

# THE AGONY AND THE ECSTASY: PRESERVING FIRST AMENDMENT FREEDOMS IN THE GOVERNMENT'S WAR ON RAVES

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## I. INTRODUCTION

In the early 1990s, a new subculture emerged and gained immense popularity with the nation's modern youth—the “rave.” While there is no clear-cut contemporary definition of what a rave is, it is typically described as an all-night dance party where electronically synthesized music is played.<sup>1</sup> These events generally combine the “social elements of a party” along with the “performance elements of a concert,”<sup>2</sup> featuring colorful moving lights and DJs<sup>3</sup> as the main performers.<sup>4</sup> Participants report feeling a sense of community amongst the crowd and find the events to be among the “most peaceful popular music oriented gatherings.”<sup>5</sup>

Relatively new to the United States, raves had their origins in England during the 1980s, where they were informally held in large, underground warehouses.<sup>6</sup> Since its migration to the United States, the rave scene has moved into established clubs, where raves are legally held and tickets—often purchased in advance from companies such as Ticketmaster—are needed in order to gain entrance.<sup>7</sup> Yet, raves have received widespread negative attention from the media and the government because of the illicit drug use in which some patrons allegedly partake.

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<sup>1</sup>Dictionary.com, *Definitions of “Rave”*, at <http://www.dictionary.com/search?q=rave> (last visited Mar. 28, 2002).

<sup>2</sup>Kansas City Promoters Association & High-R Frequencies Media, *Rave and Electronic Dance Music*, at <http://kcpa.kcraves.com/RavePRKitGeneric1.doc> [hereinafter KCPA] (last visited Nov. 25, 2002).

<sup>3</sup>DJ is the colloquial term for “disc jockey,” a person who plays recorded music for dancing at a nightclub or party. Merriam-Webster, *Collegiate Dictionary*, available at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=disc%20jockey> (last visited Nov. 21, 2002).

<sup>4</sup>KCPA, *supra* note 2.

<sup>5</sup>RaveMedia.org, *Frequently Asked Questions: Aren't Raves Illegal?*, at [http://www.ravemedia.org/modules.php?op=modload&name=FAQ&file=index&myfaq=yes&id\\_cat=6&categories=Section+I%3A+Raves&parent\\_id=4](http://www.ravemedia.org/modules.php?op=modload&name=FAQ&file=index&myfaq=yes&id_cat=6&categories=Section+I%3A+Raves&parent_id=4) (last visited Nov. 21, 2002).

<sup>6</sup>See *Ecstasy Abuse and Control: Hearing Before the S. Governmental Affairs Comm.* (2001) (statement of Joseph D. Keefe, Chief of Operations, Drug Enforcement Administration), 2001 WL 21757820 [hereinafter Keefe].

<sup>7</sup>Raves are organized, promoted, and financed by local and national enterprises. *Id.* These organizers employ bands, disc jockeys, or both to play at the selected venue. *Id.* Advertising is typically conducted through the use of flyers, posters, the radio, the Internet, and word-of-mouth. *Id.*

Ecstasy, GHB, Ketamine, and LSD are collectively known as the “club drugs.” Of these, Ecstasy has been the highlight of recent media attention and is most commonly associated with the rave scene. Although use of the drug is not at epidemic proportions,<sup>8</sup> there has been a disproportionate increase in use over recent years, according to Alan I. Leshner, director of the National Institute on Drug Abuse.<sup>9</sup> Because Ecstasy is receiving such national attention, raves have become an obvious target of governmental investigation.<sup>10</sup>

In furtherance of its “War on Drugs,” the federal government has decided to use the 1980s Federal “Crackhouse Law”<sup>11</sup> to shut down raves in an effort to curb Ecstasy use. In January 2001, three rave promoters of the State Palace Theater in New Orleans were indicted under the statute. Rather than being accused of distributing drugs at their venue or of being involved with drug sales in any way, they were accused of designing raves “with ‘pervasive’ drug abuse in mind”<sup>12</sup>—an unprecedented application of the law. The case never went to trial as two of the defendants entered into a plea agreement six months later, which among other things, called for the prohibition of “drug paraphernalia” and other items believed to enhance the high of Ecstasy, such as pacifiers, glow sticks, and dust masks, inside the State Palace Theater.<sup>13</sup> The story, however, does not end there. The plea agreement was soon challenged in a class action lawsuit, and in February 2002, the agreement was declared unconstitutional on First Amendment grounds.<sup>14</sup>

The government’s attempt to prosecute these rave promoters signals to many a change in the “War on Drugs” as the focus shifts from those who are actually dealing drugs, to those who organize events where their use may be popular.<sup>15</sup> The Drug Enforcement Administration (DEA) asserts that “raves, by definition, support the use of drugs like Ecstasy,” and believes that the availability of “drug paraphernalia” such as pacifiers, glow sticks, and even bottled water at raves is “evidence that promoters condone

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<sup>8</sup>As of November 2000, less than one percent of the American population took Ecstasy once a month. John Cloud & Nisid Hajari, *Ecstasy/Happiness is . . . a Pill?*, TIME INT’L, Nov. 13, 2000, at 40, 41, available at 2000 WL 28889673.

<sup>9</sup>Donna Leinwand & Gary Fields, *Feds Crack Down on Ecstasy Health Fears, Organized Crime Put Drug on Map*, USA TODAY, Apr. 19, 2000, at 1A, available at 2000 WL 5775719. Between the years of 1994 and 1999, seventy-one deaths nationwide were attributed to Ecstasy out of a total of 58,595 drug-related deaths. *Ecstasy Abuse and Control: Hearing Before the S. Comm. on Governmental Affairs* (2001) (statement of Donald R. Vereen, Deputy Director, Office of National Drug Control Policy), 2001 WL 21757823 [hereinafter Vereen]. However, of the seventy-one deaths, forty-two occurred in 1999 alone, which presumably indicates an increase in use. See *id.*

<sup>10</sup>See Jenny Eliscu, *The War on Raves*, ROLLING STONE, May 24, 2001, available at <http://www.mapinc.org/drugnews/v01/n817/a11.html>.

<sup>11</sup>21 U.S.C. § 856 (2000). See discussion *infra* Part III for a full analysis of the Federal Crackhouse Law.

<sup>12</sup>Gwen Filosa, *Rave Promoters Face Narcotics Charges, Indictments Based on ‘Crackhouse Law’*, THE TIMES-PICAYUNE, Jan. 13, 2001, at 1, available at 2001 WL 9378829.

<sup>13</sup>See Doug Simpson, *N.O. Business Pleads Guilty in Rave Drug Case*, THE BATON ROUGE ADVOC., June 14, 2001, at 7B, available at 2001 WL 3862415.

<sup>14</sup>See discussion *infra* Part V.B.

<sup>15</sup>Michelle Minon, *Prosecutors Eye Raves in Fight Against Drugs at Penn. State U.*, U-WIRE, Feb. 1, 2001, available at 2001 WL 12494937.

drug use.”<sup>16</sup> In fact, the government has been holding workshops around the country on how to shut down raves, using the New Orleans incident as an example.<sup>17</sup> The American Civil Liberties Union (ACLU) and many others have denounced the government’s tactic as all-out censorship of electronic music—a form of expressive speech claimed to be protected by the First Amendment.<sup>18</sup>

The goal of this Note is to demonstrate that the government’s use of the Federal Crackhouse Law to shut down raves is a violation of concert promoters’ First Amendment rights to free speech. Part II provides background on the origins and physiological effects of Ecstasy and the history of its classification as a controlled substance. Part III explains the initial purpose of the Federal Crackhouse Law and how it has consistently been applied. Part IV summarizes the case against the New Orleans rave promoters, analyzing the constitutional arguments against use of the statute in this manner and considering the implausibility of securing a conviction against the rave promoters under the statute. Part V addresses two things: a subsequent case in which the DEA unsuccessfully tried to apply the Crackhouse Law to another concert provider, and the consequences of the New Orleans case, particularly the legal ramifications of the resultant plea agreement. Finally, the Note concludes in Part VI with a glimpse of what lies ahead for raves.

## II. ECSTASY (MDMA)

### A. ORIGINS

More commonly known as Ecstasy, 3, 4-Methylenedioxymethamphetamine (MDMA)<sup>19</sup> is a synthetic drug that was first developed in Germany in 1914, and whose patent was issued to the German pharmaceutical company Merck.<sup>20</sup> With the development of MDMA, Merck chemists thought they had found a “promising intermediary substance that might be used to help develop more advanced therapeutic drugs.”<sup>21</sup> Ecstasy, however, quickly faded into the backdrop only to resurface nearly forty years later.<sup>22</sup>

In 1953, during the Cold War, the United States Army “funded a secret University of Michigan animal study of eight drugs, including [MDMA].”<sup>23</sup> The purpose of the study was to discover the drugs’ potential

<sup>16</sup>Eliscu, *supra* note 10.

<sup>17</sup>Press Release, American Civil Liberties Union, Citing Free Speech Rights, LA Court Rejects Government’s Extremist Tactics in Culture War Against Raves (Feb. 4, 2002), *available at* <http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=9700&c=228&Type=s> (last visited Nov. 21, 2002) [hereinafter ACLU, Citing Free Speech Rights].

<sup>18</sup>*See generally* Eliscu, *supra* note 10.

<sup>19</sup>Keefe, *supra* note 6.

<sup>20</sup>Cloud & Hajari, *supra* note 8, at 42.

