

THE RAVE ACT: A SPECIOUS SOLUTION TO THE SERIOUS PROBLEM OF INCREASED ECSTASY DISTRIBUTION WITHIN THE UNITED STATES THAT IS UNCONSTITUTIONALLY OVERBROAD

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I. INTRODUCTION

The RAVE Act² was designed to thwart use and distribution of the illegal street drug ecstasy by holding the owner of a nightclub or other venue criminally responsible for any illegal drug-related activities that occur at an electronic music³ concert held on his or her property. Congress' goal in passing the RAVE Act was to curtail ecstasy use by eliminating electronic music concerts and raves in much the same way that crackhouses could be shut down: by holding the property owners liable for crack use that took place on the property.

A rave is, in general, a party or a concert featuring electronic music, usually accompanied by dancing. While no statutory definition of a rave exists, the legislative history of the RAVE Act, as proposed in 2002, indicates that Congress was targeting two different types of raves.⁴ The first type of rave identified by Congress is "held in a dance club with only a handful of people in attendance."⁵ The second type of rave is "held at a temporary venue such as a warehouse, open

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² See H.R. 718, 108th Cong. (2003). The acronym RAVE stands for Reducing Americans' Vulnerability to Ecstasy; see also S. 226, 108th Cong. §§ 1-4 (2003) (enacted).

³ For lack of a better term, this Comment will refer to the music found at both electronic music concerts and raves as electronic music. The music is also referred to as techno or dance music. There are also many sub-genres, the details of which are outside the scope of this Comment. See generally JIMI FRITZ, RAVE CULTURE: AN INSIDER'S OVERVIEW (SmallFry Press 1999) [hereinafter FRITZ]; MIREILLE SILCOTT, RAVE AMERICA: NEW SCHOOL DANCESCAPES (ECW Press 1999).

⁴ See S. 2633, 107th Cong. § 2 (2002).

⁵ *Id.*

field or empty building and has tens of thousands of people present.”⁶ For purposes of this Comment and for clarity, the former will be referred to as an electronic music concert and the latter as a rave. There is also a third type of “rave” that Congress did not identify: a large-scale event featuring electronic music that is held in a large venue such as a sports arena or an amphitheater.⁷ This type of event will also be referred to as an electronic music concert, as the main difference between a rave and an electronic music concert is that a rave is usually “underground,” unlicensed and unregulated; an electronic music concert is “mainstream” and held in venues that are licensed and regulated by the city⁸ (and sometimes state) in which the concert takes place.

II. THE HISTORY OF RAVES AND ECSTASY⁹

Use of the club drug ecstasy was popular in New York City’s gay male nightclubs in the early 1980s. British disc jockeys (“DJs”) and performers who visited these New York nightclubs returned to England endorsing the use of the drug, and ecstasy was introduced at electronic

⁶ *Id.*

⁷ Denver promoter Jason Bills [says] ‘I think it's ridiculous to assume that the sole reason I'm doing an event at the Denver Coliseum is so that people can do drugs. We do parties in convention centers and places where professional sports teams are playing, and we'd like to be held to the same standards as any other concert promoter.’

See Jenny Eliscu, *The War on Raves*, ROLLING STONE, May 24, 2001, available at <http://www.mapinc.org/drugnews/v01/n817/a11.html> (last visited June 5, 2004).

⁸ See *infra* Part VII A.

⁹ The author has made a good faith effort to trace the history of raves, electronic music concerts and the illegal street drug ecstasy. However, since these phenomena are an “underground” subculture and the stuff of which urban legends are made, there may be inconsistencies or alternate explanations for the research in this part of the Comment. The author takes full responsibility for any such inconsistencies.

music concerts and raves throughout England.¹⁰ The English rave phenomenon, in turn, was exported back to the United States by New York DJ and electronic music promoter Frankie Bones, who began throwing warehouse parties in the outer boroughs of New York¹¹ in 1989.¹² Since then, electronic music has become popular throughout the United States.¹³

A. “Rave culture,” MDMA and Ecstasy

1. “Rave Culture”

In the RAVE Act as proposed in 2002, Congress found that the “trafficking and use of ‘club drugs,’ including 3,4-methylenedioxymethamphetamine [clinical MDMA] . . . is deeply embedded in the rave culture.”¹⁴ Some rave attendees are drug free; some are not. A recent clinical survey of electronic music concerts held in nightclubs in the United States found that 30% of participants tested positive for MDMA using a testing device called the ORALScreen.TM¹⁵ In another, 20% tested positive for ecstasy by saliva analysis.¹⁶ A recent and encouraging German study indicates that ecstasy use is a transient, youthful phenomenon that

¹⁰ See Julie Holland, M.D., *Ecstasy: A History*, in ECSTASY: THE COMPLETE GUIDE: A COMPREHENSIVE LOOK AT THE RISKS AND BENEFITS OF MDMA 17 (Julie Holland, M.D. ed., Park Street Press 2001); see also *Utopian Pharmacology*, BLTC Research, available at <http://mdma.net> (last visited June 5, 2004).

¹¹ See *id.* This is one theory on the birth of the rave phenomenon. Other urban legends will state that the “scene” began in San Francisco, Chicago or other cities, but the main idea is that the music began in the United States, was exported to England where it became associated with ecstasy, and then returned to various cities in the United States.

¹² *Id.*

¹³ See generally FRITZ; see also ECSTASY: THE COMPLETE GUIDE at 16-18 (providing a concise overview of the different subgenres of electronic music that have become popular in different regions of the country).

¹⁴ See S. 2633, 107th Cong. § 2 (2002) (Finding No. 3).

¹⁵ See generally George S. Yacoubian, Jr., et. al., *Estimating the Prevalence of Ecstasy Use Among Club Rave Attendees*, 31 CONTEMPORARY DRUG PROBLEMS (Spring 2004).

¹⁶ See Amelia M. Arria et al., *Ecstasy Use Among Club Rave Attendees*, reprinted in 156 ADOLESCENT MEDICINE (Arch Pediatrics 2002), available at www.archpediatrics.com.

people quickly outgrow once they reach their twenties.¹⁷ British use of ecstasy is falling dramatically,¹⁸ as is ecstasy use here in the United States.¹⁹ This Comment does not argue that there is no correlation between electronic music and ecstasy use. This Comment does argue that the RAVE Act is not narrowly tailored to the government's concededly compelling interest in battling ecstasy distribution and is therefore unconstitutional.

As noted in the Introduction, there are two types of electronic music concerts: the first and smaller one is usually held in a nightclub; the second type is larger and usually held in an arena. Typically, an electronic music concert in a nightclub can cost between five thousand and sixty thousand dollars to produce.²⁰ This type of event usually features at least one international, headlining DJ and several secondary talents from within the country or the local area.²¹ The promoter of this type of event typically circulates a flyer in advance, will find an approved venue with the appropriate licenses and permits for this kind of event, and will often seek support from either City Hall or the police department in an effort to minimize the risk of potential problems.²² The owner of the venue typically does not seek out such a party promoter, but if the promoter

¹⁷ See Kirsten von Sydow et al., *Use, Abuse and Dependence of Ecstasy and Related Drugs in Adolescents and Young Adults – A Transient Phenomenon? Results From a Longitudinal Study*, 66 DRUG AND ALCOHOL DEPENDENCE 147-59 (2002).

¹⁸ See David McCandless, *Goodbye Ecstasy, Hello 5-Meo-DMT: New Designer Drugs Are Just a Click Away; Psychedelics Legal in US but Banned in UK Are Openly Available on the Internet*, available at <http://mdma.net/uk> (last visited Feb. 16, 2004).

¹⁹ Press Release, Robert Wood Johnson Foundation, Teen Ecstasy Use Cut by 25 Percent From Peak as Trend Reverses; Three-Quarters of a Million Fewer Teens Using “Love Drug” (Feb. 25, 2003), available at <http://www.rwjf.org>; Press Release, The University of Michigan, Ecstasy Use Falls For Second Year in a Row, Overall Teen Drug Use Drops (Dec. 19, 2003), available at <http://www.monitoringthefuture.org>.

²⁰ See FRITZ, at 108.

²¹ *Id.* at 109.

²² *Id.*

approaches the business owner with a proposed arrangement by which the owner will profit, the owner will usually agree to allow his property to be used for this specialized type of event.²³

The second type of electronic music concert is a very large event, held in a stadium like any other large concert.²⁴ Events such as these can cost anywhere from one to five hundred thousand dollars to produce, and require a well-financed, sophisticated and responsible organization to administrate.²⁵ They can feature dozens of DJs and many subgenres of electronic music.²⁶ The venues used are usually large sports centers and arenas, and as with large sporting events, organizers are increasingly seeking sponsorship from major companies such as Coca-Cola, Sony and Camel Cigarettes.²⁷ Like the small business owner, the owner of a large venue is similarly open to holding these types of events, provided they are profitable. Thus, these large-scale electronic music concerts are very similar to large-scale rock concerts, except that the performers are creating a different style of music.

The second type of event Congress cited in the legislative history to the RAVE Act, the true rave, is normally held in a temporary venue like a warehouse, open field or empty building and has tens of thousands of people present.²⁸ These true raves are underground events and,

²³ See, e.g., *Reducing Americans' Vulnerability to Ecstasy Act of 2002: Hearing on H.R. 5519 Before the House Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary*, 107th Cong. 3 (2002) (testimony of Graham Boyd, Director, Drug Policy Litigation Project, American Civil Liberties Union), available at <http://www.house.gov/judiciary/boyd101002.pdf>. According to Boyd, "Robert Brunet manages the State Palace Theater in New Orleans Mr. Brunet hired James Estopinal to arrange and promote electronic music concerts" *Id.*

²⁴ See FRITZ, at 111-13.

²⁵ See FRITZ, at 111; Eliscu, *supra* note 7. Denver promoter Jason Bills has staged "major events without incident since 1993, investing six-figure budgets in productions that feature everyone from underground house kingpin Armand Van Helden to DJ Jazzy Jeff." *Id.*

²⁶ *Id.*

²⁷ See FRITZ, at 103.

²⁸ S. 2633, 107th Cong. § 2 (2002).

because they are not subject to any sort of regulation, are much more likely to be the sites of drug use or distribution. These events, unlike an electronic music concert, are less likely to have security or other protective measures.²⁹ A policy of targeting these events would be more narrowly tailored to the goal of eliminating ecstasy distribution.

2. MDMA

The drug trafficking that Congress hopes to curtail by shutting down electronic music concerts is that of the street drug ecstasy, the pure form of which is 3,4-methylenedioxymethamphetamine, or MDMA. MDMA was originally patented by the Merck Pharmaceutical Company in 1914, after company scientists stumbled upon it while attempting to create a new medication to stop bleeding.³⁰ (As usual, the process of its synthesis was patented).³¹ Merck did not mention any use for MDMA in its patent application.³² The chemical formula for this drug lay dormant until it was rediscovered in the early 1970s by chemist Alexander Shulgin,³³ who introduced MDMA to some of his colleagues. Through these contacts, in the 1970s, a group of Northern California psychotherapists was giving MDMA to

²⁹ See FRITZ, at 104.

³⁰ See DRUG IDENTIFICATION BIBLE 765, (Amera-Chem, Inc. 2001); ECSTASY: THE COMPLETE GUIDE, at 11.

³¹ See Holland, *supra* note 13, at 11.

³² *Id.*

³³ Alexander "Sasha" Shulgin, Ph.D., is a pharmacologist and chemist known for his creation of new psychoactive chemicals. After serving in the Navy, he earned his Ph.D. in Biochemistry from U.C. Berkeley in 1954. In the late 50s and early 60s he did post-doctorate work in psychiatry and pharmacology at U.C. San Francisco and worked briefly as research director at BioRad Laboratories before becoming a senior research chemist at Dow Chemical Co. In 1960, Shulgin tried mescaline for the first time. He then experimented with synthesizing chemicals with structures similar to mescaline such as DOM. After leaving Dow in 1965 to become an independent consultant, Sasha taught public health at Berkeley and San Francisco General Hospital. In 1967, he was introduced to the possibilities of MDMA by an undergrad at San Francisco State University at a time when very few people had tried MDMA.

See http://www.erowid.org/culture/characters/shulgin_alexander/shulgin_alexander.shtml (last visited June 5, 2004).

patients for terminal illness, trauma, phobias, drug addiction and other disorders.³⁴ Its users reported enhanced sensations, heightened feelings of empathy, self-acceptance and a general feeling of relaxed euphoria.³⁵ Psychotherapist Ann Shulgin called it a “penicillin for the soul.”³⁶ These scientists did not publish their findings on the use of MDMA in a therapeutic setting and the public did not become widely aware of this use of the drug until the *San Francisco Chronicle* published a story about it in June of 1984.³⁷

By the early 1980s, the height of the crack cocaine epidemic, MDMA appeared on the recreational drug scene. A group of entrepreneurs in Texas began selling MDMA, under the brand name Sassyfras³⁸, over the phone and at certain nightclubs in Dallas³⁹ and Fort Worth, where over-the-counter sales were subject to tax.⁴⁰ The tax revenue from this MDMA-fueled

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Holland, *supra* note 13, at 13; see also NICHOLAS SAUNDERS, E IS FOR ECSTASY, ch.3 n.141, available at <http://www.ecstasy.org/books/e4x/e4x.ch.03.html> (last visited June 5, 2004). It appears that these psychotherapists, like Shulgin, were synthesizing the MDMA themselves in basement laboratories or other clandestine locations. These therapists believed that “no therapist has the right to give a psychoactive drug to another person unless and until he is thoroughly familiar with its effects on his own mind” *Id.*

³⁸ A natural form of the drug can be made from sassafras or nutmeg. The private psychotherapists in the United States who were using MDMA in their clinical practice called it “Adam”, an allusion to “being returned to the natural state of innocence before guilt, shame and unworthiness arose.” See Holland, *supra* note 13, at 13. An anonymous street drug dealer claims that the name ecstasy was chosen mainly for marketing reasons. *Id.* The person who allegedly named the drug has explained that “ecstasy was chosen for obvious reasons, because it would sell better than calling it empathy.” *Id.* Empathy would be more appropriate, but how many people know what it means?” *Id.*; see also <http://mdma.net> (last visited June 5, 2004).

³⁹ In Dallas, where alcohol was prohibited at the Southern Methodist University, students bought legal MDMA as a substitute, paying by credit card. See http://www.a1b2c3.com/drugs/x_01.htm (last visited June 5, 2004).

⁴⁰ See SIMON REYNOLDS, GENERATION ECSTASY: INTO THE WORLD OF TECHNO AND RAVE CULTURE 143 (Little, Brown and Co. 1998).

nightlife attracted the attention of Senator Lloyd Bentson, who urged the Drug Enforcement Administration to make the drug illegal under the Controlled Substances Act of 1970.⁴¹

The DEA held hearings in February, June and July of 1985, at which therapists testified as to the unique ability of MDMA to catalyze the therapeutic process and to enhance communication between spouses, family members and therapist and patient.⁴² In 1988, ignoring this testimony, the Drug Enforcement Administration classified MDMA as a Schedule I⁴³ drug, defined by the DEA as having high abuse potential and no medical value.⁴⁴ Most recently, MDMA was approved by the Food and Drug Administration for medical study on human test subjects in 2001.⁴⁵ These clinical trials are expected to begin soon.⁴⁶

3. Ecstasy

The street drug ecstasy is not pure MDMA. Makers of street ecstasy often add other stimulants such as ephedrine, phenylpropanolamine (PPA), caffeine, atropine and/or glyceryl

⁴¹ Controlled Substances Act, 21 U.S.C. §§ 801-904 (2004).

⁴² On behalf of the Drug Enforcement Administration, Dr. Lewis Seiden of the University of Chicago presented data on MDA, a different drug that is a chemical relative of MDMA. It remains unclear as to why the DEA presented evidence about a different drug. After all of the evidence was presented, Judge Francis Young recommended to the Drug Enforcement Administration that MDMA be placed in Schedule III, which would allow clinical work and research to proceed. *See* Holland, *supra* note 13, at 15.

⁴³ Controlled Substances Act, 21 U.S.C. §§ 801-904 (2004). The statute states, in relevant part:

- (1) Schedule I.--
- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

⁴⁴ Once a drug is classified as Schedule I, it is no longer available either by prescription or over the counter. *See id.*

⁴⁵ A South Carolina psychiatrist, Dr. Michael Mithoefer, “plans to conduct psychotherapy sessions with 20 women who suffer from post-traumatic stress disorder due to sexual assaults or other violence, and who haven’t been helped by other treatment.” *See, e.g.*, <http://www.cnn.com/2004/HEALTH/02/25/ecstasy.study/> (last visited June 5, 2004). Twelve of the women will be given MDMA; eight will be given a placebo. The study was finally approved by the DEA on February 24, 2004. Mithoefer says he has extensive experience in working with post-traumatic stress disorder patients and he’s “excited about the possibility of finding a better treatment for the hundreds of thousands of Americans who suffer from the sometimes debilitating disorder.” *Id.*

⁴⁶ *Id.*

guaiacolate to enhance the effects of their product.⁴⁷ The effects of ecstasy can be very similar to those of MDMA, the key ingredient. Psychotherapist R.D. Laing, who took pure MDMA at Esalen, California in 1984 when it was still legal, said: "It made me feel how all of us would like to feel we are anyway . . . smooth and open hearted, not soggy, sentimental or stupid."⁴⁸ The most familiar emotion experienced is that of being in love,⁴⁹ and the most predictable feelings experienced are those of empathy, openness, peace and caring.⁵⁰ Users are affected emotionally for usually four to six hours, and freely hug and touch one another.⁵¹ Their visual perception and sense of time may be altered.⁵² Typically, the user will feel that "all is right with the world."⁵³ The psychological effects of ecstasy are typically much more pronounced than the physical ones.⁵⁴

The most common physical effects caused by ecstasy use include hyperthermia and dehydration caused by elevated body temperatures from the drug combined with physical exertion.⁵⁵ The long term effects of ecstasy use are still unknown. While some scientific results and studies suggest that heavy ecstasy use can cause long-term brain damage, much more

⁴⁷ DRUG IDENTIFICATION BIBLE 767-68 (2001).

