



**House.
Legislative
Analysis
Section**

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DRUG PARAPHERNALIA

**Senate Bill 288 (Substitute H-1)
First Analysis (12-10-87)**

**Sponsor: Sen. Vernon J. Ehlers
Senate Committee: Judiciary
House Committee: Judiciary**

THE APPARENT PROBLEM:

According to the Department of State Police, the sale of drug paraphernalia — such as cocaine spoons, water pipes, and kits for growing marijuana — is a multi-million dollar business that glamorizes the use of illegal drugs. Reportedly, the growth of this industry coincides with the growth of substance abuse. In addition to the 30,000 "head shops" nationwide (as of November 1979), numerous other retailers carry drug paraphernalia as a sideline. In order to combat the increasing misuse of drugs, especially by minors, many advocate outlawing the sale of items designed to be used for controlled substances. A model law to that effect has been prepared by the Drug Enforcement Administration (DEA), and laws limiting the sale of drug paraphernalia have been adopted by some 36 other states as well as the city of Detroit.

THE CONTENT OF THE BILL:

The bill would amend the Public Health Code to make it a crime to sell or offer for sale drug paraphernalia, knowing that it will be used to plant, manufacture, store, conceal, or introduce into the human body a controlled substance. Drug paraphernalia would be defined as things specifically designed for use in growing, manufacturing, storing, concealing, or introducing into the human body a controlled substance; a list of examples would be included. The bill would not apply to an object sold to a person licensed under Article 15 of the Public Health Code or under the Occupational Code, or to any intern or trainee in one of those professions, when the object was for use in that profession, nor would the bill apply to an object sold to a hospital or a medical supplier. Various other items also would be specifically exempted.

The attorney general or a prosecuting attorney would notify a person at least two business days before he or she was to be arrested for selling drug paraphernalia, and request that he or she refrain from selling the material. The notice would inform the person that if he or she complied, no arrest would be made. Compliance would be a complete defense against prosecution under the bill, as long as compliance continued.

A person receiving the above-described notice could seek a declaratory judgment to obtain an adjudication of the legality of the material being sold. The attorney general or the prosecutor who sent the notice would be made the defendant to the action. A declaratory judgement stating that the specified material did not violate the bill's prohibition against selling drug paraphernalia would be a complete defense against prosecution.

Selling paraphernalia in violation of the bill would be a misdemeanor punishable by up to 90 days in jail, a fine of up to \$5,000, or both. An adult selling paraphernalia to a minor would be guilty of a misdemeanor punishable by imprisonment for up to one year, a fine of up to \$7,500, or both.

In addition, the bill would include drug paraphernalia in the public health code's forfeiture of property provisions.

MCL 333.7521 et al.

HOUSE COMMITTEE ACTION:

The House Substitute's definition of drug paraphernalia differs from the original bill in that it does not apply to material used or possessed with intent to be used for controlled substances, but rather only to material specifically designed for such use; the House version's list of examples of paraphernalia also differs from the Senate's. The Senate version proscribed the use, delivery, manufacture, and advertising of drug paraphernalia, and specified circumstantial factors to consider in determining whether something constituted drug paraphernalia. The Senate version did not provide for advance notice of a pending arrest, for declaratory judgments, or for specific defenses.

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency's analysis of the original bill, the bill would have an indeterminate impact on state and local government. Local enforcement costs and increased fine revenue are not determinable. The bill also would result in an indeterminate loss of state sales tax revenues from previously legal sales of certain drug paraphernalia. (5-26-87)

ARGUMENTS:

For:

Illegal drug use by the nation's youth has reached epidemic proportions and is fostered by the proliferation of drug paraphernalia. The industry is so well entrenched, in fact, that it even has its own trade magazines and associations. With the sale of drug paraphernalia in "head shops," convenience stores, and gas stations, its ready availability can only arouse curiosity about drugs, glamorize drug use, educate impressionable youths on how to use drugs, and help finance an already flourishing drug trade. At the same time that millions of dollars are being spent on enforcing drug laws, airing anti-drug commercials, and rehabilitating users, the paraphernalia shops are thriving, selling items intended solely to promote the use of illicit substances. This paradox sends a message that use of the drugs is actually condoned; the legality and ubiquity of drug paraphernalia contradict everything that the rest of society attempts to teach.

Prohibiting the open sale of drug paraphernalia would send a clear message that drug use is not, in fact, permissible, and would allow the state to adopt a more consistent approach toward the drug trade. By taking drug paraphernalia off the shelves and criminally penalizing those who continue to sell it, the bill would remove a blatant encouragement to use illegal drugs and would bring the state another step closer to a drug-free society.

OVER

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Against:

Instead of taking a superficial approach to the drug abuse problem by outlawing the sale of drug paraphernalia, the state would do better to improve drug education programs in the schools and to focus law enforcement efforts on convicting the pushers. Enforcement of this bill would fragment already strained resources and get at only the "little guy." Moreover, outlawing the sale of drug paraphernalia would not necessarily reduce the actual use of drugs, as many of the items in question can be made at home.

For:

The bill improves on the Senate version of the bill by omitting many of the originally enumerated items, such as blenders and containers, that have legitimate uses as well as drug-related uses. In doing so, in limiting its scope to the knowing sale of items specifically designed for drug use, and in providing a mechanism for the cessation of sales, the bill offers effective regulation without unnecessary conflicts with civil liberties.

Against:

The committee substitute of the bill is so weakened as to be virtually worthless. The Senate version correctly emphasized the use to which purported paraphernalia was put, rather than rigidly limiting itself to the single criterium of design, which is what the committee substitute would do. Further, the committee substitute fails to allow for the consideration of circumstantial factors the way the Senate-passed bill would have. Finally, instead of strict treatment of those who would promote drug use by selling paraphernalia, the substitute provides for a two-day warning to those facing arrest under its limited provisions.

Against:

The bill would be more effective if it also prohibited the advertising of drug paraphernalia. In upholding an ordinance that regulated the commercial marketing of drug paraphernalia, the U.S. Supreme Court stated, "The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed 'speech,' then it is speech proposing an illegal transaction, which a government may regulate or ban entirely (emphasis in original) (Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 102 S Ct 1186, 1192 (1982)). Like the activity in that case, the advertisement of drug paraphernalia promotes an illegal enterprise and may be similarly regulated.

Response: If it prohibited the advertisement of drug paraphernalia, the bill could unconstitutionally infringe upon First Amendment rights to free speech, and could thereby jeopardize the entire proposal. Further, such a prohibition would have no effect on large national magazines that advertise drug paraphernalia. Finally, a prohibition against selling drug paraphernalia is sufficient for the purpose; a retailer who cannot sell paraphernalia has no reason to advertise it.

Against:

Imposing criminal penalties on those who sell drug paraphernalia would be too severe. The bill's goals could be achieved by economic sanctions, such as stiff fines or license revocation.

Response: Without criminal penalties, the bill would stand little chance of being enforced and would fail to send a strong message that society disapproves of drug abuse. Further, criminal prosecution would only fall on paraphernalia sellers foolhardy or recalcitrant enough to continue to sell paraphernalia after being warned to stop.

POSITIONS:

The Michigan Council on Crime and Delinquency supports the bill. (12-8-87)

The Prosecuting Attorneys Association of Michigan supports the bill (12-8-87)

The Department of State Police opposes the bill. (12-9-87)