<sup>21</sup>*Id.*

<sup>22</sup>*See id.*

<sup>23</sup>*Id.*

for use in chemical warfare.<sup>24</sup> However, the study found that MDMA was not particularly toxic, and that it would take approximately “[fourteen] of today’s purest pills [of Ecstasy] ingested at once, to kill you.”<sup>25</sup>

During the late 1970s,<sup>26</sup> Ecstasy “came into use among physicians and psychotherapists” for treatment of disorders such as post-traumatic stress disorder.<sup>27</sup> The drug was often prescribed for its therapeutic qualities—its ability to increase the “acoustic, visual and tactile sensory perceptions,” and to cause a “tension-decreasing, mood-lightening effect.”<sup>28</sup> The drug later made its way out of medical offices and into the mainstream public.<sup>29</sup> Dallas clubs, for instance, legally sold the drug in bars and clubs for twenty dollars per pill, plus tax.<sup>30</sup> Interestingly enough, the drug did not become illegal until 1988.<sup>31</sup>

Despite this, Ecstasy had become prevalent in the United States rave and club scenes by the mid-1990s.<sup>32</sup> Accordingly, the market for the drug consisted primarily of club-goers who were usually students and young professionals.<sup>33</sup> Now the typical Ecstasy user falls between the ages of 12 and 35, with “most falling into the 16-25 age group.”<sup>34</sup> Users tend to come from “middle to upper class backgrounds,” which may be explained by the high cost of the drug<sup>35</sup> and the belief that it is safer than other drugs because it is ingested in pill form, rather than snorted or injected.<sup>36</sup>

Approximately ninety percent of all Ecstasy pills are manufactured in Northern Europe,<sup>37</sup> with eighty percent produced in the Netherlands alone.<sup>38</sup> The lack of domestic Ecstasy production may be due in part to the inability to secure the “precursor” chemicals necessary for manufacturing the drug.<sup>39</sup> In Europe, these precursors are cheap, widely available, and not heavily regulated by the government.<sup>40</sup> In the United States, however, the most common precursors of Ecstasy are illegal and under heavy regulation, making synthesis of the drug highly expensive.<sup>41</sup>

<sup>24</sup>*See id.*

<sup>25</sup>*Id.* Ecstasy is sold and ingested in pill form. Abraham Abramovvsky, *Is New York Law Ready for the Ecstasy Epidemic?*, 224 N.Y. L.J. 3 (2000).

<sup>26</sup>John Cloud, *Ecstasy/Happiness Is . . . a Pill?/The Science*, TIME MAG., June 5, 2000, at 62, available at 2000 WL 17633626.

<sup>27</sup>Abramovvsky, *supra* note 25, at 3.

<sup>28</sup>Lisa Scott, *The Pleasure Principle: A Critical Examination of Federal Scheduling of Controlled Substances*, 29 SW. U. L. REV. 447, 466 (2000).

<sup>29</sup>*See* Abramovvsky, *supra* note 25, at 3.

<sup>30</sup>Cloud & Hajari, *supra* note 8, at 43.

<sup>31</sup>*See* discussion *infra* part II.C.

<sup>32</sup>Abramovvsky, *supra* note 25, at 3.

<sup>33</sup>*See id.*

<sup>34</sup>*Id.*

<sup>35</sup>Each pill is usually purchased for around twenty dollars. Leinwand & Fields, *supra* note 9, at 1A.

<sup>36</sup>Abramovvsky, *supra* note 25, at 3.

<sup>37</sup>Leinwand & Fields, *supra* note 9, at 1A.

<sup>38</sup>Karen DeYoung, *Alarm on Spreading Ecstasy; Illegal Pills Fly in From Europe, Eluding Standard Remedies for Smuggling*, THE WASH. POST, Aug. 1, 2000, at A3, available at 2000 WL 19621920.

<sup>39</sup>Abramovvsky, *supra* note 25, at 3.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

Although manufacturing of the drug is virtually non-existent within the United States, the country remains one of the world's primary consumers of Ecstasy<sup>42</sup> and its importation is on the rise.<sup>43</sup> This may be explained in part by the huge profit margins that stand to be made on the sale of the drug.<sup>44</sup> The cost of synthesizing Ecstasy and producing the pill for the European laboratories is between fifty cents and one dollar.<sup>45</sup> Yet, "once the [tablets] reach the United States, a domestic cell distributor will charge from six dollars to eight dollars per tablet,"<sup>46</sup> and the retailer later sells those same pills for twenty dollars.

#### B. HOW DOES IT AFFECT THE BODY?

Until recently, there has been little scientific research on the neurological and physiological effects of Ecstasy.<sup>47</sup> Known as the "Love Drug" or "Hug Drug," Ecstasy is said to "promote feelings of love, closeness, and empathy."<sup>48</sup> The drug "triggers a chemical reaction in the brain that lowers inhibitions and engenders feelings of well-being and closeness to others. There are few reports of LSD-like bad trips, and virtually no violence associated with its use. So far, [the drug] is not considered addictive."<sup>49</sup>

Although there have been reports of people ending up in the emergency room after ingesting Ecstasy, the majority of these people almost certainly were not taking pure MDMA, but pills adulterated with other, more harmful substances.<sup>50</sup> For example, dextromethorphan (DXM), a cough suppressant that causes hallucinations if taken in a 130 milligram dosage—"thirteen times the amount found in Robitussin"—is often cut into fake Ecstasy pills.<sup>51</sup> DXM inhibits sweating and can cause heatstroke.<sup>52</sup> Paramethoxyamphetamine, a "potent hallucinogenic and hypothermic drug,"<sup>53</sup> is another adulterant that is often found in adulterated forms of Ecstasy.

Although Ecstasy may not be imminently lethal, it does affect the body. The immediate physical side effects of Ecstasy use include involuntary teeth clenching, muscle tension, rapid eye movement, and chills or sweating.<sup>54</sup> Of course, these effects vary from individual to individual and

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<sup>42</sup>More than forty percent of all the Ecstasy pills exported worldwide end up in the United States. Vereen, *supra* note 9.

<sup>43</sup>See DeYoung, *supra* note 38, at A3.

<sup>44</sup>Abramovvsky, *supra* note 25, at 3.

<sup>45</sup>Vereen, *supra* note 9.

<sup>46</sup>Keefe, *supra* note 6.

<sup>47</sup>See DeYoung, *supra* note 38, at A3.

<sup>48</sup>Vereen, *supra* note 9.

<sup>49</sup>DeYoung, *supra* note 38, at A3.

<sup>50</sup>Cloud & Hajari, *supra* note 8, at 43.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 44.

<sup>53</sup>*Id.*

<sup>54</sup>Vereen, *supra* note 9.

depend on dosage and purity of the pill.<sup>55</sup> These effects can last from three to six hours per ingested tablet.<sup>56</sup>

At this point, the scientific community “cannot say with absolute certainty how and to what extent” Ecstasy causes long-term negative side effects on the brain, but there is general agreement that brain damage—whether it be permanent or temporary—does occur with heavy and prolonged use.<sup>57</sup> The primary damage believed to be caused by Ecstasy abuse is the drug’s effect on the neurotransmitter serotonin.<sup>58</sup>

Serotonin plays a role in the regulation of “mood, sleep, pain, emotion, appetite and other behaviors.”<sup>59</sup> Ecstasy decreases the user’s ability to remove the neurotransmitter from the intracellular space, thus amplifying its effects within the brain,<sup>60</sup> which may account for the increased sense of well-being that is experienced by the user. By releasing large amounts of serotonin, the brain is consequently depleted of this neurotransmitter.<sup>61</sup> Because the brain must take time to rebuild its serotonin levels, researchers are concerned that habitual use of Ecstasy will result in long-term serotonin depletion.<sup>62</sup> Persistent shortages in the neurotransmitter may be responsible for long-term negative behavioral effects such as depression, sleep problems, anxiety, and impairments in visual and verbal memory.<sup>63</sup>

While many believe the drug causes brain damage, the scientific community hopes that the brain may be able to recover from extensive Ecstasy use.<sup>64</sup> New research on methamphetamines shows that “neuronal functions and systems that have been damaged by chronic drug use can recover.”<sup>65</sup> Some regard Ecstasy’s structural similarity to methamphetamine as positive insofar as Ecstasy’s effects may be reversible.<sup>66</sup>

### C. FEDERAL SCHEDULING OF ECSTASY AS A CONTROLLED SUBSTANCE

The legislation that regulates law enforcement and control of narcotics is Title II of the Comprehensive Drug Abuse and Prevention Control Act, more commonly known as the Controlled Substances Act (“Act”).<sup>67</sup> The Act authorizes the Attorney General to label controlled substances for the

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<sup>55</sup>*Id.* Sometimes Ecstasy pills are not pure MDMA, but are mixed with other drugs—for example, speed (methamphetamine)—that can be harmful to the body. *Ecstasy Abuse and Control: Hearing Before the S. Comm. on Governmental Affairs* (2001) (statement of Alan I. Leshner, Director, National Institute on Drug Abuse), 2001 WL 21757821 [hereinafter Leshner].

<sup>56</sup>Leshner, *supra* note 55.

<sup>57</sup>See Leshner, *supra* note 55. See generally Richard A. Millstein & Alan I. Leshner, *The Science of Addiction: Research and Public Health Perspectives*, 3 J. HEALTH CARE L. & POL’Y 151, 158–60 (1999).

<sup>58</sup>See Millstein & Leshner, *supra* note 57, at 159.

<sup>59</sup>*Id.* at 159.

<sup>60</sup>*Id.*

<sup>61</sup>Leshner, *supra* note 55.

