andriakos insisted on a trial, after which the judge dismissed the charge against him, finding there was insufficient evidence for the case to go to the jury. Andriakos' lawyer, Chuck Watson, notes that The Grateful Shed, which had two cases of smoking accessories that accounted for a small share of its business, was burglarized in January 2006. "A bunch of this so-called paraphernalia was stolen," he says. The local police "caught the guy who did it and told [Andriakos' partner] to come get the merchandise. They didn't want it. He put it right back in the store." Watson adds that "the county attorney told [Sil] that what he was doing was not illegal.... If you get the government's permission to do something, how many governments' permission do you have to get?"

At least two. Susan Halonen, a DEA public information officer in Denver, says Sil and Andriakos were able to operate "under the radar" because their communities were "tolerant" and Montana's paraphernalia law has been interpreted to require some sort of "drug nexus," such as residue or a nearby stash. As Sil and Andriakos discovered, the DEA's reading of federal law does not leave the same wiggle room. Asked why only a handful of Montana merchants were targeted even though others were selling the same stuff, Halonen says the DEA, which did not have any presence in western Montana until 2002, has limited manpower. "They can't target everybody," she says, "even though they'd like to."

‘Nobody Said Anything’

Sil and Andriakos’ complaint is a common refrain among manufacturers and retailers hit with paraphernalia charges: No one ever told us this was a problem. “If anyone had ever said, ‘You’re breaking the law; you need to stop,’ I would have called my attorney and then I would have stopped,” Chris Hill told the *Sarasota Herald-Tribune* after his arrest in 2002. “But it’s not that kind of party. They want to shoot first and ask questions later.” Even after Hill’s prosecution, many people in the industry were not up to speed on the federal paraphernalia ban.

The government’s response, of course, is that ignorance of the law is no excuse, that anyone who gets into this business should realize the risks he’s taking. “If you violate the law, you have to accept the consequences,” says Buchanan. And if you haven’t heard of the law, “that’s your problem.”

But suddenly being charged with selling illegal paraphernalia after years of apparent legitimacy still strikes many people as unfair, especially given the vagueness of state and federal law. “All of a sudden, a shop that has been operating in full view, a member of the chamber of commerce, all that good stuff, the next day they’re a pariah within their community,” says Allen St. Pierre. After the federal arrests in 2003, he recalls, NORML’s phone rang off the hook with calls from worried manufacturers and retailers. “Those people were totally dumbfounded,” he says. He sums up the typical response this way: “This is outrageous. How can this possibly be? I’ve been making these products for years, and nobody said anything to me.”

That story is especially plausible in parts of the country that are relatively tolerant of the drug culture’s accoutrement and symbols. “Certainly in California people assume that things are a lot more lax than they really are,” says Bill Rittenberg, who notes that retailers in places like New Orleans and Key West also do not seem terribly worried about running afoul of paraphernalia laws. “They’re in certain areas, and they’re not in other areas—just like pornography.” But as with pornography, prosecutors can lure distributors to sell their merchandise in places where jurors are less likely to take it lightly. “We play by the rules, we don’t break the law, and we don’t do business in Des Moines,” a Chong Glass spokesman told the *Drug War Chronicle* a year before the DEA raided the Gardena, California, business. Unfortunately for Tommy Chong, they did do business on Buchanan’s turf, western Pennsylvania, where DEA agents set up a fake head shop that ordered his pipes.

The celebrity sting attracted considerable media attention, prompting Chris Hill to complain in his *High Times* interview that “nobody cared [about paraphernalia laws] until Tommy Chong got arrested.” But six years later, it’s hard to discern the impact of Chong’s bust or the other arrests generated by Operations Pipe Dreams and Headhunter, which the DEA says put 42 paraphernalia dealers and manufacturers out of business.

“If there were any individuals out there who were unaware of the law,” says Buchanan, “they’re now aware of the law.” She says the arrests also raised awareness among parents and educators, and she claims “there are less illegal products available.” But to people with more intimate knowledge of the paraphernalia market, it doesn’t look that way. “I hate to say it because I don’t want to poke a gorilla in the eye, but what happened in 2003 was cosmetic,” says Rick Cusick, the former *High Times* editor. “It didn’t eliminate any industry, and it didn’t slow down a whole lot... They made everybody go underground a little bit for a little while, and then it started to creep back again.” Vaughn, who helps clients set up smoke shops that will pass legal muster by meeting with local law enforcement officials and asking them to clear the merchandise ahead of time, agrees the intimidating effect of the arrests has dissipated. “I would say that the impact today based on what happened in February 2003 is minimal,” he says.

Stephen Dillon, an Indianapolis defense attorney with extensive experience in paraphernalia cases (and chairman of NORML’s board of directors), perceives some subtle changes. “They probably won’t advertise the same way they did before Pipe Dreams,” he says. “The smart ones won’t. And they won’t have items that

are per se paraphernalia, only designed for one purpose....They don't put marijuana leaves on the bongs anymore."

This sort of adjustment, akin to slapping black plastic covers on dirty magazines at the newsstand, is the most that the on-again, off-again crusade against drug paraphernalia is likely to accomplish: a somewhat more discreet version of a business that will continue to operate in one form or another as long as people are interested in smoking pot. "The aggressivemarketing of the tools and paraphernalia of drug use has been an active affront to the efforts of parents, educators, and community leaders who are trying to help young people stay away from drugs," drug czar John Walters complained in a statement issued the day of Ashcroft's Operation Pipe Dreams press conference. "Today's actions send a clear message to those who would poison our children." The message: Get those marijuana leaves off your bongs.

Senior Editor [Jacob Sullum](#) is the author of [Saying Yes: In Defense of Drug Use](#) (Tarcher/Penguin).

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