⁴⁸ See SAUNDERS, E IS FOR ECSTASY ch.4 n.3, n.25, available at <http://www.ecstasy.org/books/e4x/e4x.ch.04.html> (last visited June 5, 2004).

⁴⁹ *Id.* at n.132.

⁵⁰ *Id.* at n.166. Note that a person's experience with MDMA or ecstasy can vary from paranoia to sleep, depending greatly on other factors called 'set and setting' which includes the person's cultural beliefs, expectations and state of mind at the time. Even genetic make up may affect the experience.

⁵¹ See *supra* note 50, at 769.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ DRUG IDENTIFICATION BIBLE 769 (2001).

research is needed to conclusively determine ecstasy's clinical effects.⁵⁶ Counterfeit ecstasy pills containing stimulants such as ephedrine, phenylpropanolamine (PPA), caffeine, atropine and/or glyceryl guaiacolate are sold on the street as pure MDMA, and are believed to be responsible for, or involved in, a number of ecstasy overdoses.⁵⁷ The added chemicals can cause permanent brain damage or even death.⁵⁸

Over the past few years, the federal government has recognized a threat to the public safety in ecstasy use and launched law enforcement measures targeting the drug.⁵⁹ Senator Biden cited the death of a 17-year-old girl⁶⁰ at a party in New Orleans as the catalyst to an assessment of "raves" (defined in this Comment as electronic music concerts) in New Orleans, conducted by the Drug Enforcement Administration that showed a "close relationship"⁶¹ between raves and club-drug overdoses.⁶² In a two-year period, 52 raves were held at the State Palace Theater in New Orleans,⁶³ which has a capacity of 3,500 people.⁶⁴ During that same period, approximately

⁵⁶ See Holland, *supra* note 13, at 55.

⁵⁷ See John A. Henry, M.D. & Joseph G. Rella, M.D., *Medical Risks Associated With MDMA Use*, in ECSTASY: THE COMPLETE GUIDE, *supra* note 13, at 71-2.

⁵⁸ See Matthew Baggott, M.D., and John Mendelson, M.D., *Does MDMA Cause Brain Damage?*, in ECSTASY: THE COMPLETE GUIDE, *supra* note 13, at 110-45; Holland, *supra* note 13, at 55; SAUNDERS, E IS FOR ECSTASY: "The most likely danger from taking [e]cstasy is consuming something else instead," *available at* <http://www.ecstasy.org/books/e4x/e4x.ch.06.html> (last visited June 5, 2004).

⁵⁹ See, e.g., Ecstasy Anti-Proliferation Act of 2000, Pub. L. No. 106-310 (codified at 42 U.S.C. §§ 290aa-5b); Illicit Drug Anti-Proliferation Act of 2003, Pub. L. No. 108-21, 117 Stat. 691; Ecstasy Awareness Act, H.R. 2962 IH, 108th Cong. (2003); Clean, Learn, Educate, Abolish, Neutralize and Undermine Production (CLEAN-UP) of Methamphetamines Act, H.R. 834, 108th Cong. (2003).

⁶⁰ The girl was seventeen-year-old Jillian Kirkland of Monroeville, Alabama. See John Cloud, *Ecstasy Crackdown: Will the Feds Use a 1980s Anti-Crack Law to Destroy the Rave Movement?*, TIME, Apr. 9, 2001, at 62-3.

⁶¹ 148 CONG. REC. S5706 (daily ed. June 18, 2002) (statement of Sen. Biden).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Evelyn McDonnell, *Antirave New World: A Bill in the Senate Designed to Go After Drug Use Has Fans of Electronic Music Singing an Angry Tune*, MIAMI HERALD, Sept. 18, 2002, at E1. New Orleans' State Palace Theatre

400 teenagers were treated at local emergency rooms for overdosing on drugs.⁶⁵ Yet the government later stipulated at trial that only 30-40 overdoses may have been related to the events held at the State Palace Theater.⁶⁶ Reports of ecstasy overdoses may be grossly exaggerated.⁶⁷

The deaths attributed to ecstasy are relatively few, compared to the rapidly increasing number of ecstasy tablets imported into the United States each year. The sum total of ecstasy-related deaths for the five-year period 1994-1998 was twenty-seven.⁶⁸ U.S. Customs seized 400,000 ecstasy tablets in 1997, 750,000 in 1988, 3,500,000 in 1999 and 9,300,000 in 2000.⁶⁹ The Drug Enforcement Administration estimated that by June 2000, more than two million ecstasy tablets were being smuggled into the United States each week.⁷⁰ Typically, ecstasy is smuggled into the U.S. hidden in luggage, or by way of human “mules” or falsely documented airfreight shipments.⁷¹

B. Electronic Music

has a capacity of 3,500; Florida's Club La Vela, (the largest nightclub in the country) has a capacity of 6,000. Both venues' owners were prosecuted under the Crackhouse statute because somewhere in their vast confines, it was charged, people were using drugs.

⁶⁵ 148 CONG. REC. S5706 (daily ed. June 18, 2002) (statement of Sen. Biden); *see also* Information Bulletin: Raves, National Drug Intelligence Center, U.S. Dep't of Justice, No. 2001-L0424-004, April 2001, at 4, *available at* <http://www.usdoj.gov/ndic/pubs/656/656t.htm> (last visited June 11, 2004).

⁶⁶ *See supra* note 26.

⁶⁷ *See infra* notes 420-22 and accompanying text.

⁶⁸ CYNTHIA R. KNOWLES, UP ALL NIGHT: A CLOSER LOOK AT CLUB DRUGS AND RAVE CULTURE 7 (Red House Press 2001); *see also* the data from the U.S. Substance Abuse and Mental Health Services Administration (SAMHSA), *available at* <http://www.oas.samhsa.gov> (last visited June 8, 2004); further statistics *available at* <http://thedeia.org/statistics.html> (last visited June 8, 2004).

⁶⁹ DRUG IDENTIFICATION BIBLE 766.

⁷⁰ *Id.*

⁷¹ *Id.*

The Department of Justice has called raves “high energy, all-night dance parties . . . which feature dance music with a fast, pounding beat and choreographed laser programs.”⁷² Whether a legitimate electronic music concert or an underground rave, the acknowledged focal points⁷³ of the event are the music and the dance. This section of the Comment will examine how innovations in technology have changed the way music is produced and consumed, and the significance of these technological changes to live performances, culminating in a new breed of modern artist: the DJ.

In the Western world, before the arrival of early music technology – the cylinder, the gramophone, the phonograph or the player piano – music was conceptually associated with two primary concrete forms: “an audible event (a performance) or a written abstraction of – or prescription for – such an event (a score, a lead sheet, or some other kind of manuscript containing musical notation).”⁷⁴ The artist who played the written score on his musical instrument was called the performer.⁷⁵ The artist who wrote the written score, or musical notations, was called the composer.⁷⁶ Innovations in technology have, over time, blurred the lines between these two distinct categories.⁷⁷

⁷² Information Bulletin: Raves, National Drug Intelligence Center, U.S. Dep’t of Justice, No. 2001-L0424-004, April 2001, at 1, *available at* <http://www.usdoj.gov/ndic/pubs/656/656t.htm> (last visited June 11, 2004).

⁷³ *Id.*

⁷⁴ Kai Fikentscher, *There’s Not A Problem I Can’t Fix, ‘Cause I Can Do It In the Mix: On the Performance Technology of 12-Inch Vinyl*, in *MUSIC AND TECHNOCULTURE* 291 (René T.A. Lysloff & Leslie C. Gay, Jr. eds., 2003).

⁷⁵ See Leonard Kasdan & Jon H. Appleton, *Tradition and Change: The Case of Music*, 12 *COMPARATIVE STUDIES IN SOCIETY AND HISTORY* 50, 58 (1970).

⁷⁶ *Id.*

⁷⁷ See KAI FIKENTSCHER, “YOU BETTER WORK!” UNDERGROUND DANCE MUSIC IN NEW YORK CITY 91 (2000); ERIC SALZMAN, *TWENTIETH CENTURY MUSIC: AN INTRODUCTION* 235 (H. Wiley Hitchcock ed., Prentice Hall 2002) (1967); see generally Leonard Kasdan & Jon H. Appleton, *Tradition and Change: The Case of Music*, 12 *COMPARATIVE STUDIES IN SOCIETY AND HISTORY* 50 (1970).

1. New Technologies

With the advent of computerized keyboards in the 1950s, one musician could create complex rhythms and harmonies that previously required a whole ensemble of musicians.⁷⁸ Like the piano, the computerized keyboard is simply an instrument; ultimately, its musical and popular success depends on the talent of the musicians who use it.⁷⁹

Perhaps the greatest tool for recording music was the arrival of the multitrack tape recorder in the 1950s.⁸⁰ From that point on, a recording no longer necessarily documented a performance at all.⁸¹ Instead, it was a new type of musical manuscript, a “sonic score.”⁸² The tape recorder eliminated the need for the composer to muster an ensemble orchestra.⁸³ Put another way, the recorded music could now reflect an illusionary performance.⁸⁴ For example, ensemble instruments could now be recorded individually, in sequence, and then be balanced with each other in a final mix, which sonically represented a performance that had never really taken place.⁸⁵

⁷⁸ See Emilio Ghezzi, *Il Computer come il pianoforte/Der Computer als Klavier [The Computer as a Piano]*, 5 ANNALI DI SOCIOLOGIA/SOZIOLOGISCHES JAHRBUCH 205 (1989). Note that some genres (e.g., rock) lend themselves more easily to electronic instruments; classical music does not.

⁷⁹ *Id.*; see also *supra* note 78, at 55: “It should be made clear that the computer is not composing the music but is merely generating, modifying and storing materials at the direction of the composer.”

⁸⁰ See SALZMAN, *supra* note 80, at 151.

⁸¹ See, e.g., Kai Fikentscher, “There’s Not A Problem I Can’t Fix, ‘Cause I Can Do It In the Mix: On the Performance Technology of 12-Inch Vinyl,” in *MUSIC AND TECHNOCULTURE* 292-4 (René T.A. Lysloff & Leslie C. Gay, Jr. eds., Wesleyan University Press 2003); SALZMAN, *supra* note 80, at 33-34; Leonard Kasdan & Jon H. Appleton, *Tradition and Change: The Case of Music*, 12 *COMPARATIVE STUDIES IN SOCIETY AND HISTORY* 50 (1970) (predicting that these new technologies would cause this effect).

⁸² See *id.*; see also FRANK TIRRO, *JAZZ: A HISTORY* 139 (W.W. Norton & Co. 1993).

⁸³ *Id.*

⁸⁴ See Fikentscher, *supra* note 77, at 292-3.

⁸⁵ *Id.*

A prime example of this trend is the material recorded in a studio for the Beatles' landmark album *Sgt. Pepper's Lonely Hearts Club Band*, material that was impossible to be performed onstage by its authors after its release in 1967.⁸⁶ The Beatles, called "true children of the electronic age,"⁸⁷ used recording technologies to mix English music hall music with other styles such as swing, rock-and-roll and classical chamber music, to make it their own.⁸⁸ Their later recordings⁸⁹ have been called a move "toward larger forms and concepts; these albums are not just collections of songs but have larger overall artistic and theatrical shape."⁹⁰ Although the Beatles scored their initial successes as a live performing group,⁹¹ it was the recording medium that became, in effect, the real instrument on which they played.⁹²

Yet another new "instrument" that has revolutionized the way we think about music is the DJ console or "set,"⁹³ which typically consists of at least two turntables, a mixer and a pair of headphones. In the 1970s, DJs did not work in recording studios but in bars, clubs, and discotheques, where they were in direct contact with their patrons.⁹⁴ Like "the swing band leaders of the 1930s, disco [DJs] engaged with their dancing clientele directly and

⁸⁶ See Fikentscher, *supra* note 77, at 293.

⁸⁷ See SALZMAN, *supra* note 80, at 234.

⁸⁸ See SALZMAN, *supra* note 80, at 234-5.

⁸⁹ These recordings include albums such as *Sgt. Pepper's Lonely Hearts Club Band* (1967) and *Abbey Road* (1969). See SALZMAN, *supra* note 83, at 235.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See FIKENTSCHER, *supra* note 80, at 36; see also *infra* note 118 and accompanying text.

⁹⁴ See Fikentscher, *supra* note 77, at 294.

dynamically.”⁹⁵ But “instead of playing saxophones or brass riffs on the bandstand, they played records, and used turntables, mixers and amplifiers to create music that, although based on sounds created, arranged and recorded by others, became ultimately ‘theirs.’”⁹⁶

Today, rock and jazz ensembles, DJs and any other performers with strong experimental or artistic points of view have come almost invariably to rely on synthesizers and other instruments that can provide electronic sound modification, whether as an enhancement to live performances or to create unique music wholly within the recording studio.⁹⁷ Thus, these new technologies have clearly changed the ways in which music is produced and consumed.

2. The DJ as Maestro of Electronic Music

The chief significance of the DJ’s role in the creation of electronic music lies not in the use of new material (in the sense of traditionally- or electronically-generated sounds) but in the fact that the composer is “communicating directly with his audience without an intermediary.”⁹⁸ In the context of a rave or an electronic music concert, a mix refers to the blending of records and perhaps sound effects, accomplished by the DJ with less sophisticated equipment (than that of a recording studio) and in real time.⁹⁹ A DJ’s live performance then actually constitutes a ‘remix,’ the term the DJ uses, for his own live mix using vinyl recordings that have been previously mixed in the recording studio.¹⁰⁰ In that sense, a ‘remix’ is comparable to a written

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See SALZMAN, *supra* note 83, at 154.

⁹⁸ See *supra* note 78, at 55; see also Monica Ruz Santorras, *Nouvelles Technologies et Nouvelles Activités Artistiques: Le Cas du Disc-Jockey* [*New Technologies and New Artistic Activities: The Case of the Disc Jockey*] (INTERNATIONAL SOCIOLOGICAL ASSOCIATION (ISA), D. Weibel trans. 1998).

⁹⁹ See FIKENTSCHER, *supra* note 80, at 49.

¹⁰⁰ *Id.*

score in the context of classical Western music. This is how “musical authorship has become a temporary and subjective issue.”¹⁰¹

a) DJ as Composer-Performer¹⁰²

The approach of a composer to electronic music is in many respects quite different from the approach of a composer to instrumental music.¹⁰³ Although technology has simplified many of his tasks, it has also placed greater responsibilities upon the composer.¹⁰⁴ He now knows that his work involves “not only the conception”¹⁰⁵ but the performance of the composition as well.¹⁰⁶

Even as radio and sound film technologies evolved in the 1920s and 1930s, and recorded music became abundant, both environments continued to present the music as if it were a live broadcast, or a “make-believe concert.”¹⁰⁷ Finally, though, innovative radio DJs such as Jack Cooper and Martin Block began to present the recordings not as “make-believe concerts”;¹⁰⁸ instead, they incorporated records into their radio shows, as basic elements for their own

¹⁰¹ See *id.* at 50. This is not to say that a composition performed live by a DJ could not be recorded at the site of the concert (something that is often done for commercial purposes with many types of music, but which is beyond the scope of this Comment).

¹⁰² This discussion focuses almost exclusively on the technologies preferred by DJs. The use of more modern technologies, such as MP3 players, is beyond the scope of this Comment. For an excellent practical guide to composing and performing music using digital (as opposed to analog) technologies, see generally CHARLES DODGE & THOMAS A. JERSE, *COMPUTER MUSIC: SYNTHESIS, COMPOSITION AND PERFORMANCE* (2d ed. 1997) (1985).

¹⁰³ See *supra* note 78, at 54.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See Fikentscher, *supra* note 77, at 292-3.

¹⁰⁸ *Id.*

performances.¹⁰⁹ Later, DJs in discotheques also used vinyl recordings to form the basis of their own creative individual musical expression.¹¹⁰ Today, these vinyl recordings (or records) are as indispensable to the DJ's musical instruments (turntables, mixers, equalizers) as strings are to violinists, harpists and guitarists.¹¹¹ To deejay is to make new music in real time, using recordings, turntables, mixers and sound reinforcement technology – originally designed for recording and playback purposes only – in creative ways.”¹¹²

Among the DJ's creative choices are the musical repertoire; the technology used to play music for dancing; the techniques used to play, mix and remix records into the flow of one musical performance; and the rapport and interaction between DJ and dancers.¹¹³ Today's club DJs usually use two or more turntables, an audio mixer, and two separate amplification systems that will reach both the dance floor and the DJ booth.¹¹⁴ Together, these form “the console.”¹¹⁵ The coordination of two or more turntables and a mixer necessitates using the cross-fader control on the mixer to control the flow and balance of two (or more) separate audio signal feeds. At the same time, in addition to other optional considerations, the DJ must simultaneously control the tempo, volume, and balance of timbres and textures; these skills are as crucial in the context of an electronic music concert as they are with any other type of musical composition.¹¹⁶

¹⁰⁹ *See id.* at 292.

¹¹⁰ *Id.*

¹¹¹ *See Fikentscher, supra note 77, at 295.*

¹¹² *See id.* at 294.

¹¹³ *Id.*

¹¹⁴ *See id.* at 298.

¹¹⁵ *Id.* “The ‘set’ may also refer to the musical program designed by the [DJ].” *Id.*

¹¹⁶ *See Fikentscher, supra note 77, at 299.*

While the DJ is usually composer and performer at once, it is the DJ who has great skill in composition who achieves more artistic success than those who possess only good technical (performance) skills.¹¹⁷ Someone who has mastered the operation of two or even three turntables and an audio mixer is not necessarily considered a good DJ.¹¹⁸ The DJ's repertoire of music usually travels with him or her, in the form of several crates of records.¹¹⁹ The compositional skills, called "programming"¹²⁰ by DJs, are "an art that can include a range of musical considerations."¹²¹ Programming encompasses the overall duration of a night of uninterrupted music for dancing with its "slow and gradual increase of energy at the beginning, the pacing toward one or several peaks that find their ultimate release in that last record,"¹²² followed by silence at the end of the performance.¹²³ Through the creative mixing of music recorded on vinyl

¹¹⁷ See *id.* at 300. As one DJ (Paradise Garage, New York DJ Larry Levan) put it,

When I listen to DJs today they don't mean anything to me. Technically some of them are excellent – emotionally they don't do anything for me There is actually a message in the dance, the way you feel, the muscles you use, but only certain records have that.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See FIKENTSCHER, *supra* note 80, at 41.