<sup>62</sup>*Id.*

<sup>63</sup>See *id.*

<sup>64</sup>See *id.*

<sup>65</sup>*Id.*

<sup>66</sup>See *id.*

<sup>67</sup>See generally Scott, *supra* note 28, at 451.

purpose of “regulating their use, possession, and sale” under schedule I, II, III, IV or V, with the toughest regulation being placed on schedules I and II.<sup>68</sup> Ecstasy is considered a schedule I controlled substance.<sup>69</sup>

Scheduling determinations require factual findings as to a drug’s abuse potential and medicinal properties.<sup>70</sup> A substance is classified under schedule I if the three following requirements are met: “(A) [t]he drug or other substance has a high potential for abuse[;]<sup>71</sup> (B) [t]he drug or other substance has no currently accepted medical use in treatment in the United States[; and] (C) [t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.”<sup>72</sup>

The Act also requires the Attorney General to consider the following factors before either placing or removing any substance from a schedule:

- (1) [i]ts actual or relative potential for abuse[;]
- (2) [s]cientific evidence of its pharmacological effect, if known[;]
- (3) [t]he state of current scientific knowledge regarding the drug or other substance[;]
- (4) [i]ts history and current pattern of abuse[;]
- (5) the scope, duration, and significance of abuse[;]
- (6) [w]hat, if any, risk there is to the public health[;]
- (7) [i]ts psychic or physiological dependence liability[; and]
- (8) [w]hether the substance is an immediate precursor of a substance already controlled under this subchapter.<sup>73</sup>

Ecstasy was first recommended for schedule I placement in January of 1984 by the DEA Administrator.<sup>74</sup> In accordance with federal procedures, the proposal was made to Assistant Secretary for Health and Human Services, Dr. Charles Tocus, who eventually concluded that Ecstasy should be a schedule I controlled substance.<sup>75</sup> However, Tocus so concluded without consulting with any professional medical organizations or the Drug Abuse Advisory Committee—the Federal Drug Administration’s panel of experts.<sup>76</sup>

The proposal of Ecstasy as a schedule I substance elicited protest from a number of commentators who soon requested a hearing on the subject.<sup>77</sup> The matter was then referred to an administrative law judge in order to evaluate the evidence and expert opinions.<sup>78</sup> A number of psychiatrists and psychotherapists testified that placement under schedule I was not appropriate for Ecstasy because there were accepted medical uses for the

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<sup>68</sup>*See id.* at 452.

<sup>69</sup>*Id.* at 469.

<sup>70</sup>*Id.* at 452.

<sup>71</sup>“a substance has potential for abuse if: (1) There is evidence that individuals are taking the drug . . . in amounts sufficient to create a hazard to their health or to the safety of other individuals or of the community; or (2) [t]here is a significant diversion of the drug . . . from legitimate drug channels; or (3) Individuals are taking the drug . . . on their own initiative rather than on the basis of medical advice.” *Id.* at 455.

<sup>72</sup>*Id.* at 452–53 (ellipses omitted).

<sup>73</sup>*Id.* at 454.

<sup>74</sup>*Id.* at 466.

<sup>75</sup>*Id.* at 466–67.

<sup>76</sup>*Id.* at 467.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* at 468.

drug.<sup>79</sup> After the hearing, the administrative law judge concluded that Ecstasy did not satisfy the three requirements for schedule I classification, and should instead be placed into schedule III.<sup>80</sup>

Rejecting the Administrative Law Judge's recommendation, the DEA Administrator nevertheless placed Ecstasy into schedule I in 1986.<sup>81</sup> He interpreted the second requirement of having a "currently accepted medical use" to mean "that the FDA has evaluated the substance for safety and approved it for interstate marketing in the United States."<sup>82</sup> Although this placement of Ecstasy into schedule I was later successfully challenged on the grounds that the DEA Administrator's interpretation of the second requirement was incorrect,<sup>83</sup> on remand the Administrator summarily decided that further hearings were not necessary because the "record below [was] extraordinarily complete," and that Ecstasy should permanently be classified as a schedule I controlled substance.<sup>84</sup> Placement of Ecstasy into schedule I became effective March 23, 1988.<sup>85</sup>

### III. THE FEDERAL CRACKHOUSE LAW

#### A. GENERAL PURPOSE

The Federal Crackhouse Law, 21 U.S.C. § 856, states that it shall be unlawful to:

- (1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance;
- (2) manage or control any building, room, or enclosure, either as 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.

First enacted in 1986, the Federal Crackhouse Law was part of a variety of drug legislation amending the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>86</sup> Its purpose is to "outlaw operation of houses or buildings, so-called 'crack houses,' where 'crack,' cocaine and other drugs are manufactured or used."<sup>87</sup> The statute is "aimed . . . at

<sup>79</sup>*See id.*

<sup>80</sup>*Id.* Schedule III placement requires that the drug have less potential for abuse than drugs placed under schedules I and II, has a "currently accepted medical use in treatment in the United States[.]" and tends to cause less physical and psychological dependence than drugs scheduled under I or II. *Id.* at 452. As a point of reference—heroin and LSD are schedule I drugs, cocaine and morphine are classified under schedule II, and long-acting barbiturates and some non-narcotic painkillers are classified as schedule III substances. *See id.* at 453.

<sup>81</sup>Scott, *supra* note 28, at 468.

<sup>82</sup>*Id.*

<sup>83</sup>To read this opinion, see *Grinspoon v. Drug Enforcement Admin.*, 828 F.2d 881 (1st Cir. 1987).

<sup>84</sup>Scott, *supra* note 28, at 469.

<sup>85</sup>*Id.*

<sup>86</sup>Richard Belfiore, Annotation, *Validity, Construction, and Application of Federal "Crack-House" Statute Criminalizing Maintaining Place for Purpose of Making, Distributing, or Using Controlled Drugs (21 USC § 856)*, 116 A.L.R. FED. 345, 345 (1993).

<sup>87</sup>132 CONG. REC. S13779-01 (1986).

persons who occupy a supervisory, managerial, or entrepreneurial role in a drug enterprise, or who knowingly allow such an enterprise to use their premises to conduct its affairs.”<sup>88</sup>

The statute has been most often applied as per its intended purpose, to punish those involved in running drug manufacturing or distributing operations from crackhouses, warehouses, and other buildings.<sup>89</sup> For example, § 856(a) was applied to a methamphetamine lab in *United States v. Wicker*,<sup>90</sup> and to a cocaine warehouse and packaging facility in *United States v. Martinez-Zyas*.<sup>91</sup>

One case illustrating application of the statute to a home is *United States v. Lancaster*, where narcotics were being sold directly from the defendant’s residence.<sup>92</sup> Lancaster tried to argue that the statute was unconstitutionally vague because it could be construed to “prohibit simple possession and personal consumption of drugs in one’s residence, although it does not give fair notice that it does.”<sup>93</sup> However, the court reasoned that § 856(a)(1) could not be construed in this manner because the “casual drug user does not maintain his house for the purpose of using drugs,” but for the purpose of residence, and consumption of drugs is merely incidental to his residence.<sup>94</sup> Furthermore, even if such construction were plausible, Lancaster’s conduct exceeded mere personal consumption.<sup>95</sup> Authorities repeatedly searched his home, and on each occasion found large groups of individuals inside the residence along with large quantities of narcotics and drug paraphernalia.<sup>96</sup>

Hence, subsection (a)(1) generally makes it a crime to knowingly open or maintain a premises for narcotics activities, as illustrated by *Lancaster*, while subsection (a)(2) makes it illegal to knowingly make premises available for the purpose of drug offenses.<sup>97</sup> At first glance, the two subsections appear to address the same offense, and in fact, courts often fail to differentiate between the two.<sup>98</sup> Each subsection, however, was designed for a different purpose. Subsection (a)(1) purports to punish those who use their own property for the purpose of committing drug offenses, while (a)(2) means to punish those who may not have actually opened their place for the purpose of narcotics activity, but who have knowingly allowed others engaging in that purpose to use the property.<sup>99</sup> More generally, (a)(1) is intended to punish those who have direct, day-to-day control over the property and engage in narcotics offenses there, while (a)(2) is aimed at

<sup>88</sup>*United States v. Thomas*, 956 F.2d 165, 166 (7th Cir. 1992).

<sup>89</sup>*E.g.*, *United States v. Bethancourt*, 692 F. Supp. 1427 (D.D.C. 1988) (crackhouse); *e.g.*, *United States v. Restrepo*, 698 F. Supp. 563 (E.D. Pa. 1988) (cocaine warehouse). *See United States v. Tamez*, 941 F.2d 770, 773 (9th Cir. 1991).

<sup>90</sup>848 F.2d 1059, 1060 (10th Cir. 1988).

<sup>91</sup>857 F.2d 122, 125–26 (3rd Cir. 1988).

<sup>92</sup>968 F.2d 1250, 1252 (D.C. Cir. 1992).

<sup>93</sup>*Id.* at 1253.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.*

<sup>96</sup>*See id.* at 1252–53.

<sup>97</sup>*See Belfiore, supra* note 86, at 345.

<sup>98</sup>*See id.* at 354.

<sup>99</sup>*Id.*

punishing those who have some sort of legal relationship, e.g., as owner, lessee, agent, employee, or mortgagee, to the premises and either actively engage in drug trafficking or knowingly acquiesce in the property's use as a drug house.<sup>100</sup>

The federal government is currently trying to apply subsection (a)(2) to rave promoters, alleging that they sponsor drug use through raves. Can the government use the Federal Crackhouse Law to hold these promoters culpable for drug use that occurs at their events? Do these rave promoters really "know," within the spirit of the law, that drug use is occurring inside their buildings? To answer these questions, a closer examination of subsection (a)(2) first needs to be taken.

B. SUBSECTION (A)(2): "MAKE AVAILABLE . . . FOR THE PURPOSE OF" REQUIREMENT

Few decisions have interpreted the application of § 856(a)(2), but one of the definitive cases discussing the "purpose requirement" of this subsection is the Fifth Circuit's opinion in *United States v. Chen*.<sup>101</sup> Chen owned a motel that was frequently used by drug traffickers who not only sold drugs from the motel parking lot, but also dealt drugs from rooms they occupied in the motel.<sup>102</sup> Witnesses testified that Chen personally witnessed drug transactions, alerted tenants when police officers planned to search certain rooms, encouraged tenants to make drug sales so that their rent could be paid, and even loaned money to the tenants to purchase drugs.<sup>103</sup> Although she did not knowingly maintain the motel for the purpose of drug trafficking and thus could not be convicted under subsection (a)(1), the Fifth Circuit found that she could be held liable under (a)(2) as long as she operated the motel, knowingly making it available for others to engage in the specific purpose of unlawfully using, storing, or distributing a controlled substance, and "not merely that she 'operated a motel where drug activity was rampant.'"<sup>104</sup>

The court first discussed the "purpose" component of (a)(1), defining "purpose" as the "object toward which one strives" or as the "goal," and concluding that the purpose requirement in subsection (a)(1) applied to the person who opens or maintains the place for the illegal activity.<sup>105</sup> The court then distinguished (a)(2), explaining that the person who controls the building "need not have the express purpose in doing so that drug related activity take place; rather such activity is engaged in by others (*i.e.*, others have the purpose)."<sup>106</sup> In other words, (a)(2) "does not require the person who makes the place available to others for drug activity to possess the purpose of engaging in illegal activity; the purpose in issue is that of the

<sup>100</sup>See *United States v. Johnson*, 977 F.2d 1360, 1372-73 (10th Cir. 1992).

