CHAPTER 944

CRIMES AGAINST SEXUAL MORALITY

Cross−reference: See definitions in s. 939.22.

SUBCHAPTER I

LEGISLATIVE INTENT

944.01 Intent. The state recognizes that it has a duty to encourage high moral standards. Although the state does not regulate the private sexual activity of consenting adults, the state does not condone or encourage any form of sexual conduct outside the institution of marriage. Marriage is the foundation of family and society. Its stability is basic to morality and civilization, and of vital interest to society and this state.

History: 1983 a. 17.

SUBCHAPTER II

SEXUAL CRIMES WHICH AFFECT THE FAMILY

944.05 Bigamy. (1) Whoever does any of the following is guilty of a Class I felony:

(a) Contracts a marriage in this state with knowledge that his or her prior marriage is not dissolved; or

(b) Contracts a marriage in this state with knowledge that the prior marriage of the person he or she marries is not dissolved; or

(c) Cohabits in this state with a person whom he or she married outside this state with knowledge that his or her own prior marriage had not been dissolved or with knowledge that the prior marriage of the person he or she married had not been dissolved.

(2) In this section "cohabit" means to live together under the representation or appearance of being married.

History: 1977 c. 173; 1993 a. 486; 2001 a. 109.

944.06 Incest. Whoever marries or has nonmarital sexual intercourse, as defined in s. 948.01 (6), with a person he or she knows is a blood relative and such relative is in fact related in a degree within which the marriage of the parties is prohibited by the law of this state is guilty of a Class F felony.

History: 1977 c. 173; 2001 a. 109; 2009 a. 13.

Lawrence v. Texas, 539 U.S. 558 (2003), did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct. There was no clearly established federal law in 2001 that supported defendant's claim that he had a fundamental right to engage in incest free from government proscription. Muth v. Frank, 412 F.3d 808 (2005).

SUBCHAPTER III

FORNICATION; ADULTERY; GRATIFICATION

944.15 Public fornication. (1) In this section, "in public" means in a place where or in a manner such that the person knows or has reason to know that his or her conduct is observable by or in the presence of persons other than the person with whom he or she is having sexual intercourse.

(2) Whoever has sexual intercourse in public is guilty of a Class A misdemeanor.

History: 1977 c. 173; 1983 a. 17, 27; 1987 a. 332; 2001 a. 109.

944.16 Adultery. Whoever does either of the following is guilty of a Class I felony:

(1) A married person who has sexual intercourse with a person not the married person's spouse; or

(2) A person who has sexual intercourse with a person who is married to another.

History: 1977 c. 173; 1993 a. 486; 2001 a. 109.

944.17 Sexual gratification. (1) In this section, "in public" means in a place where or in a manner such that the person knows or has reason to know that his or her conduct is observable by or in the presence of persons other than the person with whom he or she is having sexual gratification.

(2) Whoever does any of the following is guilty of a Class A misdemeanor:

(a) Commits an act of sexual gratification in public involving the sex organ of one person and the mouth or anus of another.

(c) Commits an act of sexual gratification involving his or her sex organ and the sex organ, mouth or anus of an animal.

(d) Commits an act of sexual gratification involving his or her sex organ, mouth or anus and the sex organ of an animal.

(3) Subsection (2) does not apply to a mother's breast−feeding of her child.

History: 1977 c. 173; 1983 a. 17; 1987 a. 332; 1995 a. 165.

SUBCHAPTER IV

OBSCENITY

944.20 Lewd and lascivious behavior. (1) Whoever does any of the following is guilty of a Class A misdemeanor:

(a) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(b) Publicly and indecently exposes genitals or pubic area.

(2) Subsection (1) does not apply to a mother's breast−feeding of her child.

History: 1977 c. 173; 1983 a. 17; 1989 a. 31; 1995 a. 165.

"Publicly" is susceptible to a construction that will avoid the question of constitutional overbreadth, by limiting the application of the statute to constitutionally permissible goals of protecting children from exposure to obscenity and preventing assaults on the sensibilities of unwilling adults in public. Reichenberger v. Warren, 319 F. Supp. 1237 (1970).

944.21 Obscene material or performance. (1) The legislature intends that the authority to prosecute violations of this section shall be used primarily to combat the obscenity industry and shall never be used for harassment or censorship purposes against materials or performances having serious artistic, literary, political, educational or scientific value. The legislature further intends that the enforcement of this section shall be consistent with the first amendment to the U.S. constitution, article I, section 3, of the Wisconsin constitution and the compelling state interest in protecting the free flow of ideas.

(2) In this section:

(a) "Community" means this state.