¹²¹ *Id.*

¹²² It is passages such as the above that lead some people who are unfamiliar with electronic music to assume that electronic music lovers must be on drugs. Compare the above excerpt, taken from KAI FIKENTSCHER, "YOU BETTER WORK!" UNDERGROUND DANCE MUSIC IN NEW YORK CITY 41 (2000) with the following excerpt from ROBERT JOURDAIN, MUSIC, THE BRAIN AND ECSTASY: HOW MUSIC CAPTURES OUR IMAGINATION 331 (1997), in which the author does not refer to the illegal street drug ecstasy in his book at all. Rather, referring to the joyful experience of listening to beautiful music, he says:

When music transports us to the threshold of ecstasy, we behave almost like drug addicts as we listen again and again . . . [i]t's for this reason that music can be transcendent. For a few moments it makes us larger than we really are, and the world more orderly than it really is As our brains are thrown into overdrive, we feel our very existence expand and realize that we can be more than we normally are, and that the world is more than it seems. That is cause enough for ecstasy.

¹²³ See FIKENTSCHER, *supra* note 80, at 41.

and the various means of playback technology, DJs have become musical authors, producing their own interpretations of prerecorded music, not only through the choice of repertoire but also through their style of mixing.”¹²⁴

In addition to the compositional skills, considered most important, a good DJ must also possess “mixing” skills.¹²⁵ The DJ, starting in the early days of radio in the 1920s, but especially since the disco era of the 1970s, has played a crucial role in the process of redefining the role of music technologies.¹²⁶ This process has been marked by a shift of emphasis away from the composition of written scores, or authoritative musical texts, and toward the creation of new performance modes.”¹²⁷ The DJ, then, is arguably a “visionary figure”¹²⁸ who has helped to bridge the transition from the analog to the digital era by redefining the turntable and sampler as performance instruments.¹²⁹ This “new virtuosity”¹³⁰ is not “mere embellishment but an organic part of the musical substance itself.”¹³¹

While the art of deejaying is

“sometimes not viewed as a very prestigious activity or profession to be associated with the specific musical skills or techniques that traditional musicians must acquire This perspective changes once one considers the twin turntable

¹²⁴ See Fikentscher, *supra* note 77, at 302.

¹²⁵ “While mixing skills have helped many a DJ achieve cult status, especially in the field of hip-hop music, they are not considered as important as programming skills in the context of . . . club music.” See Fikentscher, *supra* note 77, at 299.

¹²⁶ See *id.* at 290.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See SALZMAN, *supra* note 83, at 171.

¹³¹ *Id.* “Modern jazz and its offshoots is a complex performance art with a wide harmonic and melodic range and special emphasis on instrumental virtuosity. Its impromptu, intuitive and even ecstatic qualities have been enormously influential on almost every kind of new music.” *Id.* at 232-33.

set and the audio mixer as one instrument consisting of three units that have to be operated simultaneously as well as synchronously in order to allow the artistry of deejaying to emerge.”¹³²

1) DJ Techniques

DJs employ three main technical skills in creating their unique brand of electronic music. First, the technique of ‘slip-cueing’ allows a DJ to construct an “uninterrupted musical program through the blending together of individual records to form one seemingly unending musical soundscape.”¹³³ The technique has also been called the ‘mixing’ of records, or a system of “dovetailing one tune into another...designed to reduce disconcerting breaks in the music and [to create] momentum.”¹³⁴ This is the most common way for a DJ to segue from one record to another.¹³⁵

A second common technique is the ‘fast cut.’¹³⁶ Fast cutting involves a rapid, almost instantaneous switch between turntables, usually just before the first downbeat of the section or song about to be played.¹³⁷

The third main technique that DJs use is the overlay.¹³⁸ Overlays are achieved by playing two records at the same time through the P.A. system for an extended period of time, often lasting minutes. The aim is to “synchronize two different records so as to make them sound like

¹³² See Fikentscher, *supra* note 77, at 298-99.

¹³³ See *id.* at 296-97.

¹³⁴ *Id.*

¹³⁵ See *id.* at 299.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

one piece of music (which they then become in the hands of an accomplished DJ).”¹³⁹ When a DJ “works a record,”¹⁴⁰ the DJ becomes a performer.¹⁴¹

C. The Dance: The Audience’s Response to the DJ’s Performance

Electronic music evolved from house music, which evolved from disco.¹⁴² One author has said that the main way that electronic dance music differs from traditional music is that electronic dance music is not just about creating new sounds, but is also about learning to listen to music in a different way.¹⁴³ With conventional music, the audience tends to listen to the structure of the song and follow the songwriter’s lyrics. By contrast, with electronic dance music, the music is more cyclical and continuous, and often has few or no lyrics for the listener to focus on.¹⁴⁴ Thus, it has been said that the experience of listening to electronic dance music is much like the experience the musician has when he creates the music, in that it requires concentration and focus. Electronic dance music is specifically designed to inspire the intense physical desire to dance.¹⁴⁵

¹³⁹ See Fikentscher, *supra* note 77, at 299.

¹⁴⁰ *Id.*

¹⁴¹ Consider this account of New York DJ David Morales’ technique:

Morales doesn’t play records so much as he transforms them. Many of the 12-inch singles Morales mixes are grating and monotonous when left unaltered or heard out of their club context. But layered on top of another, cut up, stretched out, and paced to create an evening of multiple climaxes, these bass-and-drum machine-generated records turn into grand, almost symphonic soundscapes of urban life

See Fikentscher, *supra* note 77, at 302.

¹⁴² See FRITZ, at 65.

¹⁴³ *Id.* at 76.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; see also MICHEL GAILLOT, MULTIPLE MEANING, TECHNO: AN ARTISTIC AND POLITICAL LABORATORY OF THE PRESENT 52-53 (Éditions Dis Voir 1998).

“The shared cultural dimension that enables DJs and dancers to interact . . . is marked by . . . tension between freedom and order.”¹⁴⁶ This tension has been compared to the development of free-form jazz,¹⁴⁷ as “the interdependence of a rhythm section and a soloist in a jazz ensemble is comparable to that of DJ and dancers. The rhythm section shares with the DJ a focus on pulse and structure (harmonic and/or rhythmic), providing a foundation on which the soloist can ‘dance.’”¹⁴⁸ The members of the audience at an electronic music concert or at a rave are like the jazz soloists, as they are expected to “make their own choices in terms of . . . execution, in relation to the performance . . . of . . . the ensemble.”¹⁴⁹

“Dancing, the response to successful deejaying, involves the ‘listener’ actively. Dancing transforms a ‘listener’ into a ‘dancer,’ whose performance has the often realized potential of influencing the [DJ’s] programming, thereby creating a feedback loop between DJ booth and dance floor.”¹⁵⁰ “On the microlevel of rhythm, DJ and dancers interact by maintaining a balance between constant features (pulse, meter, musical structure) and variable features (dynamics, sound and repertoire). On the macrolevel, the music may be organized in sets, or according to style or tempo or overall energy level. Combined, these considerations fall under the concept of programming. Programming is understood as an art that puts the DJ in the position of authority.”¹⁵¹ Thus, a successful response from the dance floor is the DJ’s responsibility.

III. THE CRACKHOUSE STATUTE WAS CONSTITUTIONAL

¹⁴⁶ See FIKENTSCHER, *supra* note 80, at 91.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See Fikentscher, *supra* note 77, at 294.

¹⁵¹ See FIKENTSCHER, *supra* note 80, at 91.

As stated in the Introduction, the RAVE Act is an amendment to the 1986 Crackhouse statute. While the Crackhouse statute has been construed very narrowly by the courts and has been upheld as constitutional, the RAVE Act faces formidable constitutional hurdles. This section will examine how the Crackhouse statute was able to withstand challenges to its constitutional validity, and how the statutory language lent itself to a narrowing construction by the courts.

The first section of the Crackhouse statute (Section (a)(1)) made it illegal to “knowingly open or maintain any place, for the purpose of manufacturing, distributing, or using any controlled substance”¹⁵² and withstood at least two challenges for vagueness.¹⁵³

First, the Eleventh Circuit upheld this provision in 1992, holding that a conviction under this section of the Crackhouse statute required two mental elements: knowledge and purpose. As applied to defendants whose acts were “so clearly within” the concept of knowingly maintaining a place, the statute met constitutional scrutiny.¹⁵⁴ That circuit noted that the inclusion of the two intent elements within the statutory language itself, “knowingly” and “for the purpose of,” did much to eliminate contentions of vagueness or unfairness of the statute as applied to criminal defendants.

Second, the Court of Appeals for the District of Columbia Circuit also rejected a criminal defendant’s vagueness challenge that same year, holding that the statutory language was not inherently ambiguous and could not reasonably be construed to criminalize simple consumption

¹⁵² See *infra* note 166.

¹⁵³ See *United States v. Clavis*, 956 F.2d 1079 (11th Cir. 1992); *United States v. Lancaster*, 968 F.2d 1250 (D.C. Cir. 1992).

¹⁵⁴ *Clavis*, 956 F.2d at 1094. These acts included leasing the premises, being regularly present on the premises when the landlord comes to conduct repairs, paying rent for the premises and accepting the keys of the premises from the landlord.

of drugs in one's home.¹⁵⁵ Rather, the court found that the "for the purpose of" language of 21 U.S.C. § 856(a)(1) precluded the conviction of the "casual" drug user under the Crackhouse statute.¹⁵⁶

The second section of the Crackhouse statute (Section (a)(2)) criminalized the management or control of "any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance"¹⁵⁷ and survived a vagueness challenge on at least one occasion.¹⁵⁸ The Southern District of New York found this provision of the Crackhouse statute to be constitutional, and that the statutory terms "using" and "storing" did not cause the Crackhouse statute to be impermissibly vague on its face.¹⁵⁹ The *Milani* court analogized the Crackhouse statute to penal statutes such as those criminalizing the conduct of landlords of houses of prostitution and the National Prohibition Act, statutes whose facial validity had long been assumed.¹⁶⁰

¹⁵⁵ *Lancaster*, 968 F.2d at 1253.

¹⁵⁶ *Id.*

¹⁵⁷ *See* *United States v. Milani*, 739 F. Supp. 216 (S.D.N.Y. 1990).

¹⁵⁸ *Id.*

¹⁵⁹ *Milani*, 739 F. Supp. at 216, in which the court was "unable to rule on whether the statute is impermissibly vague as applied to the defendant" in this case, in the absence of a plenary trial record. *Id.*

¹⁶⁰ *See* U.S. CONST. amend XVIII; the National Prohibition Acts, 41 Stat. 305 (1919); 42 Stat 222 (1921); and 46 Stat. 1036 (1931) that made a federal crime the "manufacture, sale or transportation of intoxicating liquors . . . for beverage purposes," *repealed* by U.S. CONST. XXI § 1; the Prohibition Repeal Act, 49 Stat. 872 (codified at 40 U.S.C. § 1306); 2004 N.Y Laws 230.40: "A person is guilty of permitting prostitution when, having possession or control of a premises which he knows are being used for prostitution purposes, he fails to make reasonable effort to halt or abate such use." *Id.*

The Crackhouse statute was never challenged as overbroad, and the Supreme Court has never considered the constitutionality of the Crackhouse statute on any basis.¹⁶¹

A. Elements of a “Crackhouse” Offense

The mens rea component to a “Crackhouse” offense, incorporated by the various courts of appeal, virtually eliminated constitutional concerns of overbreadth. Section (a)(1) applied to the property manager or owner using the premises for unlawful purposes himself. Section (a)(2) applied to the property manager who allowed others to use the premises for unlawful purposes. The elements of a Crackhouse offense were established through evidence linking the defendant to the premises, in either a supervisory or managerial role, under Section (a)(1), or as a landlord, under Section (a)(2).¹⁶²

1. Section (a)(1)

To convict a defendant under the old Crackhouse statute, Section (a)(1), the jury had to find that the defendant a) knowingly b) opened or maintained a place c) for the purpose of manufacturing, distributing, or using any controlled substance.¹⁶³

a) Knowingly

The knowledge of a defendant could be imputed to him when a reasonable jury could infer that the defendant would have come across and therefore known about drugs and drug paraphernalia that were scattered throughout the house.¹⁶⁴ Likewise, if the defendant did not

¹⁶¹ The constitutionality of the Crackhouse statute has also been challenged on numerous occasions on double jeopardy grounds, but such challenges are beyond the scope of this Comment. *See generally* Richard Belfiore, *Validity, Construction and Application of Federal “Crack-House Statute” Criminalizing Maintaining Place for Purpose of Making, Distributing, or Using Controlled Drugs* (21 U.S.C.A. § 856) 116 A.L.R. FED. 345 (1993).

¹⁶² *United States v. Banks*, 987 F.2d 463, 466-67 (7th Cir. 1993).

¹⁶³ *United States v. Onick*, 889 F.2d 1425, 1428-29 (5th Cir. 1989).

¹⁶⁴ *Onick*, 889 F.2d at 1429.

have reason to know of any drugs or drug paraphernalia in the house, he would not be convicted under Section (a)(1).¹⁶⁵ The knowledge element was easier to prove if the defendant actually lived on the premises.

b) Opened or Maintained a Place

This was typically the easiest element for prosecutors to establish, and the defendant was usually charged with maintaining, rather than opening, the place. A court would find that a defendant maintained a property if the defendant exercised sufficient “dominion and control” over it; the dominion and control under this statute was more stringent than that of drug possession statutes. In this context, “maintain” connoted a higher degree of continuity and duration than mere constructive possession.¹⁶⁶ The easiest way to charge the defendant with maintaining the premises was by proving that he had legal title to, or paid rent for, the property.¹⁶⁷

c) For the Purpose of

The relevant “purpose” under Section (a)(1) was that of the defendant himself, and no others.¹⁶⁸ The defendant had to maintain the place for his own goal of manufacturing, distributing or using drugs.¹⁶⁹ It was not sufficient that he allowed others to use the property for

¹⁶⁵ *Id.*

¹⁶⁶ *United States v. Morgan*, 117 F.3d 849, 856 (5th Cir. 1997).

¹⁶⁷ *United States v. Roberts*, 913 F.2d 211, 221 (5th Cir. 1990). Juries have been allowed to infer that a criminal defendant maintained a place with much less evidence – for example, when the defendant had hung clothes or had traffic tickets in the closets of rooms where drugs and drug paraphernalia were found. *Id.*

¹⁶⁸ *United States v. Chen*, 913 F.2d 183, 189 (5th Cir. 1990).

¹⁶⁹ *Chen*, 913 F.2d at 190.

such goals.¹⁷⁰ The Seventh Circuit suggested that a finding that the defendant held a “supervisory, managerial or entrepreneurial” role in a drug enterprise was one way to ascertain whether the defendant had the requisite mental purpose for a conviction under Section (a)(1).¹⁷¹

2. Section (a)(2)

To convict a defendant under the old Crackhouse statute, Section (a)(2), the jury had to find that the defendant a) managed or controlled a building, room or enclosure b) either as owner, lessee, agent, employee or mortgagee and c) knowingly made it available for the purpose of unlawfully manufacturing, distributing, or using a controlled substance.¹⁷²

a) Managed or Controlled

Under this section, the defendant must have managed or controlled the building, room or enclosure where drug use took place. This normally required that the defendant owned or had legal title to the property.¹⁷³

b) Owner, lessee, agent, employee or mortgagee

The plain language suggested that the defendant under this section could hold any number of titles vis-à-vis the property and be held liable under Section (a)(2).

c) Knowingly Made it Available for the Purpose of

1) Knowingly Made it Available

¹⁷⁰ *Id.* Note that the majority of cases tried under the Crackhouse statute were prosecuted under Section (a)(1). *See infra* notes 279-81 and accompanying text.

¹⁷¹ *United States v. Banks*, 987 F.2d 463, 466-67 (7th Cir. 1993). The Tenth Circuit has cited items that may be used as evidence that a defendant is using a place to run a drug business. The list includes: lab equipment, scales, guns and ammunition to protect the inventory and the profits; packaging materials such as baggies, vials, gelcaps, etc; financial records or profits (in the form of cash or expensive merchandise; and the presence of multiple employees or customers; *see United States v. Verners*, 53 F.3d 291, 297 (10th Cir. 1995).

¹⁷² *Chen*, 913 F.2d at 187 (quoting *United States v. Onick*, 889 F.2d at 1431 n.1 (5th Cir. 1989)).

¹⁷³ *United States v. Lancaster*, 968 F.2d 1250, 1252 (D.C. Cir. 1992); *United States v. Harrison*, 133 F.3d 1084, 1085-86 (8th Cir. 1998).

Section (a)(2) required only that proscribed activity was present on the property, that the defendant knew of the activity and allowed the activity to continue.¹⁷⁴ The Tenth Circuit and the District of Columbia Circuit both recognized, in analyzing the former Section (a)(2), that knowledge of what goes on inside a house may be inferred from living therein.¹⁷⁵ The *Jenkins* court noted that the natural inference, with a house, is that those who live in the house know what is going on inside it, particularly in the common areas.¹⁷⁶ Thus, the defendant who maintained a house primarily as a residence, or a commercial property as a business enterprise, could nevertheless be convicted under Section (a)(2) if the defendant knowingly made the premises available to other residents or businesspeople for purposes of drug manufacture, distribution or use.¹⁷⁷

2) For the Purpose of

Unlike the “purpose” element of Section (a)(1), which went to the purpose of the defendant property-owner,¹⁷⁸ the purpose at issue under Section (a)(2) is not that of the person managing or controlling the building,¹⁷⁹ it is the purpose of the people renting or otherwise using the place for illegal activities.

Because it is harder to prove that a person knowingly made his property available to others for illegal uses than it is to prove that a person knowingly used his own property

¹⁷⁴ *United States v. Tamez*, 941 F.2d at 774.

¹⁷⁵ *See United States v. Higgins*, 282 F.3d 1261 (10th Cir. 2002); *United States v. Jenkins*, 928 F.2d 1175, 1179 (D.C. Cir. 1991).

¹⁷⁶ *Jenkins*, 928 F.2d at 1175-79.

¹⁷⁷ *Jenkins*, 928 F.2d at 1179; *Tamez*, 941 F.2d 770, 774 (9th Cir. 1991).