<sup>101</sup>913 F.2d 183 (5th Cir. 1990).

<sup>102</sup>*Id.* at 185.

<sup>103</sup>*Id.* at 186.

<sup>104</sup>*Id.* at 188.

<sup>105</sup>*Id.* at 189-90 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1062 (4th ed. 1970)).

<sup>106</sup>*Id.* at 190.

person renting or otherwise using the place.”<sup>107</sup> Hence, the meaning of “purpose” in both subsections is identical, but the difference is in *whose* “purpose” it is to engage in the illicit activity.

The other leading case to discuss the application of the “purpose” component in subsection (a)(2) is *United States v. Tamez*.<sup>108</sup> Tamez owned a used car dealership under investigation for narcotics violations.<sup>109</sup> Several government agents and witnesses had purchased cocaine at the dealership from Tamez’s employees, and were told that he was using the proceeds from the drug sales to finance his car business.<sup>110</sup> There was also evidence that he used company cars in transactions unrelated to either car sales or repossessions.<sup>111</sup> Tamez argued that the Federal Crackhouse Law was inapposite because the statute was meant to apply only to crackhouses, and it required the defendant to intend that the building be used for the purpose of drug offenses. Because the buildings in his case had no purpose other than use as a car dealership, he claimed he could not be held criminally liable.<sup>112</sup> Rejecting this position, the court acknowledged that while the initial purpose of the law was to prevent the operation of crackhouses, under the plain language of § 856(a)(2), Tamez could be held criminally liable because evidence showed that the dealership was being used as a distribution center for drugs.<sup>113</sup>

Following *Chen*’s logic, the Ninth Circuit held that subsection (a)(2) only requires illegal activity, that the defendant knew of the activity, and that the defendant permitted that activity to continue.<sup>114</sup> Although no evidence established that the dealership was maintained for the purpose of drug offenses, the court emphasized the fact that a significant degree of distribution activities emanated from the defendant’s car dealership.<sup>115</sup> Hence, while subsection (a)(2) does not require that the sole purpose of the premises be to store or distribute drugs, it must be a substantial purpose.<sup>116</sup> The court also distinguished (a)(1), declaring that Congress intended it to “apply to deliberate maintenance of a place for a proscribed purpose, whereas (a)(2) was intended to prohibit an owner from providing a place for illegal conduct, and yet to escape liability on the basis . . . of lack of illegal purpose.”<sup>117</sup> Under *Chen*, therefore, the express purpose of engaging in drug activity need not belong to the defendant, but to those who use his or her premises.<sup>118</sup>

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<sup>107</sup>*Id.* at 191.

<sup>108</sup>941 F.2d 770 (9th Cir. 1991).

<sup>109</sup>*See id.* at 772.

<sup>110</sup>*See id.*

<sup>111</sup>*See id.*

<sup>112</sup>*Id.* at 773.

<sup>113</sup>*See id.* at 773–74.

<sup>114</sup>*Id.* at 774.

<sup>115</sup>*Id.*

<sup>116</sup>*See id.* at 773–74.

<sup>117</sup>*Id.* at 774.

<sup>118</sup>*See id.*

## C. SUBSECTION (A)(2): “KNOWLEDGE” REQUIREMENT

As mentioned earlier, very little case law exists discussing the requirements for a § 856(a)(2) conviction. Obviously, a defendant acts knowingly if he has actual knowledge of making the premises available for the purpose of drug offenses.<sup>119</sup> There must, however, be direct evidence of actual knowledge.<sup>120</sup> For example, the fact that a defendant *suspects* that premises are being used for drug dealing is insufficient evidence to convict.<sup>121</sup>

In *United States v. Jenkins*,<sup>122</sup> the District of Columbia Circuit further examined the “knowledge” requirement of subsection (a)(2). In that case, officers found plastic bags on the defendant’s kitchen counter, a computerized scale, a cutting board with small, “rocklike” pieces of cocaine, and four rounds of .38 caliber ammunition on top of a dresser in the defendant’s room.<sup>123</sup> The defendant claimed she generally left the house early and returned late, and had not entered the kitchen on the night of the search.<sup>124</sup> Disbelieving the defendant’s testimony, a jury convicted Jenkins under § 856(a)(2). The court of appeals affirmed, finding “the evidence sufficient to sustain the verdict, although just barely.”<sup>125</sup>

The appellate court found the fact that she owned the house and lived there to be persuasive, further reasoning that the “natural inference is that those who live in a house know what is going on inside, particularly in the common areas.”<sup>126</sup> That a computerized scale and cocaine were found on the kitchen counter was sufficient evidence for the jury to find that whoever had been manufacturing the crack was not trying to conceal these activities from Jenkins.<sup>127</sup> And from this, the jury could infer that Jenkins already knew about the drug activity.<sup>128</sup> Furthermore, at trial the government introduced evidence that drugs and guns go hand in hand, and thus the court found that the location of the .38 ammunition in Jenkins’ bedroom could be a powerful indicator of Jenkins’ knowledge of the illicit activity.<sup>129</sup>

The knowledge component under subsection (a)(2) can also be fulfilled if the defendant is willfully blind to the activities that occur on his or her premises.<sup>130</sup> Willful blindness “denotes a conscious effort to avoid positive knowledge of a fact which is an element of an offense charged, the

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<sup>119</sup>See *Chen*, 913 F.2d at 191.

<sup>120</sup>See *id.* at 193.

<sup>121</sup>*Id.*

<sup>122</sup>928 F.2d 1175 (D.C. Cir. 1991).

<sup>123</sup>*Id.*

<sup>124</sup>*Id.* at 1178.

<sup>125</sup>*Id.* at 1179.

<sup>126</sup>*Id.*

<sup>127</sup>*Id.*

<sup>128</sup>*Id.*

<sup>129</sup>See *id.*

<sup>130</sup>See Belfiore, *supra* note 86, at 385.

defendant choosing to remain ignorant so he can plead lack of positive knowledge in the event he should be caught.”<sup>131</sup>

In *Chen*, the court affirmed that a defendant could be convicted under subsection (a)(2) if she tried to be deliberately ignorant—or in the court’s words, “deliberately closed her eyes to what otherwise would have been obvious to her”—of others’ purpose to engage in drug activity.<sup>132</sup> Chen said she saw people talking in the parking lot and believed they may have been up to illegal activity, that “despite all the visits by the police with search and arrest warrants she would ‘never ask’ why they were there even though she was curious,” and that when residents would call and ask her whether police were present at the motel, she would never ask why they were concerned.<sup>133</sup> The court concluded that these statements were sufficient for a jury to find that Chen “consciously avoided becoming aware of the drug related activities occurring incessantly at the . . . [m]otel.”<sup>134</sup>

#### IV. THE NEW ORLEANS CASE

##### A. BACKGROUND

The State Palace Theater, located in New Orleans, began as a cinema in 1950.<sup>135</sup> Forty-two years later, Robert and Brian Brunet began to lease the space and turned it into a concert venue.<sup>136</sup> Initially, the two brothers booked mainstream acts such as the Beastie Boys and the Dave Matthews Band.<sup>137</sup>

In 1995, James Estopinal approached the Brunets and told them he could pack their club with dancers.<sup>138</sup> The first dance only drew a crowd of 900 people but, by 1999, crowds of up to 4,300 people lined up to pay as much as thirty-five dollars each to attend raves at the State Palace Theater.<sup>139</sup> Nevertheless, the monthly raves failed to generate a majority of the club’s revenues, in part because Estopinal spent large amounts of money on artistic flyers and renowned DJs, such as Britain’s Paul Oakenfold—commanding a potential fee upwards of \$25,000.<sup>140</sup> On most nights, the club played conventional rock, of which the Brunets saw little downside, as the “dancers didn’t fight or break limbs like alt-rock’s

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<sup>131</sup>United States v. Chen, 913 F.2d 183, 191 (5th Cir. 1990) (quoting United States v. Restrepo-Granda, 575 F.2d 524, 528 (5th Cir. 1978)).

<sup>132</sup>*Id.* at 191.

<sup>133</sup>*Id.* at 192.

<sup>134</sup>*Id.* at 191.

<sup>135</sup>John Cloud, *Ecstasy Crackdown: Will the Feds Use a 1980s Anti-Crack Law to Destroy the Rave Movement?*, TIME MAG., Apr. 9, 2001, at 62, available at 2001 WL 17215600.

<sup>136</sup>*Id.*

<sup>137</sup>*Id.*

<sup>138</sup>*Id.*

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

moshers.”<sup>141</sup> As the popularity of the raves increased, however, the New Orleans police began to take notice.

Finally, on January 12, 2001, a federal grand jury indicted the three rave organizers—the Brunets and Estopinal—under the Federal Crackhouse Law for making the State Palace Theater available for use of illicit drugs, particularly Ecstasy and LSD.<sup>142</sup> This marked a novel application of the statute because the men were not accused of selling, distributing, or having any involvement with drugs.<sup>143</sup> Instead, the promoters were charged with turning the State Palace Theater into a market for drugs,<sup>144</sup> and of purposely providing a venue for drugs “under the guise of an electronic music dance party.”<sup>145</sup> Prosecutors hailed the indictment as a starting point in a nationwide crackdown on raves.<sup>146</sup> The case, however, never proceeded to trial as the Brunets later entered into a plea agreement.

