

SUBJECT: Enhanced punishments for obscenity depicting murder or sexual assault.

COMMITTEE: Criminal Jurisprudence —favorable, without amendment

VOTE: 7 ayes — Keel, Riddle, Pena, Denny, Escobar, Raymond, Reyna

0 nays

2 absent — Hodge, P. Moreno

WITNESSES: For — Jeff Cunningham

Against — Samuel J. England, ACLU of Texas

BACKGROUND: Penal Code, sec. 43.23 prohibits the promotion of obscene material and the possession of the material with the intent to promote it. The code also prohibits the production, presentation, direction, or participation in an obscene performance.

This offense is a class A misdemeanor, punishable by up to one year in jail and/or a \$4,000 fine. If the offense involves the wholesale promotion of obscene material or possession with the intent to wholesale promote it, the offense is a state jail felony, punishable by 180 days to two years in jail and a maximum fine of \$10,000.

Under 43.23(h), the punishment is enhanced one degree if it depicts:

- a child younger than 18 at the time the image of the child was made;
- an image that to a reasonable person would be virtually indistinguishable from the image of a child younger than 18; or
- an image created, adapted, or modified to be the image of an identifiable child.

A third-degree felony is punishable by two to 10 years in prison and a maximum fine of \$10,000.

The United State Supreme Court has found that government prohibitions of obscenity do not violate First Amendment protections of freedom of speech. Under Texas law, to be considered obscene, the material must:

- be something that the average person, applying contemporary community standards, would find, taken as a whole, appeals to prurient interest;
- depicts or describes patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality or patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and
- taken as a whole, lack serious literary, artistic, political, and scientific value.

DIGEST: HB 1074 would amend the Penal Code, sec. 43.23(h), to enhance penalties for material that contained obscene depictions of conduct constituting murder, capital murder, sexual assault, or aggravated sexual assault.

The bill would take effect on September 1, 2005, and would apply only to offenses committed on or after that date.

**SUPPORTERS
SAY:**

The current obscenity law does not prohibit the sale of obscene material that depicts violent acts in a sexual manner. While selling this material is not itself a violent act, it can encourage others to commit violent crimes. Studies have linked the material depiction of violent crime in a sexually explicit manner to the actual committing of these acts because exposure to these depictions may encourage individuals to act out their fantasies. For instance, it is thought that convicted murderer Patrick Russo had purchased pictures of strangled women from the Internet before committing murder.

This material has become more prevalent because of its availability and accessibility on the Internet. The bill ultimately would help to curb violent crime by punishing those who distributed this material with stiff penalties. Oklahoma recently enacted similar legislation, which has deterred websites from selling this material in the state, and HB 1074 would have a similar effect in Texas.

The bill would prohibit only obscenity and therefore would not apply to constitutionally protected speech. It would not apply to any violent popular television programs or films because the acts depicted in these shows would not be considered obscene.

According to Legislative Budget Board, this bill would not significantly impact the resources or workload of state corrections agencies.

OPPONENTS
SAY:

This bill is unnecessary because under current law, law enforcement can punish an obscenity offense with up to two years in prison and a \$10,000 fine. The definition of obscenity is broadly written so that the offense addressed by the bill already is covered in several places under the definition. For instance, obscenity is defined as "patently offensive representations or descriptions of ultimate sexual acts," and "patently offensive representations or descriptions of . . . sadism (and) masochism." Violent and sexual depictions of murder or sexual assault could fall under both these definitions.

HB 1074 has the potential to violate individuals' First Amendment rights. The breadth of the definition of obscene could cover almost any sexual depiction of murder or sexual assault. These kinds of violent and graphic depictions are common to contemporary films and television, including the popular program, *The Sopranos*. Many Texans watch these shows, yet are law-abiding, non-violent citizens. The fact is that there is no conclusive evidence that such images could lead to violent crime.

This bill would add up to eight years of prison time for a non-violent offense. Texas prisons already are pressed to their limit and such additional costs place a huge burden on taxpayers. Unless solid evidence exists that an increase in prison time would result in a reduction in the distribution of this material, lawmakers should seek less costly solutions to this problem, such as heavy fines.

NOTES:

The companion bill, SB 1274 by Deuell, has been referred to the Senate Criminal Justice Committee.