¹⁷⁸ *Tamez*, 941 F.2d at 774.

¹⁷⁹ *Chen*, 913 F.2d at 191.

for illegal drug activities, the majority of cases that were tried under the Crackhouse statute resulted in convictions under section (a)(1). The former Section (a)(2) was unusual in that the purpose element applied to someone other than the actor.¹⁸⁰ Notably, the majority of Crackhouse cases involved actual crackhouses, where the properties had little or no legitimate value or use unrelated to drug activity. Historically, legitimate businesses or residential homes were safe from prosecution under the Crackhouse statute. The strict judicial construction of the Crackhouse statute kept it within constitutional bounds and prevented it from being struck down as overbroad or vague.

B. The Rationale of the Disorderly House

The rationale behind the Crackhouse statute was that it deterred property owners from maintaining, or making their premises available as, a disorderly house. The term “disorderly house” usually refers to houses of prostitution or ill fame, common gaming houses, or controlled substance premises (crackhouses).¹⁸¹ A disorderly house may also be defined as “a dwelling where people carry on activities that are a nuisance to the neighborhood” or “a dwelling where people conduct criminal or immoral activities.”¹⁸²

Statutes that penalize the maintenance of a disorderly house usually require the defendant to know of the illegal use of the premises.¹⁸³ A conviction under the Crackhouse statute required proof that the defendant intentionally or knowingly opened or maintained the place for the use, manufacture or distribution of controlled substances, or knowingly allowed others to use the

¹⁸⁰ The *Chen* court found at least 16 federal criminal statutes that use the combination of “knowingly” and “for the purpose of.” In all of these, the purpose requirement clearly goes to the “actor” in the statute, the one who has the knowledge. *Id.* at 190 n.9.

¹⁸¹ 24 AM JUR 2D *Disorderly Houses* § 23 (2004).

¹⁸² BLACK’S LAW DICTIONARY 210 (2d ed. 2001).

¹⁸³ 24 AM JUR 2D *Disorderly Houses* § 23 (2004).

place for illegal activities, although such a purpose need not be the sole or main purpose of the premises.¹⁸⁴

V. EARLY ATTEMPTS TO USE THE CRACKHOUSE STATUTE TO SHUT DOWN RAVES

The federal government originally tried to prosecute promoters of raves and electronic music concerts under the Crackhouse statute and other federal drug laws. The four major targets were Little Rock, Arkansas; Boise, Idaho; Panama City, Florida; and New Orleans, Louisiana, and their prosecutions were characterized by Senator Biden as “two wins, a loss and a draw.”¹⁸⁵

The “draw” referred to by Senator Biden was the government’s first effort to prosecute a nightclub owner under the Crackhouse statute, the first prosecution of its kind in the country.¹⁸⁶ The federal government’s first anti-rave initiative prosecuted under the Crackhouse statute was launched in New Orleans with its case against the State Palace Theater, in which a United States Attorney brought charges against Robert Brunet and Brian Brunet, the owners of Barbecue of New Orleans (doing business as the State Palace Theater), and James Estopinal, the event promoter at the State Palace.¹⁸⁷ All defendants were offered plea deals that included a ban of particular items¹⁸⁸ from the State Palace, despite the fact that the defendants had taken measures to prevent drug use on their property¹⁸⁹ and the lack of any evidence that these men were

¹⁸⁴ See *United States v. Morgan*, 117 F.3d 849, 857; *United States v. Verners*, 53 F.3d 291. The mens reas of “knowingly” and “intentionally” were discussed more fully in *supra* Part III A.

¹⁸⁵ 148 CONG. REC. S5706 (daily ed. June 18, 2002) (statement of Sen. Biden).

¹⁸⁶ S. 2633, 107th Cong. (2002).

¹⁸⁷ Plaintiffs’ Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction, *McClure v. Ashcroft*, 2002 U.S. Dist. LEXIS 2532 at 2 (E.D. La. Feb. 01, 2002) (No. 01-2573), *vacated on other grounds McClure*, 335 F.3d 404 (5th Cir. 2003). [hereinafter Plaintiff’s Memorandum].

¹⁸⁸ The list of items included pacifiers, objects that glow, masks, vapor rub products and massage tables. *See id.*

¹⁸⁹ *Id.*

involved in any way with drug activity. They accepted the plea deal, to avoid the possibility of serving time in jail, but later challenged the plea deal on constitutional grounds.¹⁹⁰

Public reaction against the government's prosecution mounted¹⁹¹ and the judge ruled that the defendants' plea agreement should be enjoined, noting that while he did not doubt that the government's interest was in battling use of the drug ecstasy, "it seems that a total ban on possessing and utilizing objects which are inherently legal items is not a narrowly tailored means of achieving the goal of curbing drug use."¹⁹² Ultimately, that decision was overturned on the grounds that the plaintiffs lacked standing to contest the injunction.¹⁹³

The "loss" Senator Biden referred to, and the second true Crackhouse prosecution of an electronic music concert, took place in Panama City, Florida, where police seized Blow Pops™ and bubblegum from the club's gift shop as evidence that the managers knew of, and consented to, drug use.¹⁹⁴ The prosecution pointed to items such as glowsticks, bubblegum and water to prove that the CEO and the club's general manager knew there was drug use within the club, and

¹⁹⁰ *Id.* They claimed that the government's civil injunction banning pacifiers, objects that glow, masks, vapor rub products, massage tables and chill rooms from the State Palace were objects that were not inherently illegal and could not be banned from their premises.

¹⁹¹ *Id.* According to Plaintiffs' Memorandum at 10 ¶ 32, a New Orleans Times Picayune editorial condemned the misuse of the Crackhouse law; the conservative Weekly Standard called for the dismissal of U.S. Attorney Eddie Jordan, and the case was scrutinized in publications such as Time Magazine, the Los Angeles Times and the New York Times.

¹⁹² *See McClure v. Ashcroft*, 2002 WL 188410 (E.D. La.) (2002), *rev'd on other grounds*, *McClure v. Ashcroft*, 335 F.3d 404 (5th Cir. 2003).

¹⁹³ *See McClure v. Ashcroft*, 335 F.3d 404 (5th Cir. 2003). Lower courts commonly confuse overbreadth, a substantive First Amendment doctrine, with issues of standing. However, "it is not precise to think of the overbreadth problem as a form of standing or as a justiciability issue." *See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE* § 20.8 (3d ed. 1999); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 39 (1981): "[O]verbreadth analysis is concerned with the substance of constitutional review; it does not rely on any distinctive standing component."

¹⁹⁴ David Angier, *Prosecutors Try to Establish Conspiracy Case Against La Vela Officials*, PANAMA CITY NEWS HERALD, Nov. 9, 2001, available at <http://www.newsherald.com/articles/2001/11/09/lo110901b.htm> (last visited June 5, 2004).

allowed it to continue.¹⁹⁵ Prosecutors argued that these items were proof of drug use because ecstasy causes a range of physical reactions when ingested, including heightened sensitivity, more energy, uncontrollable clenching of jaw muscles and grinding of teeth, and elevated body temperatures. What the prosecution failed to do, however, was establish that the presence of these items on the premises was sufficient to establish that the defendants had imputed knowledge of illegal activities occurring on the premises.¹⁹⁶ The case went to trial but on November 27, 2001 a jury acquitted the defendants of all charges after only seventy-five minutes of deliberation.¹⁹⁷

One of the two “wins” Senator Biden referred to was in Boise, Idaho,¹⁹⁸ where federal prosecutors have invoked the Crackhouse statute in the rave context several times since 2001.¹⁹⁹ One rave promoter was charged with using his business to sell drugs at raves and sharing in drug profits.²⁰⁰ Another rave promoter convicted and sentenced under the Crackhouse statute was selling ecstasy at his own raves.²⁰¹ Thus, the Crackhouse statute can be and is used against unscrupulous drug distributors who also maintain the place where the drug distribution occurs. The Boise case, then, provides an example of how the nightclub owner who acts just like a

¹⁹⁵ *Id.* At trial, a county sheriff’s investigator said ecstasy users wave glow sticks in front of their eyes for visual stimulation, and chew blow pops and bubblegum to minimize the damage to their teeth. The investigator admitted on cross-examination that simply because someone uses a glow stick doesn't mean they're using controlled substances.

¹⁹⁶ For a fascinating discussion of items found at raves such as candy, glow sticks and baby pacifiers and their significance, see Michael H. Dore, *Targeting Ecstasy Use At Raves*, 88 VA. L. REV. 1583, 1605-18 (2002).

¹⁹⁷ See *supra* note 197.

¹⁹⁸ See Patrick Orr, *Boise Man Faces Drug Charges: Rave Promoter Had Plans to Run a Boise Academy*, IDAHO STATESMAN, July 23, 2002, at 1.

¹⁹⁹ *Id.*

²⁰⁰ See *Rave Promoter Will Go To Prison*, IDAHO STATESMAN, Apr. 20, 2002, at 1.

²⁰¹ *Id.*

crackhouse owner could have been effectively prosecuted under the old Crackhouse statute, and that the RAVE Act is unnecessary if the government's objective²⁰² is to prosecute unscrupulous business owners. Now the Boise rave scene, if it still exists, has gone underground, according to Boise Mayor Brent Coles.²⁰³

The other "win" referred to by Senator Biden was the Little Rock case,²⁰⁴ which involved federal drug conspiracy charges against rave promoters who had people sell ecstasy for them at raves. These defendants were actually convicted under conspiracy laws. The Crackhouse statute was not used in this case at all.²⁰⁵ The Little Rock case demonstrates that drug conspirators can, and should be, punished under existing federal drug laws.

No doubt, the government's mixed results in using the Crackhouse statute to try to prosecute electronic music promoters and business owners who provide a public forum for this type of music were, at least in part, the impetus behind Senator Biden's "tailoring" the Crackhouse statute to the rave situation. No doubt, the new RAVE Act makes a prosecutor's job easier.²⁰⁶ However, in the "tailoring," Congress actually expanded the language of the

²⁰² In fact, the government's objective, as stated by the main sponsor of the RAVE Act, Senator Biden, is to prosecute "rogue rave promoters." *See infra* notes 279-80.

²⁰³ *See* Donna Leinwand, *Cities Crack Down on Raves: Rising Popularity Prompts Backlash Over Drug Use*, USA TODAY, Nov. 13, 2002, at A1. That raves are now being driven underground leads to a policy argument against the RAVE Act. *See infra* Part VII B.

²⁰⁴ 148 CONG. REC. S5706 (daily ed. June 18, 2002) (statement of Sen. Biden). Only the cases in Boise, Panama City, and New Orleans involved charges under the Crackhouse statute, which would hold the owners of the property criminally and civilly liable.

²⁰⁵ *See id.*

²⁰⁶ *See generally* Gwen Filosa, *Rave Promoters Face Narcotics Charges; Indictments based on 'Crackhouse Law,'* TIMES-PICAYUNE, Jan. 13, 2001, at 1, referring to U.S. Attorney Jordan's prediction that other cities would follow New Orleans' example in using the Crack House Statute in the rave context. Because of proof problems, Jordan's prediction was not fulfilled. *Id.*

Crackhouse statute in a way that renders it substantially and unconstitutionally overbroad and therefore violative of the First Amendment rights of many groups of people.

VI. THE HISTORY OF THE RAVE ACT

The RAVE Act was first introduced in the Senate on June 18, 2002.²⁰⁷ The House of Representatives held hearings on the bill that October.²⁰⁸ In the Senate, two of the original co-sponsors of the bill, Richard Durbin (D-IL) and Patrick Leahy (D-VT), Chair of the Senate Judiciary Committee, took the rare step of withdrawing themselves as co-sponsors, citing concerns that the bill lacked adequate protection for innocent property owners.²⁰⁹

Senator Leahy noted that the House Judiciary Committee heard evidence the previous year that the Drug Enforcement Administration and prosecutors are now using the Crackhouse statute to pursue “even business owners who take serious precautions” to avoid drug use at their events.²¹⁰ He also was concerned with the provision allowing civil suits that “dramatically

²⁰⁷ S. 2633, 107th Cong. §§ 1-4 (2002).

²⁰⁸ *Reducing Americans’ Vulnerability to Ecstasy Act of 2002: Hearing on H.R. 5519 Before the House Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary*, 107th Cong. (2002), available at <http://www.house.gov/judiciary/boyd101002.pdf> (last visited June 11, 2004). It passed the Senate Judiciary Committee a little over a week after it was introduced, without a public hearing or recorded vote, and was expected to quickly pass the full Senate. See <http://emdef.org/s2633> (last visited June 5, 2004). While public hearings are not required, they are usually the starting point of a committee’s consideration of a bill. See http://congress.indiana.edu/learn_about/legislative.htm (last visited Nov. 6, 2003).

²⁰⁹ See bill summary and status, S. 2633, 107th Cong. (2002), available at <http://thomas.loc.gov> (last visited June 11, 2004). Durbin withdrew on Sept. 24, 2002; Leahy on Sept. 13, 2002. *Id.*

²¹⁰ Press Release, Senator Leahy’s office (April 10, 2003), available at <http://leahy.senate.gov/press/200304/041003c.html> (last visited June 8, 2004); see also Aja Whitaker, *Business Owners Ranting Over Rave Law: Drug Law Targets Club Managers, Owners*, TAMPA BAY BUS. J., July 21, 2003, available at <http://tampabay.bizjournals.com/tampabay/stories/2003/07/21/story6.html?page=1> (last visited June 5, 2004).

increases” the potential liability of business owners, and urged further consideration of this provision, included in what he termed a “hastily-assembled package.”²¹¹ Senator Durbin withdrew his support from the bill in September.²¹²

Ultimately, Senate leadership never brought it up for a full Senate vote.²¹³ The House Subcommittee on Crime held a hearing on the bill but decided not to vote on it.²¹⁴ Finally, both the House and Senate versions of the RAVE Act died when the 107th Congress adjourned at the end of 2002. In February of 2003, Senate supporters re-introduced the RAVE Act under a new name (the Illicit Drug Anti-Proliferation Act).²¹⁵ The new bill did not contain the controversial “findings” section included in the 2002 bill that found “raves have become little more than a way to exploit American youth” and that the trafficking and use of “club drugs” is “deeply embedded in the rave culture.”²¹⁶

At the same time, a bill identical to the Illicit Drug Anti-Proliferation Act was introduced in the House under the old name RAVE Act.²¹⁷ As opposition to the legislation grew, supporters chose to bypass the traditional process and attach it at the last minute to an unrelated bill without debate or a vote of Congress.²¹⁸ Senator Biden slipped the RAVE Act into the “Amber Alert”

²¹¹ Press Release, Senator Leahy’s office (April 10, 2003), *available at* <http://leahy.senate.gov/press/200304/041003c.html> (last visited June 8, 2004).

²¹² *See supra* note 212.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Illicit Drug Anti-Proliferation Act of 2003, S. 226, 108th Cong. §§ 1-4 (2003).

²¹⁶ *See* S. 2633, 107th Cong. § 2 (2002).

²¹⁷ *See* H.R. 718, 108th Cong. (2003).

²¹⁸ *See* Neva Chonin, *Congress Acts Out Against Club Culture*, S.F. CHRON, April 27, 2003 (Sunday Datebook), at 35; Evelyn McDonnell, *Antirave New World: A Bill in the Senate Designed to go After Drug Use Has Fans of Electronic Music Singing an Angry Tune*, MIAMI HERALD, Sept. 18, 2002, at E1; David Montgomery, *Ravers Against the Machine: Partiers and ACLU Take On ‘Ecstasy’ Legislation*, WASH. POST, July 18, 2002, at A1.

bill.²¹⁹ The final “Amber” bill was then sent to every Member of Congress for a final straight-up or straight-down vote. Even those that opposed the RAVE Act had to vote for the final “Amber” bill if they wanted to enact the provisions preventing child abductions.²²⁰ This is how the RAVE Act, a controversial drug distribution bill, was passed into law as part of an omnibus bill to protect children, at a time when child safety was a politically hot topic and one that could not be delayed.²²¹

In contrast, the Crackhouse statute was passed as part of an omnibus anti-drug bill:

“a bill to strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops and in halting international drug traffic, to improve enforcement of Federal drug laws and enhance interdiction of illicit drug shipments, to provide strong Federal leadership in establishing effective drug abuse prevention and education programs, to expand Federal support for drug abuse treatment and rehabilitation efforts, and for other purposes.”²²²

As the *Chen* court noted, Section 856 “was enacted to ‘outlaw[] operation of houses or buildings, so-called ‘crack houses’, where ‘crack’, cocaine and other drugs are manufactured and used.”²²³ The Crackhouse statute was a natural fit into this larger bill that targeted drug use and distribution on many different levels.

²¹⁹ See S.226, 108th Cong. §§ 1-4 (2003) (enacted).

²²⁰ *Id.*

²²¹ The Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108 21 § 608 (2003). The bill passed at a time when everyone in the nation was concerned with the safety of children. Elizabeth Smart had recently been found and returned to her Salt Lake City Home, and two teenage girls had just been rescued from their abductor in southern California, thanks to that state’s emergency response system. Congress wanted to take immediate action regarding missing children, and thus the PROTECT Act was signed into law by President George W. Bush on April 30th, 2003. This act created the desired nationwide Amber Alert system and simultaneously revived the RAVE Act. The America’s Missing: Broadcast Emergency Response (“AMBER”) system was created as a legacy to 9-year-old Amber Hagerman, who was kidnapped while riding her bicycle in Arlington, Texas, and then brutally murdered. See <http://www.ojp.usdoj.gov/amberalert/> (last visited June 8, 2004) or <http://www.amberalertnow.org/> (last visited June 8, 2004).

²²² See H.R. 5484, 99th Cong., 2nd Sess., 132 CONG. REC. S13,779 (daily ed. September 26, 1986).

²²³ See *United States v. Chen*, 913 F.2d 183, 188 (5th Cir. 1990).

VII. THE RAVE ACT IS UNCONSTITUTIONAL

The RAVE Act may be challenged on any number of constitutional grounds, but this Comment will examine the main constitutional challenge to the RAVE Act: its overbreadth.²²⁴ This section proceeds to examine how the substantial overbreadth of the statute chills the exercise of constitutionally protected activities engaged in by electronic musicians, their audience, electronic music promoters and even political organizations.