#### B. OVERVIEW OF THE CASE AGAINST THE RAVE PROMOTERS

The defendants<sup>147</sup> in this case were officers or employees of Barbecue New Orleans, Inc. (“BBQ of New Orleans”), which leased the State Palace Theater for rave events, drawing between 3,000 to 5,000 people monthly.<sup>148</sup> Robert J. Brunet managed the State Palace Theater and served as officer of BBQ of New Orleans.<sup>149</sup> Brian Brunet was also an officer of BBQ of New Orleans, as well as an employee.<sup>150</sup> Estopinal, a national figure in the rave culture,<sup>151</sup> was hired by Robert Brunet to arrange and promote electronic music concerts at the State Palace Theater<sup>152</sup> featuring dance and performance artists such as fire eaters, trapeze artists, and cross-dressers on roller skates.<sup>153</sup>

Robert Brunet was charged with conspiracy to violate the statute, while his brother Brian and Estopinal were each charged with one count of

<sup>141</sup>*Id.*

<sup>142</sup>Brett Martel, *Prosecutors Target Rave Organizers*, THE BATON ROUGE ADVOC., Jan. 13, 2001, at 3B, available at 2001 WL 3848978.

<sup>143</sup>See Government’s Factual Basis at 2, *United States v. Barbecue of New Orleans, Inc.*, (E.D. La. 2001) (No. 01-153), available at [http://www.emdef.org/pdf/NOLA\\_FactualBasis.pdf](http://www.emdef.org/pdf/NOLA_FactualBasis.pdf) [hereinafter Factual Basis].

<sup>144</sup>Filosa, *supra* note 12, at 1.

<sup>145</sup>Gwen Filosa, *Rave Sponsors to Enter Plea Deal Today*, THE TIMES-PICAYUNE, June 13, 2001, at 1, available at 2001 WL 9404620.

<sup>146</sup>Brett Martel, *Charges May Bolster Probes on Raves*, ASSOCIATED PRESS, Jan. 13, 2001, available at 2001 WL 3652286.

<sup>147</sup>Although the case never went to trial, I will often collectively refer to Robert Brunet, Brian Brunet, and James Estopinal as “the defendants.”

<sup>148</sup>Factual Basis, *supra* note 143, at 1.

<sup>149</sup>*Id.*

<sup>150</sup>*Id.*

<sup>151</sup>Gwen Filosa, *Rave Party Promoters Dance Away From Plea*, THE TIMES-PICAYUNE, Mar. 9, 2001, at 1, available at 2001 WL 9388764.

<sup>152</sup>Mem. P. & A. in Supp. Defs.’ Mot. to Dismiss at 7, *United States v. Brunet*, (E.D. La. 2001) (No. 01-010) [hereinafter Mot. to Dismiss], available at <http://www.emdef.org/pdf/brunet.pdf> (last visited Nov. 25, 2002).

<sup>153</sup>Cloud, *Ecstasy Crackdown*, *supra* note 135, at 63.

violating the Crackhouse Law.<sup>154</sup> If convicted, each man faced maximum penalties of twenty years in prison and \$500,000 in fines.<sup>155</sup>

Prior to the DEA's investigation of the State Palace Theater, the defendants had instituted a zero-tolerance policy that forbid possessing, selling, or using drugs on the premises.<sup>156</sup> Signs announcing the policy were posted throughout the State Palace, and there was even an offer of free tickets to anyone who turned in a patron with drugs.<sup>157</sup> The promoters asserted that they hired security guards who refused to admit anyone who appeared to be intoxicated.<sup>158</sup> The promoters also claimed that they invited DEA agents into the venue, helping the agents dress as undercover "ravers."<sup>159</sup> An arrangement with the DEA was also made whereby "anyone caught with drugs would be detained, then the DEA and local police would be notified of the situation, and asked to arrest the detainee."<sup>160</sup> Despite the promoters' cooperation with the DEA and local police, in January 2000, the DEA launched an undercover investigation of the electronic music concerts taking place at the State Palace Theater.<sup>161</sup>

The record is unclear on the amount of Ecstasy sold or distributed at State Palace Theater raves. The federal indictment charged the defendants with making the theater available for use of approximately 475 milligrams of MDMA between 1995 and 2000.<sup>162</sup> The factual basis for purposes of the plea agreement, however, claims that undercover DEA agents purchased 13.03 grams of Ecstasy between January and August 2000.<sup>163</sup> Each pill of Ecstasy contains approximately 100 milligrams of MDMA.<sup>164</sup> Thus, according to the two conflicting sources, the amount of Ecstasy distributed or sold at the theater may have fallen anywhere between five and 130 pills.

Still, the DEA maintained that no evidence existed that the defendants distributed or sold the drug themselves.<sup>165</sup> As a result of the DEA investigation, however, prosecutors believed that the sale of pacifiers, chemical light sticks, and flashing light rings at the concerts was evidence that the promoters knew drug use was occurring.<sup>166</sup> The government asserted that these items, or in their words, "drug paraphernalia," enhance the physiological high caused by Ecstasy.<sup>167</sup> Furthermore, because ingestion of Ecstasy can cause dehydration, the DEA claimed the defendants knew of the drug abuse because BBQ of New Orleans sold

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<sup>154</sup>Martel, *supra* note 142, at 3B.

<sup>155</sup>*Id.*

<sup>156</sup>Filosa, *supra* note 151, at 1.

<sup>157</sup>*Id.*

<sup>158</sup>Mot. to Dismiss, *supra* note 152, at 7.

<sup>159</sup>*Id.*

<sup>160</sup>*Id.*

<sup>161</sup>See Factual Basis, *supra* note 143, at 2.

<sup>162</sup>See Indictment, United States v. Brunet (E.D. La. 2001) (No. 01-010), available at [http://www.emdef.org/032001\\_indictment.htm](http://www.emdef.org/032001_indictment.htm) (last visited September 8, 2002).

<sup>163</sup>See Factual Basis, *supra* note 144, at 2-3.

<sup>164</sup>DanceSafe, *What Is Ecstasy?*, at <http://www.dancesafe.org/documents/druginfo/ecstasy.php> (last visited Nov. 25, 2002).

<sup>165</sup>Factual Basis, *supra* note 143, at 2.

<sup>166</sup>*Id.*

<sup>167</sup>*Id.*

bottled water at inflated prices.<sup>168</sup> The government's suspicion that the defendants knew of rampant drug use<sup>169</sup> was also based on the presence of a "chill room" at the State Palace Theater—an area where rave patrons could cool down—as well as on "dancers' moves."<sup>170</sup> Based on these allegations, prosecutors indicted the promoters under the Federal Crackhouse Law. The indictment charged them with knowingly and intentionally making the theater available for use, while aware that rave patrons unlawfully distributed and used Ecstasy.<sup>171</sup>

In March 2001, backed by the ACLU, the defendants moved to dismiss the indictments on First Amendment grounds, saying prosecutors "want[ed] to 'silence music' and violate constitutional protections of free speech."<sup>172</sup> This surprised federal prosecutors who believed that two of the three men were going to negotiate a plea agreement; in fact, court records showed that the January indictment resulted only because prosecutors believed the men would not fight the charges.<sup>173</sup> As a result, the U.S. Attorney's Office dismissed all of the individual indictments and reopened its investigation to find more evidence.<sup>174</sup> Prosecutors expected to file new charges after a second investigation.<sup>175</sup> Weary from the expense and pressure of a potential trial,<sup>176</sup> however, Robert and Brian Brunet entered into a plea that found BBQ of New Orleans guilty of violating the Federal Crackhouse Law.<sup>177</sup> The deal prevented a trial and resolved the criminal case against the Brunets.<sup>178</sup> The government fined the company \$100,000 for violating the Federal Crackhouse Law, placed it on probation for five years, and the Brunets also agreed to prohibit the sale or possession of certain items such as glow sticks and pacifiers.<sup>179</sup> James Estopinal refused the plea and continues to speak out against the application of the law.<sup>180</sup>

### C. IS THE GOVERNMENT VIOLATING THE FIRST AMENDMENT RIGHTS OF MUSIC PROMOTERS BY PROSECUTING THEM UNDER THE FEDERAL CRACKHOUSE LAW?

The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech."<sup>181</sup>

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<sup>168</sup>*Id.*

<sup>169</sup>*See id.*

<sup>170</sup>Cloud, *Ecstasy Crackdown*, *supra* note 135, at 63.

<sup>171</sup>Factual Basis, *supra* note 143, at 2.

<sup>172</sup>Filosa, *supra* note 151, at 1.

<sup>173</sup>*See id.*

<sup>174</sup>Eliscu, *supra* note 10.

<sup>175</sup>Cloud, *Ecstasy Crackdown*, *supra* note 135, at 64.

<sup>176</sup>*See* Gwen Filosa, *Federal Rave Case Ends With a Whimper*, THE TIMES-PICAYUNE, Aug. 2, 2001, at 1, available at 2001 WL 9412484.

<sup>177</sup>Brett Martel, *ACLU Fights Ban on Toys at Rave Parties*, THE BATON ROUGE ADVOC., Aug. 22, 2001, at 11A, available at 2001 WL 3867911.

<sup>178</sup>Filosa, *supra* note 176, at 1.

<sup>179</sup>*See* Martel, *supra* note 177, at 11A.

<sup>180</sup>Electronic Music Defense & Education Fund, *Cases: The State Palace Theater*, at [http://www.emdef.org/laws\\_and\\_cases.html#nola](http://www.emdef.org/laws_and_cases.html#nola) (last visited Nov. 22, 2002).

<sup>181</sup>The Amendment reads in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or

First Amendment analysis requires the court to determine whether a type of protected speech is involved.<sup>182</sup> Here, the right implicated is the right to promote or organize electronic music concerts. Thus, the first step is to determine whether promotion or organization of electronic music concerts is a type of constitutionally protected speech.

It has been consistently held that music, “even if the music ha[s] no political message—even if it ha[s] no words,”<sup>183</sup> is a form of expression protected by the First Amendment.<sup>184</sup> In *Cinevision Corp. v. City of Burbank*, the Ninth Circuit held that promoters of rock concerts enjoy First Amendment rights.<sup>185</sup> The court explained that the ability of concert promoters to vindicate the rights of persons engaged in musical expression is a crucial value.<sup>186</sup> The court noted that the “central concern of the First Amendment is that there be a free flow from creator to audience of whatever message” the expression or speech is supposed to convey, and that in many instances, it is only the creator of that expression who can protect such a flow of ideas.<sup>187</sup> The court also emphasized the value of public access to forms of protected expression and stated that for the public to have access to live musical expression, it must “necessarily rely on concert promoters to make arrangements for musicians to perform.”<sup>188</sup>

Rave promoters, like the Brunets and Estopinal, provide DJs who play electronic music for their attendees. Without such promoters, the public would have very limited access to performances of electronic music. Thus, electronic music promoters should enjoy the First Amendment protections enjoyed by the rock concert promoters in *Cinevision*.

Once a First Amendment right to free speech has been established, the threshold question is whether there has been an infringement of that right.<sup>189</sup> In numerous cases, courts have held laws facially unconstitutional under the First Amendment because they were either content-based, vague, overbroad, or a prior restraint on ensuing speech.<sup>190</sup> Government action that significantly burdens speech can also be considered an infringement.<sup>191</sup> Specifically, laws that sufficiently burden speech so as to trigger First Amendment analysis are “ones that allow civil liability for expression; that prevent compensation for speech; that compel expression; that condition a benefit on a person foregoing speech; and that pressure individuals not to speak.”<sup>192</sup>

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the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

<sup>182</sup>See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 952–53 (2d ed. 2002).

<sup>183</sup>*Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 567 (9th Cir. 1984).

<sup>184</sup>*Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

<sup>185</sup>*Cinevision*, 745 F.2d at 569.

<sup>186</sup>See *id.* at 568.

<sup>187</sup>See *id.* (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 77 (1976) (Powell, J., concurring)).

<sup>188</sup>*Id.*

<sup>189</sup>CHEMERINSKY, *supra* note 182, at 936.

<sup>190</sup>See generally *id.* at 902–18.

<sup>191</sup>*Id.* at 936.

<sup>192</sup>*Id.*

The law at issue, the Federal Crackhouse Law, is neither content-based nor a prior restraint. Although there have been challenges to the statute under the vagueness doctrine, courts have consistently held that it is not void-for-vagueness.<sup>193</sup> Thus, if any First Amendment violation exists, it is most likely because the statute as applied to rave promoters is overbroad.

### 1. *Overbreadth*

If a law regulates substantially more speech than constitutionally permitted or inflicts great harm on particularly important speech, such a law violates the Constitution by being overbroad.<sup>194</sup> The overbreadth doctrine tests the potential applications of the law,<sup>195</sup> and the law may be invalidated on its face if it sweeps too broadly.<sup>196</sup> The doctrine is a powerful tool, not only on account of its ability to facially invalidate a law, but also because it is an exception to the usual rule of standing.<sup>197</sup> Because of this power, courts will often try to avoid invalidating a law by allowing a narrower construction of the statute that obviates its application to protected speech.<sup>198</sup> The rationale behind the doctrine is that “overbroad laws will chill significantly protected speech and that individuals to whom the law is unconstitutional may refrain from expression rather than bring a challenge to the statute.”<sup>199</sup> Hence, the primary concern is the “chilling effect” which occurs “when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulations not specifically directed at that protected activity[.]”<sup>200</sup> In essence it is “an act of deterrence.”<sup>201</sup>

Thus far, cases that have discussed use of the overbreadth doctrine have dealt with a statute or ordinance that facially implicates or regulates a form of protected speech.<sup>202</sup> The difficulty in this instance is that the Federal Crackhouse Law does not implicate any First Amendment right on its face—the statute only prohibits controlling a premises and knowingly and intentionally making it available for the purpose of manufacturing, storing, distributing, or using a controlled substance. The government’s decision, however, to use the law against rave promoters, *does* implicate a First

<sup>193</sup>See, e.g., *United States v. Clavis*, 956 F.2d 1079 (11th Cir. 1992); *United States v. Lancaster*, 968 F.2d 1250 (D.C. Cir. 1992); *United States v. Milani*, 739 F. Supp. 216 (S.D.N.Y. 1990).

<sup>194</sup>CHEMERINSKY, *supra* note 182, at 914.

<sup>195</sup>See generally *id.* at 914.

<sup>196</sup>See *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

<sup>197</sup>“The usual rule of standing is ‘that person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.’” CHEMERINSKY, *supra* note 182, at 915 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)).

<sup>198</sup>CHEMERINSKY, *supra* note 182, at 911.

<sup>199</sup>*Id.*

<sup>200</sup>Michael N. Dolich, *Alleging a First Amendment “Chilling Effect” to Create a Plaintiff’s Standing: A Practical Approach*, 43 *DRAKE L. REV.* 175, 176 (1994).

<sup>201</sup>*Id.*

<sup>202</sup>See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (invalidating ordinance outlawing live entertainment); *Osborne v. Ohio*, 495 U.S. 103 (1990) (upholding child pornography statute); *City of Houston v. Hill*, 482 U.S. 451 (1987) (voiding a city ordinance which made it illegal to interrupt a police officer in the execution of his duty); *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding ordinance that prohibited posting of signs on public property).

Amendment right, specifically the right to promote electronic music concerts, because these concerts take place in a “building, room, or enclosure” as the statute requires. Accordingly, if the government is successful in holding rave promoters culpable under this statute, then the First Amendment rights of all concert promoters and all those who organize any type of event drawing large crowds, such as professional sports events, are potentially jeopardized.

The Federal Crackhouse Law was originally intended to stop drug lords from running crackhouses and was never designed to silence musical expression.<sup>203</sup> “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”<sup>204</sup> This new and unprecedented application of the law, specifically subsection (a)(2), sweeps more broadly than the First Amendment will allow. At any rave, rock concert, or hip-hop club, there is likely to be illicit drug use. Hence, the provider of the event “knows” to the same extent as the New Orleans defendants that someone will use a controlled substance. Applying this weak scienter standard, the statute will prevent the promoters of these types of events, who have a First Amendment right to provide live musical expression, from organizing such events. Rave promoters and other music promoters, however, should not be held to the scienter requirement because among the thousands of people attending a concert, *everybody* knows that *someone* is using drugs.

Use of the Crackhouse Law in this manner “reaches a substantial amount of constitutionally protected conduct.”<sup>205</sup> Conviction of music promoters under the statute has the real possibility of eliminating avenues to live musical expression, of severing the free flow from creator to audience. “Music is one of the oldest forms of human expression . . . [and has] the capacity to appeal to the intellect and to the emotions.”<sup>206</sup> Certainly the Federal Crackhouse Law cannot constitutionally abolish such important speech.

Furthermore, it is not only conviction under the statute, but also the threat of prosecution that significantly infringes music promoters’ First Amendment rights. “The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.”<sup>207</sup> The prospect of a twenty-year prison sentence and a \$500,000 fine<sup>208</sup> may cause promoters to refrain from arranging concerts altogether or from challenging prosecution—the precise reason why overbroad laws are unconstitutional. The New Orleans case illustrates these concepts as the Brunets chose to avoid the expense of

<sup>203</sup> See discussion *supra* part IIIA.

<sup>204</sup> *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

<sup>205</sup> *City of Houston v. Hill*, 482 U.S. 451, 458 (1987).

<sup>206</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

<sup>207</sup> *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

<sup>208</sup> 21 U.S.C. § 856(b) states: “Any person who violates subsection (a) of this section shall be sentenced to a term of imprisonment of not more than 20 years or a fine of not more than \$500,000, or both, or a fine of \$2,000,000 for a person other than an individual.”

challenging the statute and the possibility of prison time by agreeing to five years probation and payment of a significantly smaller fine. The statute's application to rave promoters and other similar music providers is substantially overbroad and curtails their freedom of expression.

As mentioned earlier, judges can avoid facial invalidation of an overbroad law by adopting a narrower construction of the law. Adopted in 1986, the Federal Crackhouse Law is a relatively new statute. Until now, courts have not needed a narrower construction because the law has been applied in every instance to defendants who have been either directly involved with the drug offenses or have had close, even personal, contact with them. To save the Crackhouse Law from unconstitutionally restricting or prohibiting protected speech, the court should adopt a construction of subsection (a)(2) that would require a higher level of involvement with drug activity than simply managing or controlling large premises where some drug activity may take place. The mere act of providing a concert venue, where a few in attendance will engage in drug use among thousands, should fall outside the ambit of the Crackhouse Law.

## 2. *As Applied Challenge*

The Federal Crackhouse Law also violates the Constitution as applied to the rave promoters themselves. The Supreme Court "has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."<sup>209</sup> In the present situation, the protected "speech" element is the organization and provision of electronic music concerts or raves. The "nonspeech" element is the leasing of the State Palace Theater and allegedly knowingly and intentionally making the venue available for drug offenses.

The Supreme Court first established the framework for this analysis in *United States v. O'Brien*.<sup>210</sup> A government regulation, the Court held, is sufficiently justified if the following conditions are met: 1) it is within the constitutional power of the Government; 2) it furthers an important or substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>211</sup>

The Federal Crackhouse Law likely survives scrutiny under the first three *O'Brien* requirements, but fails the fourth. First, the federal government has the power to criminalize or regulate the manufacture, distribution or use of controlled substances pursuant to its interstate commerce power.<sup>212</sup> Second, the important government interest at stake is

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<sup>209</sup> *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 377.

<sup>212</sup> *See* 21 U.S.C. § 801(3).

the elimination of the use and proliferation of substances, such as Ecstasy, that are mentally and physically harmful. The Federal Crackhouse Law furthers this goal by punishing those engaged in the use and distribution of controlled substances and by deterring others from engaging in such activities. Third, the governmental interest is probably unrelated to the suppression of free expression because the goal of the Federal Crackhouse Law is not to suppress live musical concerts, but to combat widespread narcotics use. It can be argued, however, that the government's interest is partially related to the suppression of First Amendment rights because the DEA's Federal Crackhouse Law prosecutions have singled out rave promoters but not concert promoters in other music genres.