A. *The Overbreadth Doctrine*

A statute is overbroad when it is designed to punish activities that are not constitutionally protected but includes within its scope activities that are protected by the First Amendment.²²⁵ The objectionable qualities of overbreadth rest chiefly upon “the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.”²²⁶ Justice Powell has said that the danger inherent in an overbroad law is that it can furnish a “convenient tool” for harsh and discriminatory enforcement by local prosecuting officials against particular groups.²²⁷ Justice Marshall has said that the Court will

²²⁴ Recall that the Crackhouse statute, on which the RAVE Act was based, has been challenged unsuccessfully as being overly vague but it has never been challenged as overbroad. *See generally* Richard Belfiore, *Validity, Construction and Application of Federal “Crack-House Statute” Criminalizing Maintaining Place for Purpose of Making, Distributing, or Using Controlled Drugs* (21 U.S.C.A. § 856), 116 A.L.R. FED. 345 (1993).

²²⁵ *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 69 (1981); Village of Schaumburg v. Citizens For a Better Environment, 444 U.S. 620, 627 (1980); Young v. American Mini Theaters, 427 U.S. 50, 59 n.17 (1976); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971); Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 155 (1969); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216; *see also* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (1981) (arguing that overbreadth analysis involves substantive constitutional law); Martin H. Redish, *The Warren Court, The Burger Court and The First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031 (1984) (discussing the overbreadth doctrine from an anti-categorical perspective).

²²⁶ *See* NAACP v. Button, 371 U.S. 415 (1963); City of Houston, Texas v. Hill, 482 U.S. 451, 465 (1987) (quoting United States v. Reese, 92 U.S. 214, 221 (1876)): “As the Court observed over a century ago, “[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.””

²²⁷ *See, e.g.,* Coates v. Cincinnati, 402 U.S. 611, 615-16, (1971); Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).

ultimately vindicate a person whose speech is constitutionally protected, “for the value of a sword of Damocles is that it hangs – not that it drops.”²²⁸

1. Historical Origins

The fountainhead²²⁹ of the overbreadth doctrine was *Thornhill v. Alabama*,²³⁰ decided by the Supreme Court in 1940. The plaintiff in that case was an individual seeking reversal of his conviction for loitering and picketing under an Alabama statute prohibiting a person, without just cause or legal excuse, to “go near to or loiter about the premises of”²³¹ any person engaged in lawful business for the purpose of influencing or inducing others to adopt any of certain enumerated courses of action.²³² The Court struck the Alabama statute on its face, holding that the freedom of speech secured by the First Amendment against abridgment by the government is among the fundamental personal rights and liberties which are secured to all persons.²³³

The main rationale for this doctrine is that an overly broad statute can have a chilling effect²³⁴ on the First Amendment right to free speech. This rationale serves two main functions.²³⁵ First, it serves as the reason for striking an overbroad law and ending its deterrence of constitutionally preferred activities.²³⁶ Second, it directly answers the argument that courts

²²⁸ See *Arnett v. Kennedy*, 94 S. Ct. 1633, 1682 (1974) (Marshall, J., dissenting).

²²⁹ This term was used by Professor Monaghan in his early scholarship of this doctrine. See Monaghan, *supra* note 228, at 11.

²³⁰ See *Thornhill*, 310 U.S. 88 (1940).

²³¹ *Id.* at 92.

²³² *Id.* *Thornhill* was a union activist who was protesting his employer’s policy of not employing union laborers.

²³³ *Thornhill*, 310 U.S. at 95.

²³⁴ See, e.g., *Zwickler v. Koota*, 389 U.S. 241, 256 n.2 (1967); *Gooding v. Wilson*, 405 U.S. 518 (1971); see also Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970).

²³⁵ See Note, *supra* note 237, at 853-56.

²³⁶ *Id.*

should act with judicial restraint until a claimant who is himself privileged has pursued all normal channels of review first. The appreciation of the chill on potential litigants and its steep potential costs²³⁷ – namely delay in as applied review and the intervening loss of rights – has led certain Supreme Court justices²³⁸ to invalidate statutes on their face, rather than waiting for a litigant to challenge the statute’s constitutionality on the basis of how it has been applied to him. In this sense, the overbreadth doctrine has been called a prophylactic one, with its main purpose to combat this chilling effect.²³⁹

The overbreadth doctrine has been called a “principled response to the systematic failure of other methods of adjudication to protect first amendment rights adequately.”²⁴⁰ Since *Thornhill*, the First Amendment overbreadth doctrine flourished for nearly thirty years under the Warren Court, which tended to be protective of individual liberties.²⁴¹ Under the Burger Court, the doctrine appeared to be severely curtailed,²⁴² namely by the holding in *Broadrick v.*

²³⁷ *Id.*

²³⁸ Among the most notable is Chief Justice Earl Warren (1953-1969). See Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW U. L. REV. 1031 (1984).

²³⁹ See Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 868 n.94 (1991). Professor Fallon, in using the term “prophylactic,” refers to two things: 1) that the central Constitutional concern is to protect the speech or expressive activity of persons other than those who are allowed to present overbreadth challenges; and 2) that courts, especially the Supreme Court, have discretion to adjust the doctrine’s contours in light of their assessment of the doctrine’s practical effects; see also Daniel Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 293-95 (1988) (arguing that the Constitution may require some rule or doctrine to protect Constitutional values, even when it does not require any particular rule or doctrine); see also Henry Paul Monaghan, *The Supreme Court, 1974 Term – Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). The prophylactic effect of the overbreadth doctrine may be traced back to the origins of judicial review found in *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁴⁰ Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 846 (1970).

²⁴¹ See *supra* note 241.

²⁴² *Id.*

*Oklahoma*²⁴³ that the overbreadth of a statute, particularly where conduct (not mere speech) is involved must be “not only . . . real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”²⁴⁴ The Burger Court, in what First Amendment scholar Martin Redish has called an “overreaction” to the Warren Court’s approach to the overbreadth doctrine, placed limits on the doctrine’s use “that seem to have no rhyme or reason, other than that they limit the protective reach of the overbreadth doctrine.”²⁴⁵ The result was a retrenchment from the Warren Court’s protective approach to individual liberties. After *Broadrick*, any case involving expressive conduct had to be substantially overbroad.²⁴⁶

The *Broadrick* decision ostensibly created a limitation on the ability of individuals to bring First Amendment overbreadth claims when the protected activity is expressive conduct,²⁴⁷ rather than “pure” (verbal) speech. Yet a glaring omission from the *Broadrick* opinion was any reference to the traditionally cited “‘speech plus’ chestnuts.”²⁴⁸ The Court’s next overbreadth opinion was a pure speech case that failed to mention *Broadrick* at all,²⁴⁹ and in its subsequent decisions the Court appeared to abandon the distinction between expressive conduct and pure

²⁴³ 413 U.S. 601(1973). Professor Redish has called this ruling the “watershed (or perhaps) Waterloo of modern overbreadth analysis.” See *supra* note 241, at 1057.

²⁴⁴ See *Broadrick*, 413 U.S. at 615.

²⁴⁵ See *supra* note 241, at 1032 n.7.

²⁴⁶ See *id.* at 1058.

²⁴⁷ *Id.*

²⁴⁸ See *id.* at 1059 n.152-4 (1984), citing “speech plus” opinions such as *United States v. O’Brien*, 391 U.S. 367 (1968); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966). The term “speech plus” refers to speech that contains within it strong elements of action. See, e.g., *Broadrick*, 413 U.S. at 615; Redish, 78 NW U. L. REV. 1031, 1058; J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 988-89 (2d ed. 1983).

²⁴⁹ See *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (city ordinance making it unlawful to “curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty” was overbroad because the term “opprobrious” could be applied to statements that were not likely to give rise to an immediate breach of the peace).

speech entirely.²⁵⁰ In its next overbreadth case, the Court held that the “substantiality” requirement of *Broadrick* was “sound”²⁵¹ and should be applied to all First Amendment claims of overbreadth, irrespective of whether the claim is one of expressive conduct or pure speech.²⁵² Thus, today any claim that a statute is overbroad must meet this substantiality requirement.

The substantiality requirement has never been defined by the Supreme Court and is an analytic nightmare.²⁵³ Under the analysis employed in both *Broadrick* and *Ferber*, the substantiality of the overbreadth is determined on a comparative or relative basis, by comparing the number of instances of unprotected activity reached by the challenged statute to the number of instances of protected activity reached.²⁵⁴ If the ratio of unprotected activity to protected activity is high, the statute can stand.²⁵⁵ If the statute reaches a relatively high proportion of protected activities, the statute is struck.²⁵⁶

2. Modern Overbreadth²⁵⁷

²⁵⁰ Compare *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (declaring ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations that do not use at least seventy-five percent of their receipts for “charitable purposes” overbroad and the opinion makes no reference to the “expressive conduct” limitation of *Broadrick*) (White, J.) with *Coates v. City of Cincinnati*, 402 U.S. 611, 618, 620-21 (1971) (White, J., dissenting) (in which Justice White first urges application of the “conduct limitation” to an ordinance involving essentially the same type of solicitous conduct at issue in *Schaumburg*).

²⁵¹ *New York v. Ferber*, 458 U.S. 747 (1982).

²⁵² *Id.*; see also Redish, *supra* note 241, at 1064.

²⁵³ Professor Redish argues that “by applying its code word –“substantiality”- instead of engaging in a careful interest-balancing process, the Court disregards completely the essential function performed by the overbreadth doctrine in the first place: to determine whether a valid statutory goal can be achieved by means less invasive of free speech interests.” See Redish, *supra* note 241, at 1066.

²⁵⁴ *Broadrick* states that “particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, *judged in relation to the statute’s plainly legitimate sweep.*” *Broadrick*, 413 U.S. at 615 (emphasis added).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Modern overbreadth doctrine is also an analytic nightmare. See Marc Rohr, *Freedom of Speech After Justice Brennan*, 23 GOLDEN GATE U. L. REV. 413, 422 (1993): “The entire Court . . . has been inconsistent in its

While the substantiality requirement appears to be good common sense, more recent decisions from the Supreme Court illustrate the problems inherent to the theory that substantiality may be gauged by using a simple tally. *Massachusetts v. Oakes*²⁵⁸ provides a fine example.²⁵⁹ While Justices Brennan and Scalia agreed that a statute prohibiting the production or distribution of photos of children in particular forms of partial nudity was overbroad, the issue of substantiality remained.²⁶⁰ For both Justices, the issue was largely one of how many family photos existed, for example, of naked toddlers on the beach.²⁶¹ Justice Brennan concluded that there would be many such photos relative to the statute's permissible applications.²⁶² Justice Scalia reached the opposite conclusion.²⁶³ Neither Justice was able to provide any numerical estimate, let alone a reliable numerical estimate, as to how many acts by how many people in any given year the statute might permissibly and impermissibly reach.²⁶⁴

application of announced limitations.” See, e.g., *supra* note 253 (Justice White appears inconsistent because he endorsed application of *Broadrick*'s expressive conduct limitation to a statute addressing solicitous conduct in 1971; by 1980, in an opinion he authored discussing essentially the same issue, Justice White apparently abandoned this position).

²⁵⁸ 109 S. Ct. 2633 (1989) (plurality opinion).

²⁵⁹ See generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 894 (1991), in which Professor Fallon points out the flaws in the Supreme Court's logic in using such a formulaic approach to overbreadth.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Oakes*, 109 S. Ct. at 2645.

²⁶³ *Id.* at 2641.

²⁶⁴ See Fallon, *supra* note 242, at 894. Ultimately, the overbreadth challenge to the statute in question was rendered moot when the Massachusetts legislature amended the statute.

This unavoidable problem has led several First Amendment scholars²⁶⁵ to advocate abandonment of the simple tally approach to gauging substantiality in favor of a more sensible balancing test. Professor Fallon, for example, believes the Court should weigh: a) the state's substantive interest in being able to impose sanctions for a particular kind of conduct under a particular legal standard, as opposed to being forced to rely on other, less restrictive substitutes against b) the First Amendment interest in encouraging narrow statutes and avoiding as much as possible the chilling of constitutionally protected conduct.²⁶⁶

The Court has suggested that “overbreadth” and “narrow tailoring” are different expressions for the same constitutional defect.²⁶⁷ The narrowly tailored analysis is, by its nature, a balancing test.²⁶⁸ While the Supreme Court has never explicitly abandoned the old

²⁶⁵ Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 894 (1991); Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW U. L. REV. 1031 (1984); Lawrence A. Alexander, *Is There an Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541, 553-54 (1985).

²⁶⁶ See Fallon, *supra* note 262. Professor Fallon calls this a version of the familiar First Amendment less-restrictive-alternatives analysis. For a similar formula, see Lawrence A. Alexander, *Is There an Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541, 553-54 (1985); see also Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969) (this analysis is likely to be used “wherever the Supreme Court is serious about judicial review”); Redish, *supra* note 245, at 1066-69 (advocating a balancing test).

²⁶⁷ See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (using the requirements of the two terms interchangeably); *Grayned v. City of Rockford*, 408 U.S. 104, 114-20 (1972) (conflating overbreadth and narrow tailoring analyses). *But see* *New York v. Ferber*, 458 U.S. 747 (1982) (when the Court uses a categorical approach to free speech, as opposed to the balancing approach, the overbreadth and narrow tailoring tests identify different constitutional defects); see also *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 959, 965 n.13 (1984) (treating substantial overbreadth and narrow tailoring requirements interchangeably, and noting that the term “overbreadth” has been used “to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling government interest.”); see also *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1274 (D.C. Cir. 1992) (noting that there does not seem to be an apparent difference between the two tests); Marc I. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 n.259 (1998); Monaghan, *supra* note 229, at 37 (“the Court has reacted interchangeably to ‘overbreadth’ and ‘least restrictive alternative’ challenges both inside and outside the First Amendment context.”)

²⁶⁸ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); see also THOMAS E. BAKER & JERRE S. WILLIAMS, *CONSTITUTIONAL ANALYSIS IN A NUTSHELL* 138-43 (Thomson West Pub. Co. 2d ed. 2003) (1976), for a concise yet comprehensive description of the different balancing tests the Supreme Court uses, and how and when these tests are applied.

substantiality formula, it has implicitly used such a balancing test in recent cases²⁶⁹ such as *City of Houston v. Hill*,²⁷⁰ *Osborne v. Ohio*²⁷¹ and *City of Lakewood v. Plain Dealer Pub. Co.*²⁷²

These cases indicate that the Supreme Court cannot avoid ad hoc balancing when it seeks to judicially review statutes that affect First Amendment rights.

B. The Overbreadth Analysis

This Comment seeks to make a contribution to the growing body of scholarship advocating that the doctrine of overbreadth can play a limited role in checking the legislature when it deliberately drafts an overbroad statute to obscure an improper purpose;²⁷³ and, in this case, when the legislature deliberately drafts a very broad statute while failing to give adequate consideration to the statute's impact on First Amendment rights. As the modern overbreadth cases and commentary support an approach to overbreadth analysis that focuses on whether the statute has been narrowly tailored to serve a compelling government interest, so will this Comment, giving only limited consideration to the "substantiality" of the overbreadth of the RAVE Act.

²⁶⁹ Even as far back as *Ferber*, Justice Stevens stated that he would "refuse to apply overbreadth analysis for reasons unrelated to any prediction concerning the relative number of protected communications that the statute may prohibit," leading one commentator to speculate that Justice Stevens was in fact refusing to join his colleagues in estimating the "substantiality" of the perceived overbreadth of any statute. See Marc Rohr, *Freedom of Speech After Justice Brennan*, 23 GOLDEN GATE U. L. REV. 413, 422 (1993).

²⁷⁰ 482 U.S. 451 (1987) (where the analysis plainly had a qualitative as well as a quantitative dimension).

²⁷¹ 110 S. Ct. 1691 (1990) (while the Court avoided classifying its analysis as balancing, it could not avoid a somewhat open-ended balancing approach).

²⁷² 486 U.S. 750, 757-69 (1988) (standardless licensing statutes pose special threats to First Amendment values, as they tend to mask invidious discrimination, thus insulating the statute from judicial review).

²⁷³ See, e.g., Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 36 n.30; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 38-39 (1975); Redish, *supra* note 229, at 138 n.150. This argument is implied in David S. Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 713 (1978), and Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 918-20 (1970).

1. Narrowly Tailored²⁷⁴

In his introductory statements to S. 2633, Senator Biden explained that the new RAVE Act was intended to “tailor” the Crackhouse statute to rave promoters’ actions.²⁷⁵ Later, after opposition to the RAVE Act grew, he again stated that

“The purpose of my legislation is not to prosecute legitimate law-abiding managers of stadiums, arenas, performing arts centers, licensed beverage facilities and other venues because of incidental drug use at their events My bill would help in the prosecution of rogue promoters who not only know that there is drug use at their event but also hold the event for the purpose of illegal drug use or distribution.”²⁷⁶

As part of an overbreadth analysis, the Court does not assess just the nature of the government’s interest but also whether that interest could be served by means that would be less intrusive of activities protected by the First Amendment.²⁷⁷ In this case, the government already has many tools with which it can target the drug ecstasy - tools that do not violate an individual’s constitutional rights. For example, the Comprehensive Drug Abuse Prevention and Control Act (the Controlled Substance Act of 1970),²⁷⁸ the Comprehensive Methamphetamine Control Act of 1996²⁷⁹ and the Chemical Diversion Trafficking Act²⁸⁰ may all be used to curtail the distribution

²⁷⁴ While some might say that the level of review should be intermediate under *United States v. O’Brien*, 391 U.S. 367 (1968), this Comment assumes that the conduct at raves is expressive and is therefore entitled to the strict scrutiny of expressive conduct found in cases such as *Texas v. Johnson*, 491 U.S. 397 (1989). *See supra* Part II, Sections B and C for an illustration of why this conduct is expressive.

²⁷⁵ 148 CONG. REC. S5706 (daily ed. June 18, 2002) (statement of Sen. Biden). It is unclear from the record whether he was referring to parties held in nightclubs or parties held in open spaces; presumably, he intended to target both.

²⁷⁶ 148 CONG. REC. S10,218 (daily ed. Oct. 9, 2002) (statement of Sen. Biden).