Nevertheless, the application of the Federal Crackhouse Law fails the fourth prong of the *O'Brien* test. Convicting rave promoters under the statute would eliminate avenues to live electronic music performances. Such convictions are not essential to the furtherance of the government's interest, as the DEA (or even local law enforcement) could simply prosecute the drug dealers without silencing the music. If the elimination of Ecstasy use is the government's goal, the DEA could pursue the manufacturers and distributors of the drug instead of shutting down raves where drug use or distribution takes place. For example, undercover DEA agents could arrest individuals selling drugs without pursuing promoters as criminals and thus squelching raves altogether. Preventing electronic music concerts from taking place is neither essential nor necessary for achieving the government's interest because drug dealers would still be able to sell Ecstasy at other venues. Focusing efforts on arresting the actual providers of the drugs, rather than the providers of the music, would better serve to advance the governmental interest. Thus, the restriction on electronic music promoters is too great to justify application of the Federal Crackhouse Law in this manner.

#### D. DO RAVE PROMOTERS STAND A CHANCE AGAINST CONVICTION UNDER THE FEDERAL CRACKHOUSE LAW?

As discussed in Part III of this Note, very few cases discuss the use of § 856(a)(2). Under *United States v. Chen*,<sup>213</sup> neither the Brunet brothers nor Estopinal needed to possess the intent to engage in drug activity in order to be convicted under the statute. In fact, the DEA admitted that the three men had no actual involvement with the manufacture, storage, distribution or usage of Ecstasy or LSD. The question, therefore, is whether the rave patrons—those using the premises—had the purpose of engaging in such activity.

The purpose requirement in subsection (a)(1) and (a)(2) are identical. Thus, *United States v. Lancaster*<sup>214</sup> serves as a guide in determining whether rave attendees satisfy this component of the statute. The statute, as

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<sup>213</sup>913 F.2d 183 (5th Cir. 1990). For a discussion of the case, see *supra* part IIIB.

<sup>214</sup>968 F.2d 1250 (D.C. Cir. 1992). For a discussion of the case, see *supra* part IIIA.

interpreted in *Lancaster*,<sup>215</sup> was not intended to punish the casual drug user because the consumption of drugs in one's home is merely incidental to his residence. Most people that attend raves go to dance and listen to electronic music. Admittedly, some may choose to take illegal drugs such as Ecstasy, but that is not their primary purpose for attending the rave. Raves are essentially about the music because in no other forum can the public gain access to this type of music. If one's ultimate goal is the consumption of Ecstasy, then one could instead take it at home and save the money that would have been spent on an entrance fee for a rave. A person's choice to attend a rave indicates his or her desire to listen to the music or see the DJs perform or dance, and if he or she takes Ecstasy, that consumption is merely incidental to the primary desire of listening and dancing to electronic music.

Nevertheless, this argument does not vindicate rave promoters because the purpose of those who sell or distribute the drugs, and not just those who use, needs to be examined. The fact that undercover DEA agents were able to purchase Ecstasy at the State Palace Theater on a few occasions indicates that *some* rave attendees' drug activity may not be merely incidental to listening to electronic music. If a person brings drugs to sell at a rave, his or her probable aim is to make money and not witness live musical expression.

While the purpose of others to engage in drug activity may be established, an examination of the case law demonstrates that the Brunets and Estopinal did not actually make the State Palace Theater available for such a purpose. In both cases where the purpose requirement has been discussed—*Chen*<sup>216</sup> and *Tamez*<sup>217</sup>—clear evidence showed the defendants' involvement with drug activity and the defendants' substantial contact with those engaging in it with the requisite purpose. In *Chen*,<sup>218</sup> the defendant had day-to-day contact with residents selling drugs and played an active role by encouraging drug sales and alerting tenants when police arrived to search the premises. Chen made the motel available to drug dealers because she probably did not want to lose the business of renting rooms out to them, and she had a strong interest in seeing them make sales so that they could pay rent. In *Tamez*,<sup>219</sup> the defendant made his car dealership available for drug sales by having his employees sell cocaine, and in turn using the drug proceeds to finance the dealership. Thus, his desire for his employees to engage in drug activity was established.

There is no such degree of involvement in the New Orleans case. Using language from *Chen*,<sup>220</sup> the defendants must have done more than merely operate a venue where drug activity occurred. Unlike Chen and Tamez, who had daily contact with the persons engaging in the drug

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<sup>215</sup>*Id.* at 1253.

<sup>216</sup>913 F.2d 183, 185–86.

<sup>217</sup>941 F.2d 770, 772–73 (9th Cir. 1991). For a discussion of these cases, see *supra* part III.B.

<sup>218</sup>913 F.2d 183.

<sup>219</sup>941 F.2d 770.

<sup>220</sup>913 F.2d 183.

activity, the Brunets and Estopinal only held these raves once a month, and it is unclear whether the men even attended the raves themselves. Thus, they may have had very little contact with any of those allegedly engaging in narcotics sales or consumption. Additionally, because the three men had no direct involvement with the drug activity, they stood to gain no money from the sale of any drugs, unlike Chen and Tamez. The men earned money from the sale of tickets, and the money used to pay for the tickets was not derived from drug sales because the alleged sale of drugs took place after entrance into the rave. Furthermore, money earned from the monthly raves likely did not even generate a substantial portion of the State Palace Theater's revenues.

Still, the DEA asserts that the defendants profited from the sale of pacifiers, glow sticks, and bottles of water at inflated prices. At *any* club, however, bottled water is sold at higher prices because club owners know that dancers get thirsty and that drinking too much alcohol can also cause dehydration.<sup>221</sup> Revenues generated from the sale of pacifiers and glow sticks do not necessarily indicate that drug activity occurred at the State Palace Theater because these items are symbols of the rave culture in general, used by ravers to express themselves when dancing.<sup>222</sup> The rave promoters probably did not have an interest in making the venue available for drug use or sales because, unlike Chen and Tamez, they derived no benefit from such activity. In fact, the organizers claim to have had a zero-tolerance policy in place before the DEA investigation, and had cooperated with the DEA and New Orleans police department in trying to eradicate any illicit drug activity—hardly the actions of persons offering a venue for narcotics offenses. Moreover, unlike in *Tamez*,<sup>223</sup> where a substantial purpose of the car dealership was drug activity, the primary purpose of the State Palace Theater was to provide a place for the public to hear electronic music. If an important purpose of the raves was to allow the public to engage in the sale or use of Ecstasy, then the rave organizers would not have instituted a zero-tolerance policy or invited the DEA and New Orleans police inside.

In order to secure a conviction against the Brunets and Estopinal, federal prosecutors had to convince a jury that these promoters actually “knew” that drug use was occurring and “intentionally” made the State Palace Theater available for such use. The owner of every concert venue knows that there is a risk that some attendants will partake in illicit drug use<sup>224</sup> and may thus suspect that the venue is being used for such purposes; this suspicion, however, is insufficient to convict under the statute. In *United States v. Jenkins*,<sup>225</sup> evidence consisting of plastic bags, a

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<sup>221</sup>University of Pittsburgh, *The Hangover Strikes*, at <http://www.pitt.edu/AFShome/s/t/studhlth/public/html/studenthealth/wbpage/Alcohol/links/page6.html> (last visited Nov. 22, 2002).

<sup>222</sup>See *McClure v. Ashcroft*, No. CIV.A.01-2573, 2002 WL 188410, at \*4 (E.D. La. 2002) (holding that plea agreement that banned inherently legal items such as pacifiers, glow-in-the-dark items, vapor rub products and dust masks was a violation of the First Amendment right to freedom of expression).

<sup>223</sup>941 F.2d 770.

<sup>224</sup>Motion to Dismiss, *supra* note 152, at 8.

<sup>225</sup>928 F.2d 1175 (D.C. Cir. 1991). For discussion of case, see *supra* part IIIC.

computerized scale, pieces of cocaine, and rounds of gun ammunition were “just barely” sufficient to confirm the presence of drug activity. In the New Orleans case there was no comparable evidence—no signs of Ecstasy pills or drug paraphernalia. Thus, if the evidence in *Jenkins*<sup>226</sup> was barely enough to convict, the weaker evidence in the New Orleans case should be insufficient, too. Although the DEA classifies items such as glow sticks, pacifiers, and dust masks as “drug paraphernalia” because they allegedly enhance the high of Ecstasy, the court held in *McClure v. Ashcroft* that dancers and performers at raves use these inherently legal items to exercise their First Amendment rights to freedom of expression.<sup>227</sup> Thus, sale of these items does not necessarily evince knowledge of rampant drug activity or intent to condone drug abuse.

And, again, the sale of expensive bottled water evinces a public performance or thirsty dancers, but not sanctioned drug use. Furthermore, unlike *Jenkins* who lived where the drug activity occurred, neither the Brunets nor Estopinal lived in the State Palace Theater, so the inference from *Jenkins*<sup>228</sup>—that “those who live in a house know what is going on inside”—does not apply. Whereas *Jenkins*’ premise was only a personal residence, making it easy for her to discover what was occurring inside her own home, the State Palace Theater is a large concert venue that can accommodate 5,000 people. Surely rave promoters cannot be expected to know everything occurring inside a venue of that size.

Likewise, the Brunets and Estopinal are not guilty of deliberate ignorance. In contrast to *Chen* who made no effort to ascertain why police were searching and visiting the motel, the Brunets and Estopinal actively cooperated with the DEA and the New Orleans police and implemented a zero-tolerance policy. These efforts also speak to the promoters’ lack of intent to make the State Palace Theater available for such drug use. While one may argue that the defendants knew of drug use by virtue of their teamwork with police, § 856(a)(2) requires “knowingly *and* intentionally.” If the defendants intended for the State Palace Theater to become a marketplace for Ecstasy, then they would have tried to hide the existence of any drug activity from police and would not have gone so far as to help undercover agents dress as ravers. In sum, the Federal Crackhouse Law likely is inapplicable to the New Orleans rave promoters, and probably to all promoters, because of the lack of actual knowledge and intent to make venues available for drug activity.