²⁷⁷ *See, e.g.*, *Buckley v. American Constitutional Law Foundation*, 119 S. Ct. 636, 642 (1999); *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70 (1981); *Village of Schaumburg v. Citizens for A Better Environment*, 444 U.S. 620, 636 (1980).

²⁷⁸ 21 U.S.C. §§ 801-904 (2004).

²⁷⁹ 21 U.S.C. § 872a (2004).

²⁸⁰ 21 U.S.C. § 801 (2004).

of ecstasy or the possession or distribution of the precursor chemicals needed to make the street drug ecstasy. The Ecstasy Anti-Proliferation Act of 2000²⁸¹ provides funds for school- and community-based anti-drug abuse education programs. The government's compelling interest is satisfied with these more narrowly tailored statutes that do not burden First Amendment rights.

The main reason the statute is overbroad is that while it probably could aid law enforcement in prosecuting rogue rave promoters, the RAVE Act sweeps too broadly into the domain of precious First Amendment rights.

a) The RAVE Act's Effect on First Amendment Rights

The RAVE ACT is overbroad because it punishes activities that are protected by the First Amendment. Among these activities is music.²⁸² The individual liberties that are most threatened by the RAVE Act are those of three groups of people: 1) the DJs who create their unique styles of electronic music live at their concerts; 2) their audiences, electronic music enthusiasts who listen to the music and who sometimes engage in their own expressive conduct: rave dancing; and 3) the electronic music promoters who encourage and foster the development of electronic music by promoting electronic music concerts. Additionally, the broad language of the RAVE Act enables law enforcement officials to prosecute other protected activities like association for political purposes that are outside the electronic music context.²⁸³

²⁸¹ 42 U.S.C. § 290aa-5b (2004).

²⁸² See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("[L]ive entertainment, such as musical and dramatic works, fall within the First Amendment guarantee"); see also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *California v. LaRue*, 409 U.S. 109 (1972); *Schacht v. United States*, 398 U.S. 58 (1970); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). The Seventh Circuit has held that wordless music is speech within the meaning of the First Amendment. See *Reed v. Village of Shorewood*, 704 F.2d 943, 950 (7th Cir.1983).

²⁸³ David Crisp, *Free Drugs or Free Speech?*, BILLINGS OUTPOST, June 12, 2003, available at <http://www.billingsnews.com/story?storyid=5213&issue=152>. The event at issue in this case was a rock concert-

1) DJ Performer-Composers:

As noted above in Part II A, the DJs at electronic music concerts and raves are performing live. This Comment asserts that at their performances they are creating music, a form of expression that is constitutionally protected by the First and Fourteenth Amendments.²⁸⁴ Unlike arts such as painting or literature, where there can only be one true original that possesses authenticity,²⁸⁵ music is an art that depends on performance for realization.²⁸⁶ It is not constitutionally sufficient to say that people can create music in the privacy of their own homes. As Justice Blackmun stated in *Schad v. Borough of Mount Ephraim*²⁸⁷: “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”²⁸⁸

2) The Audience:

The listeners at an electronic music concert can assert their own independent claims to violations of their First Amendment rights. Put another way, the audience to a communication may assert a First Amendment right independent of the rights of the speaker.²⁸⁹ Where a speaker

benefit held by the National Organization for the Reform of Marijuana Laws (“NORML”) to raise money to put a medical marijuana initiative on the ballot in 2004.

²⁸⁴ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790 n.1 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment.”).

²⁸⁵ Wes Blomster, *Electronic Music*, 32 TELOS 65, 66 (1977).

²⁸⁶ *Id.* at 67.

²⁸⁷ 452 U.S. 61 (1981).

²⁸⁸ *Schad*, 452 U.S. at 78 (Blackmun, J., concurring) (quoting *Schneider v. State*, 308 U.S. 146, 151 (1939)).

²⁸⁹ See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2390-91, 2394 (1996) (statutory provision requiring cable system operators to segregate and block “patently offensive” sex-related material on leased cable channels was unconstitutional on the ground that it imposed too great a burden on the First Amendment rights of the viewing audience); *United States v. National Treasury Employees Union*, 513 U.S. 454, 470 (1995) (prohibition on the receipt of honoraria by federal employees imposed a “significant burden on the public’s right to read and hear what the employees would otherwise have written and said”); see also *Smith v. United States*, 431 U.S. 291, 319 n.18 (1977) (Stevens, J., dissenting) (“[T]he First Amendment necessarily protects the right to

exists, the protection afforded is to the communication, to its source, and to its recipients both.²⁹⁰

If the RAVE Act eliminates all raves and electronic music concerts nationwide and the DJ cannot perform in public, the audience loses its opportunity to listen, which is a violation of its First Amendment rights.²⁹¹

The audience not only listens, but sometimes - as at other types of music concerts - members of the audience dance.²⁹² Just as the Court has explicitly recognized that music is deserving of First Amendment protection,²⁹³ it has also explicitly afforded that same protection to dance.²⁹⁴ While most of the Court's cases have concerned nude dance and the expression conveyed therein,²⁹⁵ this Comment argues that the dances performed at electronic music concerts

'receive information and ideas.'" (quoting *Kleindienst v. Mandel*, 92 S. Ct. 2576, 2581-82 (1972)); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (the audience's rights to receiving a communication are reciprocal to those of the speaker, or source, of the communication), *noted in* Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1861 n.83 (1997).

²⁹⁰ See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (the protection afforded to communications runs both to the source of the communication and to the recipient of the communication.)

²⁹¹ *Id.*

²⁹² See *supra* Part II C; see also Complaint for Declaratory and Injunctive Relief, *McClure v. Ashcroft*, 2002 U.S. Dist. LEXIS 2532 at ¶ 27 (E.D. La. Feb. 01, 2002) (No. 01-2573), *vacated on other grounds McClure*, 335 F.3d 404 (5th Cir. 2003). One dancer, Michael Behan, uses both glow sticks and masks in his performances. Prior to the ban on glowing objects and masks in the State Palace Theater case, he often came in character, dressed as "Mr. Bunny," with his costume identifying him to other attendees as "a performance dancer and as somebody who would distribute candy and various toys." See *id.* As part of his costume, Behan would wear masks decorated with rabbit or "other designs painted with glow paint." *Id.* These performances were well-rehearsed, practiced in advance and tailored to "be visually attractive to viewers who watched through refractive glasses." *Id.* Other dancers and attendees "often cleared space for [Behan] on the dance floor and gathered around to watch [his] dances, even without refractive glasses." *Id.*

²⁹³ See *supra* note 287.

²⁹⁴ See, e.g., *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460 (1991); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *California v. LaRue*, 409 U.S. 109, 116-17 (1972); *Schacht v. United States*, 398 U.S. 58 (1970). Of the nine Justices, only Justice Scalia believes the First Amendment to be inapplicable to nude dancing. He agrees that the First Amendment protects expressive conduct but only "where the government prohibits conduct precisely because of its communicative attributes" See *Barnes*, 111 S. Ct. 2456, 2466 (Scalia, J., concurring).

²⁹⁵ In the Court's post-*Schad* decisions it has consistently re-affirmed its position in *Schad* that nude dancing performed as entertainment falls within the scope of the First Amendment. See *FW/PBS, d/b/a Paris Adult*

and raves should also be protected under the First Amendment, and to an even greater extent than nude dance, as the dancing at electronic music concerts and raves do not run afoul of obscenity considerations.²⁹⁶

Whether the dance performed by members of the audience at an electronic music concert or a rave is protected by the First Amendment depends on whether the conduct is expressive.²⁹⁷ An individual's conduct is considered expressive if it is "sufficiently imbued with the elements of communication."²⁹⁸ The Supreme Court developed a two-part test, the *Spence* test, to help courts determine whether expressive conduct can be characterized as "speech": 1) whether an intent to convey a particularized message was present, and 2) whether the likelihood was great that the message would be understood by those who viewed it.²⁹⁹ Later, the Court's decision in *Boy Scouts of America v. Dale*³⁰⁰ eliminated the requirement that the message from an expressive association³⁰¹ be particular.³⁰² Thus, today the standard for whether conduct is expressive within

Bookstore II v. City of Dallas, 493 U.S. 215 (1990); *Massachusetts v. Oakes*, 491 U.S. 576 (1989) (Justice Brennan declaring that *Schad* affords nude dancing protection under the First Amendment, and that modeling, like nude dancing, "enjoys like shelter under the First Amendment.") (Brennan, J., dissenting); *see also* *Sable Communications v. FCC*, 492 U.S. 115 (1989) ("[s]exual expression which is indecent but not obscene is protected by the First Amendment"); *Young v. Arkansas*, 474 U.S. 1070 (1985) (Justice White recognizing the Court's "repeated indications that barroom nude dancing is a type of expression that is protected under the First Amendment") (White, J., dissenting); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 719 (1980) (in *LaRue* the Court recognized "the protected expression implicated by nude dancing") (Stevens, J., dissenting). *But see* *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (social dancing is not constitutionally protected communicative activity).

²⁹⁶ Information Bulletin: Raves, National Drug Intelligence Center, U.S. Dep't of Justice, No. 2001-L0424-004, April 2001, at 4, *available at* <http://www.usdoj.gov/ndic/pubs/656/656t.htm>. Most event attendees wear "lightweight, loose-fitting clothes and dress in layers." *Id.*

²⁹⁷ *U.S. v. O'Brien*, 391 U.S. 367 (1968) (Free speech is not limited to the spoken word, nor does it apply to a limitless variety of conduct).

²⁹⁸ *Spence v. State of Washington*, 418 U.S. 405, 409 (1974) (per curiam).

²⁹⁹ *Id.*

³⁰⁰ 530 U.S. 640 (2000).

³⁰¹ This Comment argues that the electronic music and dance community is an expressive association. *See infra* text accompanying notes 320-21.

the context of a parade³⁰³ or other expressive gathering is simply the determination that the intent to convey a message was present and that the likelihood was great that the message would be understood by those who viewed it.

In applying the *Spence* test to the dances performed at electronic music concerts held at the State Palace Theater in New Orleans, Judge Porteous in *McClure v. Ashcroft*³⁰⁴ found that the test was met, that the dancers were acting as performance artists and that each performance by each artist conveyed a different message,³⁰⁵ and that there was a great likelihood that the audience who viewed these messages would understand the messages.³⁰⁶ The judge also found that attendees of raves go not just for the music, but to dance and to watch the performance of other dancers, whether they be on a stage or on the dance floor.³⁰⁷ Finally, the judge noted that just because the DEA agents who investigated the raves did not understand the message that was conveyed does not mean that a message was not both conveyed and understood.³⁰⁸ These

³⁰² [A]ssociations do not have to associate for the “purpose” of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to that protection. For example, the purpose of the St. Patrick’s Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.

Dale, 530 U.S. at 655.

³⁰³ See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), where the parade organizers were a private group named the South Boston Allied War Veterans Council, an unincorporated association of individuals.

³⁰⁴ See *McClure v. Ashcroft*, 2002 WL 188410 (E.D. La.) (2002), *rev’d on other grounds*, *McClure v. Ashcroft*, 335 F.3d 404 (5th Cir. 2003).

³⁰⁵ Usually the message was one of freedom or identity with a certain culture. *See id.*

³⁰⁶ *Id.* at 8 (quoting *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1087 (1990)).

³⁰⁷ *Id.*

³⁰⁸ “[W]e think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.” *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 25 (1970)).

performances are expressive conduct and are protected by the First Amendment.

The main argument against including rave dancing within the category³⁰⁹ of expressive conduct that is protected by the First Amendment is that it is not expression at all, but mere conduct.³¹⁰ But the expression that is relevant to freedom of speech is “the expression of a thought, sensation or emotion *to another person*.” (emphasis included).³¹¹ What dance expresses, as Judge Flaum emphasized in *Miller v. Civil City of South Bend*,³¹² “is, like most art-- particularly but not only nonverbal art--emotion, or more precisely an ordering of sights and sounds that arouses emotion.”³¹³ The dancers at electronic music concerts and raves are expressing their emotions. Their dances, like the “unquestionably shielded”³¹⁴ paintings of

³⁰⁹ This special category includes “symbolic speech” actions such as picketing (*Thornhill v. Alabama*, 310 U.S. 88, 102-04 (1940)); sleeping in a park (*Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), assuming but not deciding that sleeping in a park is protected speech); wearing black armbands to protest the Vietnam War (*Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969)); flag burning to protest governmental policies in general (*Texas v. Johnson*, 491 U.S. 397, 406 (1989)); nude dancing to convey eroticism (*Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456, 2460 (1991) and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981)); see also John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Richard A. Seid, *A Requiem for O'Brien: On the Nature of Symbolic Speech*, 23 CUMB. L. REV. 563 (1992); Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844 (1997).

³¹⁰ See *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

³¹¹ *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1091 (1990) (Posner, J. concurring), *rev'd* by *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion) (applying *O'Brien* to a prohibition of nude dancing in nightclubs and declining to apply the *Spence* test). The *Barnes* opinion has been criticized by several First Amendment scholars. See, e.g., Professor Alan J. Howard, 44 ST. LOUIS U. L.J. 897 (arguing that all three rationales behind *Barnes* leave much to be desired); Professor Jed Rubenfeld, 53 STAN. L. REV. 767, 773 (arguing that *Barnes* should have been decided using an obscenity analysis); Professor Richard Seid, 23 CUMB. L. REV. 563, 613 (arguing that content neutrality and the First Amendment cannot co-exist with respect to the same regulation).

³¹² *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1091 (1990) (Posner, J. concurring), *rev'd* by *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion) (applying *O'Brien* to a prohibition of nude dancing in nightclubs and implicitly declining to apply the *Spence* test).

³¹³ *Id.*

³¹⁴ See *supra* note 307, at 569.

Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,³¹⁵ are not expressing particular thoughts or ideas, but the Supreme Court has recognized that certain types of art defy the *Spence* test.³¹⁶ The creative dances performed at electronic music concerts and raves are simply another form of abstract art.

3) Electronic Music Promoters:

The activities of the electronic music concert and rave promoters who organize these creative events are also protected. The modern trend of the Supreme Court is to implicitly treat the rights of expressive associations as a unified doctrine.³¹⁷ The Court now seems to consider social clubs, parades, civil rights groups and political parties as all being members of a larger category of expressive associations.³¹⁸ In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,³¹⁹ the Court considered the attempt of a gay advocacy group to march in Boston's St. Patrick's Day parade. One might think that a parade would be considered the collective speech of the marchers.³²⁰ Instead, the Court identified the "speaker" as the veterans' group³²¹ that organized the parade. If the speaker is the organizer, the legitimate electronic music promoter

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ See Daniel A. Farber, *Speaking in the First Amendment Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483 (2001).

³¹⁸ See, e.g., *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

³¹⁹ 515 U.S. 557 (1995).

³²⁰ *Id.*

³²¹ This private group, the South Boston Allied War Veterans Council, was an unincorporated association of individuals. See *id.*

can be considered the First Amendment speaker for this expressive association, the electronic music and electronic dance community.³²²

4) Association for Political Purposes

The RAVE Act also impairs the individual's right to assemble peaceably. The freedom of association is derived from the freedom of speech and assembly set forth in the First Amendment to the U.S. Constitution.³²³ Association for purposes expressly related to the First Amendment includes political, religious or expressive activities,³²⁴ but it is widely accepted that political speech is at the core of First Amendment protection.³²⁵ This most protected type of speech has been inhibited by the RAVE Act.

The RAVE act is supposed to be used to punish business owners and/or event promoters who "knowingly" allow drug-related activities to take place at their events, but on its face the Act has given free reign to law enforcement officials who are offended either by opponents of the nation's current drug policy or by gay rights groups, who frequently use concerts and raves as fund-raising events.³²⁶ As Justice Brennan stated in *City of Houston, Texas v. Hill*: "Although we appreciate the difficulties of drafting precise laws, we have repeatedly invalidated laws that

³²² The "rave culture" is one that is predominantly young and predominantly gay, and one where the message conveyed by creative dance performances is one of peace, love, unity and respect ("PLUR"). The PLUR philosophy is frequently seen on tickets, bumper stickers, t-shirts and other items sold at "raves." See DRUG IDENTIFICATION BIBLE 770, (Amera-Chem, Inc. (2001)). The "rave community" may now arguably be considered a political association. See *infra* notes 340-41.

³²³ U.S. CONST. amend. I.

³²⁴ RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 20.41 (3d ed. 1999).

³²⁵ See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam) ("The First Amendment protects political association as well as political expression."); *Williams v. Rhodes*, 393 U.S. 23 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

³²⁶ See *supra* note 287.

provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them.” The RAVE Act is such a law.

Only two months after the RAVE Act was signed into law it was used by the Drug Enforcement Administration to intimidate the owners of a Billings, Montana, Eagles lodge into canceling a combined rock concert-benefit for the Montana chapter of the National Organization for the Reform of Marijuana Laws (NORML) and Students for Sensible Drug Policy (SSDP).³²⁷ On the day the event was set to take place a Billings-based DEA agent presented the venue owners with a copy of the RAVE Act, warning them that they could face a fine of \$250,000 if illicit drugs were found on the premises. The bands, most of whom played regularly at the venue, were also approached and warned that their participation in the event could result in a fine.³²⁸ After consulting with their lawyers, the venue owners cancelled the event.³²⁹ This demonstrates the chilling effect of the RAVE Act.

It has been alleged that the DEA disagreed with the group’s goal of raising money to put a medical marijuana initiative on the ballot in 2004.³³⁰ The concert promoter/benefit organizer, a student at a local university, later said that he would drop his activities in the NORML chapter at Montana State University-Billings and in the SSDP group as a result of this incident.³³¹ This is yet another example of the RAVE Act’s chilling effect.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *See supra* note 286.

³³⁰ *Id.*

³³¹ *See supra* note 287. The promoter-organizer, Adam Jones, was jailed for a probation violation the day before the concert. He had been on probation for a year and a half after being caught with one half of a gram of psilocybin mushrooms and was arrested the day before the benefit concert for failing to report a change in supervisors at his job. *Id.*

The arbitrary enforcement of this law is a serious problem that even the sponsor of the bill has recognized. Senator Biden expressed his concerns to the DEA administrator over the DEA's actions in Billings, and the agency has allegedly implemented internal guidelines to make it harder for the law to be abused. The DEA website, answering frequently asked questions about the new law, says: "All DEA offices have been provided with guidance regarding the implementation of this new statute. This guidance also establishes procedures within DEA to obtain Headquarters review of proposed enforcement activity under the Act."³³² These new enforcement procedures are not available to the public.³³³

These guidelines do not have the force of law and therefore do not provide any protection for political dissenters who might want to hold a political rally but are concerned that the RAVE Act will be used to shut down their event. In fact, when the RAVE Act was passed, civil liberties groups, business associations and other groups associated with the "rave community"³³⁴ held a rave/political protest on the lawn of the United States Capitol building³³⁵ on September 6,

³³² See Information Bulletin: Raves, National Drug Intelligence Center, U.S. Dep't of Justice, No. 2001-L0424-004, April 2001, at 4, *available at* <http://www.usdoj.gov/ndic/pubs/656/656t.htm> (last visited June 11, 2004).

³³³ *Id.* An exhaustive search of the publications available on the Dep't of Justice website did not reveal the guidelines issued from headquarters to the field offices.

³³⁴ See *The RAVE Act of 2002*, Electronic Music Defense & Education Fund, *available at* <http://www.emdef.org/s2633> (last visited June 8, 2004).

³³⁵ Note that the property owner who would be held liable in this hypothetical would be the United States government. Presumably, the RAVE Act would never be used in such a scenario.

2002.³³⁶ It is possible that somewhere within that political protest someone was using illegal drugs. Under the RAVE Act, as enacted, this type of political association could be suppressed.³³⁷

The RAVE Act on its face reaches not only raves but every kind of expressive, political and cultural gathering imaginable, if any illegal substance could be found there. Professor Monaghan argues that “the Court has a unique responsibility to educate the other federal branches in the need for sensitivity to free-speech interests. A holding of invalidity for overbreadth would, in effect, ‘remand’ the problem to the relevant branch for more finely tuned attention to speech concerns . . .”³³⁸ Professor Monaghan also believes that the deterrence rationale underlying the overbreadth doctrine might also dictate a special canon of federal statutory construction against judicial narrowing.³³⁹ “It is the legislature’s duty to draft legislation precisely, so that courts are not burdened with the task of ruling, on each case to come before it, whether the statute is unconstitutional as applied to the defendant in that particular case.”³⁴⁰

2. The Compelling Government Interest

³³⁶ See <http://www.emdef.org/s2633/#protests> (last visited June 8, 2004). The Washington D.C., Capital Lawn protest was organized by Ravers Organized Against the RAVE Act (ROAR) and was attended by “civil libertarians, health-care professionals, business leaders, and electronic music fans [who] joined together to publicly express their opposition to the RAVE Act.” Compare this group with the parade organizers in *Hurley*, who were also a private group (the South Boston Allied War Veterans Council) and an unincorporated association of individuals.

³³⁷ The “rave community” is arguably something of a political community, as the “protest party” is becoming increasingly prevalent. See FRITZ, at 221-22 (referring to protests named the International Street Party and Make Friends Not War (A Rave for Peace)). See generally MICHEL GAILLOT, MULTIPLE MEANING, TECHNO: AN ARTISTIC AND POLITICAL LABORATORY OF THE PRESENT (Éditions Dis Voir 1998).

³³⁸ Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 11 (1981).

³³⁹ *Id.*

³⁴⁰ *City of Houston, Texas v. Hill*, 482 U.S. 451, 465 (1987); see also Justice Powell’s opinion in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). When First Amendment rights are involved, “precision of drafting and clarity of purpose are essential.” *Id.* at 217-18.

Judge Porteous, in *McClure v. Ashcroft*,³⁴¹ framed the government's interest as "battling the use of the drug ecstasy."³⁴² This is concededly a compelling interest that promotes the public's health and safety. But while Congress intended the RAVE Act to serve that government interest and the larger concern of ecstasy distribution, it carelessly drafted the statute, thus rendering it overbroad. The statute does not distinguish electronic music and the "rave culture"³⁴³ from the ecstasy use of some but certainly not all members of the audience;³⁴⁴ nor does it distinguish between legitimate, licensed electronic music concerts and illegitimate raves.

The legislative history of the Rave Act reveals that the government's purpose is not really in reducing drug use and distribution in constitutionally valid ways. Rather, the government's purpose is to eliminate all electronic music concerts as a way of eliminating the drug ecstasy. This is not only unrealistic; it is impermissible under the United States Constitution. An impermissible legislative purpose can render an otherwise valid law unconstitutional,³⁴⁵ and the legislative history of the RAVE Act is a smoking gun. While this principle is particularly clear in

³⁴¹ See *McClure v. Ashcroft*, 2002 WL 188410 (E.D. La.) (2002), *vacated on other grounds by McClure v. Ashcroft*, 335 F.3d 404 (5th Cir. 2003).

³⁴² *Id.*

³⁴³ See *supra* Part II A; see also *supra* note 326.

³⁴⁴ Complaint for Declaratory and Injunctive Relief at 9, *McClure v. Ashcroft*, 335 F.3d 404 (5th Cir. 2003).

³⁴⁵ See *Church of the Lukumi Babalu Aye*, 508 U.S. 520 (1993) (ordinance dealing with the ritual slaughter of animals did not have compelling governmental interest which would justify the targeting of religious activities – the practice of the Santeria religion – despite the city's claims that its interest lay in public health and the prevention of cruelty to animals); *Washington v. Seattle School District*, 458 U.S. 457, 471 (1982) ("despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes"); cf. *Texas v. Johnson*, 491 U.S. 397, 407 (1989) ("we have limited the applicability of O'Brien's relatively lenient standard to those cases in which the governmental interest is unrelated to the suppression of free expression."); see also Jed Rubenfeld, 53 STAN. L. REV. 767, 776 (2001): "The real function of the O'Brien test is nothing other than ascertaining the law's purpose." Over twenty-five years ago, Paul Brest suggested that O'Brien's real teaching, despite the Court's contrary language, was that "some motives are unconstitutional." See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 590 (1975) Elena Kagan has made a similar point not only about O'Brien, but about the entire structure of contemporary free speech doctrine. See Elena Kagan, 63 U. CHI. L. REV. 413, 414 (1996) ("[N]otwithstanding the Court's protestations in O'Brien . . . First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.").

equal protection cases,³⁴⁶ it is pertinent as well to the government's impermissible purpose in targeting all musical events featuring electronic music.³⁴⁷

While there may be some correlation between electronic dance music and club drugs such as ecstasy, jazz, rock, blues and every other modern genre of music have also included some measure of characteristic drug use.³⁴⁸ For example, in the 1920s, jazz was associated with marijuana; in the 1960s, rock music with LSD; in the 1980s, punk music with speed.³⁴⁹ Yet the government has never before suggested that the musical gathering be prohibited.³⁵⁰ Law enforcement historically and rightly focused on drug use and distribution,³⁵¹ rather than the associated music, dance or culture. All of this changed in 2001, when the Department of Justice (DOJ) declared a law enforcement goal of eliminating (to use the term it used) "raves,"³⁵² a term

³⁴⁶ See Jed Rubenfeld, 53 STAN. L. REV. 767, 775 n.17 (2001), citing *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471 (1982) (striking down formally race-neutral law enacted by statewide referendum where "despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes" and that it was beyond reasonable dispute that the initiative was enacted "because of," not merely "in spite of," its adverse effects upon a racial minority); see also Jed Rubenfeld, *The Purpose of Purpose Analysis*, 107 YALE L.J. 2685 (1998).

³⁴⁷ Music is expression that is protected by the First Amendment. See *supra* note 286.

³⁴⁸ Memorandum of Points and Authorities in Support of Defendants James Estopinal's and Brian Brunet's Motion to Dismiss the Indictment at 23, *United States v. Robert J. Brunet, Brian J. Brunet, and James D. Estopinal* (E.D. La. 2001) (No. 01-010).

³⁴⁹ *Id.*; see also FRANK TIRRO, *JAZZ: A HISTORY* 328 (W.W. Norton & Co. 1993) (Jazz has also been associated with heroin).

³⁵⁰ See *supra* note 352.

³⁵¹ See, e.g., U.S. CONST. amend XVIII; the National Prohibition Acts, 41 Stat. 305 (1919); 42 Stat. 222 (1921); and 46 Stat. 1036 (1931) that made a federal crime the "manufacture, sale or transportation of intoxicating liquors . . . for beverage purposes," repealed by U.S. CONST. XXI § 1; the Prohibition Repeal Act, 49 Stat. 872 (codified at 40 U.S.C. § 1306); the Crackhouse statute, which was designed to "outlaw operation of houses or buildings (crackhouses) where crack, cocaine and other drugs are manufactured and used." See 132 CONG. REC. 26,474 (1986) (excerpt of Senate Amendment No. 3034 to H.R. 5484).

³⁵² See *supra* note 75 (describing "Operation Rave Review" under the heading of "Anti-Rave Initiatives").

that includes both electronic music concerts (small and large) and raves as they have been defined in this Comment.³⁵³

The name of the bill alone speaks volumes. While the acronym RAVE stands for Reducing Americans' Vulnerability to Ecstasy, testimony from government officials reveals that the government's goal in passing the RAVE Act is not to reduce drug use alone but to reduce drug use by eliminating the "raves" themselves. For example, shortly after the indictment of the defendants in the State Palace Theater case under the Crackhouse statute, DEA Administrator Donnie R. Marshall testified before the Senate Caucus on International Narcotics Control³⁵⁴ that "[r]aves, under any name, are a lucrative business and are frequently the sites of crimes such as pharmaceutical diversion, rape, property damage, gang violence, drug sales, robberies, assaults, and murder."³⁵⁵ He added that "we are hopeful that more investigations along the lines of the State Palace Theater investigation will have an impact on shutting down raves." Notably, he did not distinguish between legitimate electronic music concerts and illegitimate raves (events where it is more likely that drugs are present) as the events have been defined throughout this Comment. This indicates that the agency sought to eliminate all concerts featuring electronic music, whether legitimate or not.

One can further ascertain the true objective behind the RAVE Act by reading the Department of Justice's pamphlet providing a 'how-to' guide for shutting down raves.³⁵⁶ This

³⁵³ See *supra* notes 4-8 and accompanying text.

³⁵⁴ America at Risk: The Ecstasy Threat: Hearing Before the Senate Caucus on International Narcotics Control, 107th Cong. 33 (2001) (statement of Donnie R. Marshall, Administrator, Drug Enforcement Administration ("DEA")).

³⁵⁵ *Id.*

³⁵⁶ See Information Bulletin: Raves, National Drug Intelligence Center, U.S. Dep't of Justice, No. 2001-L0424-004, April 2001, at 1, available at <http://www.usdoj.gov/ndic/pubs/656/656t.htm> (last visited June 11, 2004).

bulletin, published by the Department of Justice’s National Drug Intelligence Center in April 2001, called the State Palace Theater its most successful anti-rave initiative.³⁵⁷ It recommended a number of tactics to attack raves, and although the Department’s definition of “rave” centers on modes of expression – music, dance and the visual arts – the goal of the carefully crafted strategy is to “force rave promoters to move or cease their operations.”³⁵⁸ Congress also relied on the State Palace Theater case as the catalyst for its assessment of “raves” and a starting point from which to formulate a national policy about them.³⁵⁹ Between the time the RAVE Act was first proposed in the Senate and the time it was actually passed, the bill’s sponsors had eliminated the controversial finding that “the trafficking and use of ‘club drugs’ . . . is deeply embedded in the rave culture.”³⁶⁰ The government does not even maintain the pretense of targeting drug use at raves but rather intends to eliminate the events themselves.

3. Substantiality

Recall that the test from *Broadrick*³⁶¹ requires that “particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, *judged in relation to the statute’s plainly legitimate sweep.*” (emphasis added).

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ See *supra* Part V, discussing the State Palace Theater case.

³⁶⁰ See S. 2633, 107th Cong. § 2 (2002).

³⁶¹ See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

If the legitimate sweep of the statute covers the government's interest in battling the illegal street drug ecstasy, this covers *some* electronic music concerts and probably *most* raves.³⁶² The statute's overbreadth is both real and substantial because on its face, the law can eliminate not only *all* electronic music concerts and *all* raves, but rock concerts (like the one planned for Billings), all musical concerts, political rallies and any other type of event one can imagine provided that there is even the remotest possibility of illegal drug use at the event.

*C. The Rationale of The Disorderly House Does Not Translate to the Rave Situation*³⁶³

The rationale of the disorderly house³⁶⁴ is inapplicable to the rave situation because, as noted above in the Introduction, there are two types of events: 1) the regulated electronic music concert, typically held in a nightclub (but sometimes in a larger venue such as an arena); and 2) the true rave, which is unregulated, held in an open space and is always an event of a grand scale. A disorderly house statute fits neither of these situations, because an electronic music concert is not disorderly, and a rave could never be held in a house.

The electronic music concert is orderly. It is organized for profit, under the security and protective measures implemented by the event promoter, in a venue where the business owner

³⁶² But eliminating raves and electronic music concerts probably does not do much to help the government in its war on drugs, as drugs that were once considered "underground" drugs for use at raves are now seen at "nightclubs, concerts, bars, college campuses, shopping malls, and even schools." See CYNTHIA R. KNOWLES, *UP ALL NIGHT: A CLOSER LOOK AT CLUB DRUGS AND RAVE CULTURE* vii (Red House Press 2001); see also Kim Kozlowski, *Ecstasy Use Grows for Suburban Teens; Survey: It's Almost As Common As Pot*, DET. NEWS, Nov. 17, 2003, Special Report available at <http://www.detnews.com/2003/specialreport/0311/18/a01-326994.htm> (last visited June 5, 2004), in which a staffer at an adolescent drug treatment center says one teenager told her "they were passing out ecstasy pills at her senior prom like they were after-dinner breath mints." *Id.* Rich Isaacson, special agent for the DEA, says that when he talks to parents, he tries to debunk the myth that ecstasy is a rave drug. He says, "It's a common drug now wherever teens have a house party. If there is marijuana or alcohol, I would have every expectancy that [e]cstasy would be there, too." *Id.*

³⁶³ A disorderly *conduct* statute, on the other hand, that would (for example) make it unlawful to fail to disperse in response to a valid police order might be more appropriate for the rave situation. Compare *City of Houston, Texas v. Hill*, 482 U.S. 451 (1987) (unconstitutionally overbroad disorderly conduct statute) with *Colten v. Kentucky*, 407 U.S. 104 (1972) (constitutional and narrowly tailored disorderly conduct statute). See *infra* Part XI A for an illustration of how England drafted a disorderly conduct statute that was narrowly tailored to its rave situation.

³⁶⁴ See *supra* Part III B.

has taken out the necessary permits under local law³⁶⁵ and does not want to be held liable for the acts of his clients.³⁶⁶ Unlike the crackhouse owner, who is usually an absentee landlord turning a blind eye to what is happening within the crackhouse, the nightclub property owner is usually on the premises or nearby;³⁶⁷ he usually hires an event manager to take active steps to ensure the safety of those on the premises.³⁶⁸ The State Palace Theater owners, for example, instituted a zero-tolerance policy³⁶⁹ that absolutely forbid possessing, selling or using drugs on the premises.³⁷⁰ Signs throughout the venue announced this policy, as well as an offer that free tickets were to be given to anyone who turned in a person with drugs.³⁷¹ Security guards refused to admit people who appeared to be intoxicated.³⁷² Over the past several years, the owners have

³⁶⁵ See *supra* note 190.

³⁶⁶ See *supra* note 214:

Business owners have come to Congress and told us there are only so many steps they can take to prevent any of the thousands of people who may attend a concert or a rave from using drugs, and they are worried about being held personally accountable for the illegal acts of others . . .

³⁶⁷ See *supra* note 26. According to Boyd,

Robert Brunet manages the State Palace Theater in New Orleans . . . Mr. Brunet hired James Estopinal to arrange and promote electronic music concerts – what the government refers to as “raves” but which are nothing more than musical exhibitions at which disc jockeys (DJ’s) perform computer-generated electronic music for a crowd of dancers...The prosecution in this case made no claim that any of these men ever engaged in any drug related activity whatsoever. DEA officials have implied in other Congressional hearings that the State Palace proprietors somehow condoned or encouraged drug use. This is not the case, nor was any such claim ever made in the actual State Palace case

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ See *Reducing Americans’ Vulnerability to Ecstasy Act of 2002: Hearing on H.R. 5519 Before the House Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary*, 107th Cong. 3 (2002) (testimony of Graham Boyd, Director, Drug Policy Litigation Project, American Civil Liberties Union), available at <http://www.house.gov/judiciary/boyd101002.pdf>.

³⁷² *Id.*

arranged for many arrests due to their zero-tolerance policy, including the arrests of security guards who were found to be selling drugs.³⁷³

Though DEA agents purchased alleged drugs from 82 different people, almost half of the purchases did not test positive as a controlled substance.³⁷⁴ The agents did not pursue investigations or prosecutions for any of these sales at the State Palace.³⁷⁵ The usual method of arresting the drug dealers themselves was abandoned (in this context, at least) in favor of the easier route of pursuing the businessmen who provide the music that some drug users and non-drug users alike find entertaining.³⁷⁶

While the maintenance of a place for use, manufacture or distribution of controlled substances need not be the sole or the main purpose of the premises, it had to be a significant purpose for prosecution under the Crackhouse statute.³⁷⁷ The primary purpose of a concert hall or nightclub owner is to provide entertainment, not to maintain a disorderly house where people know they can go to consume or sell hard drugs. As Senator Grassley stated in his remarks supporting the RAVE Act: “Clearly, taking steps to reduce or eliminate drug use at an event, such as the posting of signs or through zero-tolerance instructions to security personnel, are not

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ See *Reducing Americans' Vulnerability to Ecstasy Act of 2002: Hearing on H.R. 5519 Before the House Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary*, 107th Cong. 3 (2002) (testimony of Graham Boyd, Director, Drug Policy Litigation Project, American Civil Liberties Union), available at <http://www.house.gov/judiciary/boyd101002.pdf>.