## V. THE AFTERMATH

### A. CLUB LA VELA

A few months after the indictment of the Brunets and Estopinal, a federal grand jury indicted Patrick Pfeffer, Thorston G. Pfeffer, and their

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<sup>226</sup>*Id.*

<sup>227</sup>See *McClure*, 2002 WL 188410, at \*4. For discussion of case, see *infra* part VB.

<sup>228</sup>928 F.2d 1175.

corporation, Sea Watch of Panama City Beach, Inc., doing business as “Club La Vela,” under the Federal Crackhouse Law.<sup>229</sup> In May of 2000, the government charged the corporation with knowingly and intentionally making Club La Vela available for the use of unlawfully distributing Ecstasy, LSD, and many other “club drugs,” the same allegations leveled against the New Orleans rave promoters.<sup>230</sup>

Club La Vela, located in Panama City Beach, Florida, is “a place of public assembly specializing in the presentation of live and recorded musical and dance performances,” with the capacity to hold over 6,000 people.<sup>231</sup> Similar to the New Orleans case, Club La Vela’s owners had a zero-tolerance policy and a history of cooperation with the local police in trying to combat narcotics activity.<sup>232</sup> Nevertheless, an investigation ensued starting in 1996, and the Pfeffers were indicted under the Crackhouse Law, although they were never accused of being directly involved with drug activity themselves.<sup>233</sup>

The defendants pled not guilty, and the case went to trial. Federal prosecutors cited similar evidence in the Club La Vela case as in the New Orleans case—namely, the sale of glow sticks and bottled water at inflated prices—to demonstrate knowledge of pervasive drug abuse.<sup>234</sup> They also introduced a photograph of a man giving another man a massage as evidence of drug use.<sup>235</sup> It took jurors only 75 minutes to return not guilty verdicts on all charges.<sup>236</sup> The Club La Vela case is considered a “major blow to federal prosecutors” new strategy of trying to use the Federal Crackhouse Law to shut down raves, night clubs, and concert venues.<sup>237</sup>

#### B. *MCCLURE V. ASHCROFT*: CHALLENGING THE BAN ON SYMBOLS OF RAVE CULTURE

Another major victory against the government’s war against raves occurred when the plea agreement, reached as a result of the DEA’s investigation into the State Palace Theater, was invalidated in February 2002 as a violation of the First Amendment’s guarantee of freedom of speech.<sup>238</sup> The plea agreement specifically prohibited the “introduction, sale, distribution, or providing of infant pacifiers, objects that glow, vapor

<sup>229</sup>Electronic Music Defense & Education Fund, *Cases: Club La Vela*, at [http://www.emdef.org/laws\\_and\\_cases.html#floridalavela](http://www.emdef.org/laws_and_cases.html#floridalavela) [hereinafter *Club La Vela*] (last visited Nov. 22, 2002).

<sup>230</sup>See Indictment at 1, *United States v. Pfeffer* (N.D. Fla. 2001), available at [http://www.emdef.org/pdf/060501\\_Indictment.pdf](http://www.emdef.org/pdf/060501_Indictment.pdf) [hereinafter *LaVela Indictment*] (last visited Nov. 25, 2002).

<sup>231</sup>Defendants’ Motion to Dismiss at 3, *United States v. Pfeffer* (N.D. Fla. 2001), available at [http://www.emdef.org/clublavela/070001\\_LaVela\\_m\\_dismiss.pdf](http://www.emdef.org/clublavela/070001_LaVela_m_dismiss.pdf) [hereinafter *LaVela Mot. Dismiss*] (last visited Nov. 25, 2002).

<sup>232</sup>See *id.* at 6–7.

<sup>233</sup>See *LaVela Indictment*, *supra* note 230, at 1–2.

<sup>234</sup>See *LaVela Mot. Dismiss*, *supra* note 231, at 9.

<sup>235</sup>*Club La Vela*, *supra* note 229.

<sup>236</sup>*Id.*

<sup>237</sup>See *id.*

<sup>238</sup>Electronic Music Defense & Education Fund, *Laws & Cases*, at [http://www.emdef.org/laws\\_and\\_cases.html#nola](http://www.emdef.org/laws_and_cases.html#nola) (last visited Nov. 22, 2002).

rub products, dust masks, massage tables, and ‘chill rooms’—items believed by the DEA to support the high caused by Ecstasy—during any concert taking place inside the State Palace Theater.<sup>239</sup>

The agreement was challenged in a class action lawsuit brought by the ACLU and three rave attendees, Steven McClure, Clayton Smith, and Michael Behan.<sup>240</sup> The named plaintiffs were “music, dance, and performance artists who use some or all of the named banned items in their performances.”<sup>241</sup> The court first emphasized the importance of dancing in communicating ideas and emotions and found that the First Amendment protected performers’ use of these inherently legal items.<sup>242</sup>

The court then asserted that although the actions of the plaintiffs were protected speech, the ban on the items would pass constitutional muster if it survived the “time, place, or manner test” set forth in *Ward v. Rock Against Racism*.<sup>243</sup> Accordingly, the government may impose reasonable restrictions on the time, place, or manner of protected speech provided that the restrictions are justified without references to the content of the regulated speech, that the restrictions are narrowly tailored to serve a significant governmental interest, and that the restrictions leave ample alternative channels for communication of the information.<sup>244</sup>

Turning to the first part of the test, the court found that the ban imposed by the voided plea agreement was content-neutral because the government’s intent was to eliminate Ecstasy use at the State Palace Theater, and in the government’s mind, the ban would reduce the use of Ecstasy.<sup>245</sup> The court, however, held that the prohibition was not narrowly tailored to serve that legitimate goal.<sup>246</sup> “The government cannot ban inherently legal objects that are used in expressive communication because a few people use the same legal items to enhance the effects of an illegal substance.”<sup>247</sup> The plea agreement substantially burdened more speech than necessary to achieve the government’s stated goal of eradicating Ecstasy use.<sup>248</sup> Furthermore, the court found that prohibiting legal items that some people may use while on Ecstasy does not eliminate its use.<sup>249</sup> Essentially, the government cannot violate First Amendment rights in the name of the war on drugs.<sup>250</sup> The case represents a victory for free speech rights and a second major setback to the government’s strategy to utilize the Federal Crackhouse Law to shut down raves.

<sup>239</sup>Plea Agreement at 2, *United States v. Barbecue of New Orleans, Inc.* (E.D. La. 2001) (No. 01-153), [http://www.emdef.org/pdf/NOLA\\_PleaAgreement.pdf](http://www.emdef.org/pdf/NOLA_PleaAgreement.pdf) (last visited Nov. 22, 2002).

<sup>240</sup>Gwen Filosa, *Lawsuit Defends Right to Glow Sticks*, THE TIMES-PICAYUNE, Aug. 22, 2001, [http://www.nola.com/printer/printer.ssf?newsstory/o\\_glow22.html](http://www.nola.com/printer/printer.ssf?newsstory/o_glow22.html).

<sup>241</sup>*McClure v. Ashcroft*, No. CIV.A.01-2573, 2002 WL 188410, at \*2 (E.D. La. 2002).

<sup>242</sup>*See id.* at \*4.

<sup>243</sup>*See id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

<sup>244</sup>*Id.* at \*4 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

<sup>245</sup>*See id.* at \*5.

<sup>246</sup>*Id.*

<sup>247</sup>*Id.*

<sup>248</sup>*Id.*

<sup>249</sup>*Id.*

<sup>250</sup>*Id.*

## VI. WHERE DOES THE FUTURE OF THE RAVE LIE?

Thus far, federal prosecutors appear intent on continuing to apply the Federal Crackhouse Law as a weapon against raves. Eddie Jordan, U.S. attorney and chief prosecutor in the New Orleans case, declared that anyone who uses the word “rave” to promote an event could be inviting federal prosecution.<sup>251</sup> Accordingly, the DEA has vowed that if successful convictions are secured, it will attempt to jail rave promoters around the country.<sup>252</sup> As part of its new strategy, the federal government has started to encourage local prosecutors to charge rave promoters as drug dealers under state crackhouse laws and to “engage in excessive enforcement of parking permits and other local laws in order to disrupt events.”<sup>253</sup> Unfortunately, the DEA’s new war on raves seems to be gaining support from local governments. Officials in Chicago, Orlando, and Seattle have taken legal measures to stop raves, and promoters in Los Angeles and Denver report that local authorities have increasingly interfered with their events.<sup>254</sup> There seems to be an ever-growing bias against any event that bears the name “rave.”<sup>255</sup>

Yet, many legal experts remain skeptical about the law’s use. Glenn Reynolds, professor of law at the University of Tennessee, believes the application is far beyond the intent of the law and wastes federal funds.<sup>256</sup> Reynolds is not alone in his belief. Many legal experts find the novel use of the law a stretch because prosecutors must prove that rave promoters were certain of widespread drug use on their premises but did nothing to stop it.<sup>257</sup>

While combating Ecstasy abuse is a substantial and important governmental interest, the underlying problem with the DEA’s strategy is that it equates raves with drugs. At the heart of raves lies music, not drug abuse. The federal government’s attempts to use the Federal Crackhouse Law against promoters will only drive the rave scene back to its origins—in underground warehouses. If the DEA succeeds, the nation runs the risk of closing its doors to not just electronic music, but live musical expression, a right that lies at the core of the First Amendment.

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<sup>251</sup>Minon, *supra* note 15.

<sup>252</sup>See Eliscu, *supra* note 10.

<sup>253</sup>ACLU, Citing Free Speech Rights, *supra* note 17.

<sup>254</sup>See Eliscu, *supra* note 10.

<sup>255</sup>*Id.*

<sup>256</sup>Gwen Filosa, *Use of Crack Law on Raves Questioned Federal Statue Does Not Apply, Critics Say*, THE TIMES-PICAYUNE, Feb. 12, 2001, available at 2001 WL 9384587.

<sup>257</sup>See Eliscu, *supra* note 10; Filosa, *supra* note 177, at 1; Filosa, *supra* note 256; Martel, *supra* note 142, at 3B.