³⁷⁶ *Id.* Likewise, the Club La Vela in Panama City, Florida, was another venue that was singled out as a place that held raves and, by implication, distributed drugs. Brothers and co-owners Patrick Pfeffer (CEO) and Thorsten Pfeffer (General Manager) were charged with conspiring to use the club, or allow it to be used, for the use and distribution of drugs. Assistant US Attorney Greg Miller failed to provide any evidence that the Pfeffer brothers conspired to engage in drug sales at the club or negligently allowed drug sales to take place there. Defense attorney Todd Foster argued that the club earned its revenues in legitimate ways, grossing \$2.5 million in alcohol sales and \$3.2 million in cover charges the previous year. See <http://www.stopthedrugwar.org/chronicle/213/clublavela.shtml> (last visited June 5, 2004).

³⁷⁷ See *supra* note 174.

actions that would be taken by someone who would intentionally allow drug use to occur at an event.”³⁷⁸ Yet people who do take these steps, like the managers of the State Palace Theater, who had histories of cooperating with law enforcement on combating drug use and distribution, were the first targets of the DEA in “Operation RAVE Review,” were prosecuted under the Crackhouse statute and could be prosecuted under the RAVE Act.

Another reason why a disorderly house statute does not pertain to the rave situation is that the knowledge of the property owner/maintainer in each situation is inherently different. Recall that unregulated raves are, by definition, large-scale events. Recall too that the Crackhouse statute applied only to a “building, room or an enclosure.”³⁷⁹ The RAVE Act, on the other hand, applies to “any place.”³⁸⁰ While courts have recognized that the natural inference is that those who live in a house with others have sufficient knowledge of what is going on inside, particularly in the common areas, to satisfy the knowledge requirement of the former Crackhouse statute Section (a)(2),³⁸¹ this inference is not readily apparent with respect to large-scale raves. Nor is this inference apparent with respect to those electronic music concerts held in arenas, where the event in question may consist of tens of thousands of attendees.³⁸² The natural inference with both the large-scale electronic music concert and the large-scale rave, is that someone hosting such a large event would not know of, and could not possibly be held responsible for, the activities of everyone present.³⁸³

³⁷⁸ 149 CONG. REC. S1679 (daily ed. Jan. 28, 2003) (statement of Sen. Grassley).

³⁷⁹ 21 U.S.C. § 856(a)(2) (1986).

³⁸⁰ 21 U.S.C. § 856(a)(2) (2003).

³⁸¹ See *supra* note 179.

³⁸² See *supra* notes 7, 370.

³⁸³ See *supra* text accompanying note 67.

Many disorderly house statutes have been challenged on Constitutional grounds, usually with charges of vagueness. These statutes have been upheld, mainly because the scienter requirement included in the statutes allows a court to interpret the statute narrowly, thus avoiding constitutional difficulties.³⁸⁴ The same cannot be said of an overbroad statute such as the RAVE Act, as an overbroad statute by definition is one that is not narrowly tailored and does not lend itself to a narrowing construction by the judicial branch.³⁸⁵

IX. POLICY CONSIDERATIONS

Electronic music concerts and raves both raise a fairly typical concern within the local community: noise, at late hours. Noise and event regulations are typically left up to local government³⁸⁶, and many local governments have already enacted local ordinances designed to eliminate the undesirable side effects of large parties, like noise, rather than the event itself.

A. The Federal Government Should Defer to Local Government on This Issue

Chicago, Illinois is one large city that passed a city ordinance in May 2000 that would make building owners responsible for after-hours clubs and rave parties held on their property and could send the owner to jail for up to six months.³⁸⁷ The "anti-rave" ordinance, as it's been called, is actually an amendment to the city's amusement license ordinance. Sponsored by

³⁸⁴ As to the power of a court to construe a criminal statute generally, *see* 21 AM. JUR. 2D, *Criminal Law* § 18 (2004).

³⁸⁵ *See supra* Part VI A.

³⁸⁶ *See, e.g.*, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (noise restriction prohibiting yelling, shouting, or screaming that would substantially interfere with the provision of medical services including counseling at an abortion clinic was not barred by the First Amendment); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (municipal noise regulation, designed to ensure that musical performances in a public band shell did not disturb the surrounding residents by requiring performers to use a sound system and sound technician provided by the city, was valid); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (discussing the validity, under the federal constitution, of federal, state and local antinoise laws and regulations).

³⁸⁷ Ray Long, Rick Pearson, Gary Washburn and Joe Biesk, *City, State, Target Instigators of Raves With Stiff Penalties*, CHICAGO TRIBUNE, May 3, 2001, at A1.

Chicago alderman Jesse Granato (1st Ward) and co-sponsored by Chicago alderman Ted Matlak (32nd Ward), the amendment also makes the property owner/manger, promoter and entertainer (i.e. the DJ) subject to fines up to \$10,000 for using any public place of amusement that does not have a public place of amusement license.

Likewise, in the south, Gainesville, Florida's rave committee's final recommendations include a mandatory 2 a.m. closing time for bars and clubs.³⁸⁸ A 60-day "Dance Hall Moratorium" was passed in Orange County, Florida that prohibited the opening of new dance clubs.³⁸⁹ Tampa, Florida's, city code was amended in the late 1990s to prohibit late-night food sales to "ravers" but The Tampa City Council is now debating whether to amend the code again, to better accommodate businesses.³⁹⁰ Responding to club owners' concerns, politicians in Charlotte, North Carolina, began tinkering in 2000 with the city's proposed rave ordinance. The ordinance, drawn up by Charlotte-Mecklenburg police, aims to control drug sales and use at nightclubs by restricting clubs' hours of operation and requiring a permit to operate the club.

The trend for local government to address this issue has also reached the west coast. In San Bernardino, California, in 2001, the San Bernardino County Board of Supervisors unanimously approved modifications to the County Development Code affecting Temporary Special Event permits, resulting in increased requirements for sponsors of special events,

³⁸⁸ *Id.*

³⁸⁹ Eliscu, *supra* note 7.

³⁹⁰ Ron Matus, *Pizza Man Wins Right to Sell Again*, ST. PETERSBURG TIMES, May 8, 2004, available at http://www.sptimes.com/2004/05/08/Hillsborough/_Pizza_Man__wins_righ.shtml (last visited June 5, 2004). Some clubs were halting liquor sales at 3 a.m., then staying open for "ravers." The city code was amended to prevent any establishment that sold alcohol - besides hotels and convenience stores - from selling food after 3 a.m. The Tampa City Council is now debating whether to amend the code again, to better accommodate businesses.

including music events.³⁹¹ Seattle's "teen dance ordinance" requires kids under eighteen to be accompanied to dances by a parent.³⁹²

Overall, these local ordinances are based on event and venue permits, and focus on ensuring that the venues are licensed. These are all rational goals, and well within the state's police power to regulate the health, safety and welfare of its citizens. These local regulations are not unconstitutional because they do not purport to eliminate all events associated with a form of music.

B. The RAVE Act May Have Driven Electronic Music Concerts Underground

As the Boise experience with raves demonstrates,³⁹³ examined in Part V. above, the RAVE Act may have driven the forum for electronic music underground. This is a serious problem, because young people who want to hear electronic music will need to go to underground events, held in unlicensed establishments where there may not be clean facilities or access to fresh water, and no ambulances waiting nearby in case of an emergency. Thus, the RAVE Act may have had the ironic effect of harming some of the very people it was intended to protect.³⁹⁴

X. SUGGESTIONS FOR IMPROVEMENTS

A. Tailor the Statute With Specific Definitions

³⁹¹ Press Release, County of San Bernardino, Board Honors Randolph, Controls Raves and Helps Seniors (June 26, 2001), available at <http://www.co.san-bernardino.ca.us/pressreleases/docs/1816-26-01Supervisorsmeetingsummary.doc.htm> (last visited June 8, 2004).

³⁹² Eliscu, *supra* note 7.

³⁹³ See *supra* text accompanying notes 201-04.

³⁹⁴ See *supra* note 26 (statement of Graham Boyd, Director, Drug Policy Litigation Project, American Civil Liberties Union, predicting what he called this "perverse effect").

The main constitutional defect with the RAVE Act is its overbreadth. However, an overbreadth problem can be cured³⁹⁵ if the legislature narrowly tailors the statute so that it addresses constitutionally valid goals while avoiding the chilling effect that is the hallmark of an overbroad statute. The main defect with the RAVE Act is that it does not include definitions that would tailor the statute to the government's stated objective. Since England has prior experience with rave culture and remedial laws curtailing this phenomenon, it may be helpful to examine the English policy with respect to raves.

By the early 1990s, the Tory government, the police, the notoriously sensational English tabloid press and middle class England had all had enough of "rave culture."³⁹⁶ The government acted, passing the Criminal Justice and Public Order Act³⁹⁷ – a disorderly conduct statute. England's law provides many and varied legal definitions, including one for a rave, defined as "a gathering of 100 or more persons (whether or not trespassers) at which amplified music is played during the night (with or without intermissions) and is such as, by reason of its loudness and duration and the time at which it is played, is likely to cause serious distress to the inhabitants of the locality; . . ." The statute goes on to define rave music as "sounds wholly or predominantly characterized by the emission of a succession of repetitive beats."³⁹⁸ The statute also provides definitions for "entertainment licence," "exempt person," "land in the open air," "local authority," "occupier," "trespasser" and "vehicle". If Congress had included statutory definitions

³⁹⁵ See, e.g., *Massachusetts v. Oakes*, 109 S. Ct. 2633 (1989) (the overbreadth challenge to the statute in question was rendered moot when the Massachusetts legislature amended the statute).

³⁹⁶ See *The History of Raves*, available at <http://www.thesite.org/youthnet/road/Classic/article/100/jsp/Render.jsp?rb=1&a=2632> (last visited June 8, 2004) for an overview of the rise and fall of the "rave culture" in England.

³⁹⁷ 33 Eng. Code § 63-65 (1994), available in 12 HALSBURY'S STATUTES 1434-1438 (4th ed. 1997).

³⁹⁸ *Id.* at § 63(1)(b).

like these³⁹⁹ that distinguished between legitimate electronic music concerts and illegitimate events like raves, it could have averted the RAVE Act's overbreadth problem.

Similarly, when the city of Detroit⁴⁰⁰ sought to amend its 1962 "Anti-Skid Row" ordinance, to include "adult" movie theaters and bookstores in their law to prohibit aggregation of such establishments,⁴⁰¹ the city council members included a very specific definition of the types of establishments that should be considered "adult."⁴⁰² The Detroit Common Council was attempting to prevent concentrations of such businesses, as these clusters tend to attract an

³⁹⁹ *Id.* at § 63(10).

⁴⁰⁰ Incidentally, The House and the Senate passed a resolution in 2001 as part of Detroit's tricentennial that congratulated the city for (among other things) helping to pioneer techno, the electronic dance music played at raves. See David Montgomery, *Ravers Against the Machine; Partiers and ACLU take on 'Ecstasy' Legislation*, WASH. POST, July 18, 2002 at E1.

⁴⁰¹ The goal of the ordinance was to prohibit one such movie theater or bookstore from operating within 1000 feet of another such establishment, or within 500 feet of any residential area.

⁴⁰² *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 53 n.5 (1976). The city defined three types of adult establishments as the following:

Adult Book Store

An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

Adult Motion Picture Theater

An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below) for observation by patrons therein.

Adult Mini Motion Picture Theater

An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), for observation by patrons therein.

“undesirable quantity and quality of transients.” The same charges have been directed at raves.⁴⁰³ Because of the explicit drafting, Detroit’s amended ordinance was able to survive facial challenges that the statute was too vague and that it violated First Amendment rights.⁴⁰⁴

These two examples demonstrate how beneficial it is for a statute to be drafted with precision. The RAVE Act would certainly benefit from a more concrete description of what a rave is, including how many people are required to be in attendance, better descriptions of what places may be considered undesirable for holding a rave, as well as better guidelines for law enforcement personnel.⁴⁰⁵ The English law may provide guidance to American legislators in this respect.

B. Include a Safe Harbor for Legitimate Business Owners

Congress should include a safe harbor for business owners who wish to provide entertainment featuring electronic music in a licensed venue.

Senator Biden, the staunchest proponent of the RAVE Act, has said that the purpose of the law is not to prosecute law-abiding club owners.⁴⁰⁶ But if prosecutions under the RAVE Act follow the pattern of prosecutions under the Crackhouse statute, more business owners than “rogue rave promoters” will be punished. The majority of prosecutions that were conducted under the Crackhouse statute fell under Section (a)(1), where the owner’s purpose is the relevant

⁴⁰³ England’s Chief Constable of the West Midlands Ron Hadfield (head of the top police officers’ public-order committee) was appointed in 1992 to investigate issues surrounding Britain’s free festivals and he expressed his reservations about government actions concerning both raving and drug use somewhat strongly: “Do you really want to introduce draconian powers and possibly end up with a Tiananmen Square-type scenario, all because a crowd of New Age travellers and kids want to play some noisy music?” *See supra* note 400.

⁴⁰⁴ *Young*, 427 U.S. at 61.

⁴⁰⁵ Recall that after the cancellation of the Billings NORML event, DEA headquarters had to furnish all of the field officers with clarification as to how the law should be enforced. *See supra* note 336.

⁴⁰⁶ *See supra* note 280.

one.⁴⁰⁷ Only a few Crackhouse prosecutions fell under Section (a)(2),⁴⁰⁸ where the purpose of the people using the place - in the electronic music concert or rave context, the event promoters - is the relevant one. Senator Leahy withdrew his support from the RAVE Act precisely because he felt that the law did not include sufficient protections for legitimate business owners, whose liability under the RAVE Act has now been “dramatically increase[d].”⁴⁰⁹

Law-abiding business owners who take reasonable precautions to prevent incidental drug use on their premises need protection. One journalist has described club owners’ precautionary measures as more thorough than an airport security check.⁴¹⁰ The owners of the State Palace Theater went to extraordinary lengths to ensure that the State Palace Theater’s zero tolerance policy regarding drugs was enforced.⁴¹¹ Despite all these precautions, they were the first venue holding electronic music concerts to be prosecuted under the Crackhouse statute for holding “raves.”⁴¹²

These club owners should not be punished when they are taking reasonable steps to prevent drug use yet are not in a position to guarantee that the premises are drug-free. Small business owners need a safe harbor from the RAVE Act that lets them know “what they can do

⁴⁰⁷ See generally Richard Belfiore, *Validity, Construction and Application of Federal “Crack-House Statute” Criminalizing Maintaining Place for Purpose of Making, Distributing, or Using Controlled Drugs* (21 U.S.C.A. § 856) 116 A.L.R. FED. 345 (1993).

⁴⁰⁸ *Id.*

⁴⁰⁹ See *supra* note 214.

⁴¹⁰ Neva Chonin, *Congress Acts Out Against Club Culture*, S.F. CHRON, April 27, 2003 (Sunday Datebook), at 35.

⁴¹¹ See *supra* Part VI C for a list of the steps the Brunet brothers took to enforce their family business’s zero tolerance policy at the State Palace Theater.

⁴¹² 148 CONG. REC. S5706 (daily ed. June 18, 2002) (statement of Sen. Biden).

to prevent prosecution”⁴¹³ and gives them criteria to know what reasonable measures Congress thinks they should take. This safe harbor should extend to those property owners who keep their premises in conformance with local operating ordinances, cooperate with the local authorities like police and who take reasonable precautions such as hiring medical and security personnel to ensure the safety of those on the premises

XI. CONCLUSION

While the deaths of young people experimenting with ecstasy are indisputably tragic, the RAVE Act is a kneejerk reaction to those occurrences. Here in the United States, it appears that Congress has formulated its policies based on flawed science, and this has led to a media circus. As noted in Part II A 2 above, the government (until February 2004) did not allow scientific experiments for legitimate uses of MDMA to proceed, although scientists have long lauded its potential for use in psychotherapy. It concluded that the drug had no medical value, based on scientific studies that are questionable at best and, at times, seriously flawed.⁴¹⁴ It has exaggerated the statistics on how many deaths ecstasy has caused, in both New Orleans and the state of Florida,⁴¹⁵ to justify the draconian RAVE Act.⁴¹⁶ The federal government should focus

⁴¹³ See Reducing Americans’ Vulnerability to Ecstasy Act of 2002: Hearing on H.R. 5519 Before the House Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary, 107th Cong. 3 (2002) (testimony of Graham Boyd, Director, Drug Policy Litigation Project, American Civil Liberties Union), available at <http://www.house.gov/judiciary/boyd101002.pdf>.

⁴¹⁴ For excellent critiques of the flaws in the government’s scientific data, see ECSTASY: THE COMPLETE GUIDE, *supra* note 13, at 333-35 and KNOWLES, *supra* note 71, at 5-7.

⁴¹⁵ See *supra* note 67 for the figures from the State Palace Theater case. The venue’s capacity was 3,500; 400 teenagers over the course of two years were allegedly treated at local emergency rooms for overdosing on drugs, yet the government later stipulated at trial that only 30-40 overdoses may have been related to the events held at the State Palace Theater. *Id.* During the summer of 1999, authorities across Florida began an initiative to raid raves and dance parties, and announced that club drugs had been responsible for 254 deaths statewide. See KNOWLES, *supra* note 71, at 5-7. This shocking number was later refuted as grossly inaccurate. *Id.* A more accurate number, reported by medical examiners in the Drug Abuse Warning Network (“DAWN”) report, is that ecstasy caused 27 deaths nationwide between 1994 and 1998. *Id.* Together, all drug-related emergency room episodes represent only 0.6% of all emergency room visits, or less than one percent, and mentions of club drugs are “truly rare events.” *Id.*

less on eliminating electronic music concerts and more on how to prevent distribution of the street drug ecstasy within this country.

The RAVE Act is unconstitutional because its overbreadth has a real and substantial impact on First Amendment rights.

The RAVE Act is inequitable, on public policy grounds, to those legitimate business owners who provide a forum for electronic music and dance (protected forms of expression) yet cannot guarantee that their properties are completely drug-free. These business owners are better regulated at the local level. The RAVE Act may also have the disturbing effect of causing more harm than good, by driving electronic music concerts underground, encouraging the very environment it was intended to eliminate.

⁴¹⁶ Compare KNOWLES, *supra* note 71, at 5-7 with the government's data, available at <http://dawninfo.samhsa.gov/> (last visited June 8, 2004). In the most current government statistics, the most frequently mentioned causes of those drug-related ER visits are alcohol-in-combination and cocaine; ecstasy ranks seventh out of fourteen listed drugs.