(am) "Exhibit" has the meaning given in s. 948.01 (1d).

(b) "Internal revenue code" has the meaning specified in s. 71.01 (6).

(c) "Obscene material" means a writing, picture, film, or other recording that:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

(d) "Obscene performance" means a live exhibition before an audience which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

(dm) "Recording" has the meaning given in s. 948.01 (3r).

(e) "Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals.

(f) "Wholesale transfer or distribution of obscene material" means any transfer for a valuable consideration of obscene material for purposes of resale or commercial distribution; or any distribution of obscene material for commercial exhibition. "Wholesale transfer or distribution of obscene material" does not require transfer of title to the obscene material to the purchaser, distributee or exhibitor.

(3) Whoever does any of the following with knowledge of the character and content of the material or performance and for commercial purposes is subject to the penalties under sub. (5):

(a) Imports, prints, sells, has in his or her possession for sale, publishes, exhibits, plays, or distributes any obscene material.

(b) Produces or performs in any obscene performance.

(c) Requires, as a condition to the purchase of periodicals, that a retailer accept obscene material.

(4) Whoever does any of the following with knowledge of the character and content of the material is subject to the penalties under sub. (5):

(a) Distributes, exhibits, or plays any obscene material to a person under the age of 18 years.

(b) Has in his or her possession with intent to distribute, exhibit, or play to a person under the age of 18 years any obscene material.

(5) (a) Except as provided under pars. (b) to (e), any person violating sub. (3) or (4) is subject to a Class A forfeiture.

(b) If the person violating sub. (3) or (4) has one prior conviction under this section, the person is guilty of a Class A misdemeanor.

(c) If the person violating sub. (3) or (4) has 2 or more prior convictions under this section, the person is guilty of a Class H felony.

(d) Prior convictions under pars. (b) and (c) apply only to offenses occurring on or after June 17, 1988.

(e) Regardless of the number of prior convictions, if the violation under sub. (3) or (4) is for a wholesale transfer or distribution of obscene material, the person is guilty of a Class H felony.

(5m) A contract printer or employee or agent of a contract printer is not subject to prosecution for a violation of sub. (3) regarding the printing of material that is not subject to the contract printer's editorial review or control.

(6) Each day a violation under sub. (3) or (4) continues constitutes a separate violation under this section.

(7) A district attorney may submit a case for review under s. 165.25 (3m). No civil or criminal proceeding under this section may be commenced against any person for a violation of sub. (3) or (4) unless the attorney general determines under s. 165.25 (3m) that the proceeding may be commenced.

(8) (a) The legislature finds that the libraries and educational institutions under par. (b) carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and pluralistic nature of American society. The legislature further finds that it is in the interest of the state to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions.

(b) No person who is an employee, a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employee, a member of the board of directors or a trustee:

1. A public elementary or secondary school.

2. A private school, as defined in s. 115.001 (3r), or a tribal school, as defined in s. 115.001 (15m).

3. Any school offering vocational, technical or adult education that:

a. Is a technical college, is a school approved by the department of safety and professional services under s. 440.52, or is a school described in s. 440.52 (1) (e) 6., 7. or 8.; and

b. Is exempt from taxation under section 501 (c) (3) of the internal revenue code.

4. Any institution of higher education that is accredited, as described in s. 39.30 (1) (d), and is exempt from taxation under section 501 (c) (3) of the internal revenue code.

5. A library that receives funding from any unit of government.

(9) In determining whether material is obscene under sub. (2) (c) 1. and 3., a judge or jury shall examine individual pictures, recordings of images, or passages in the context of the work in which they appear.

(10) The provisions of this section, including the provisions of sub. (8), are severable, as provided in s. 990.001 (11).

History: 1977 c. 173, 272; 1987 a. 416; 1993 a. 399; 1995 a. 27 s. 9154 (1); 1997 a. 27; 1999 a. 9; 2001 a. 16, 104, 109; 2005 a. 22, 25, 254; 2009 a. 302; 2017 a. 59.

The sufficiency of an obscenity complaint and the correctness of jury instructions are discussed. State v. Simpson, 56 Wis. 2d 27, 201 N.W.2d 558.

To charge a defendant with the possession or sale of obscene materials, the complaint must allege that the defendant knew the nature of the materials; a charge that the defendant acted "feloniously" is insufficient to charge scienter. State v. Schneider, 60 Wis. 2d 563, 211 N.W.2d 630.

NOTE: The preceding annotations relate to this section as it existed prior to its treatment by 1987 Wis. Act. 416.

This section is not unconstitutionally overbroad or vague. States are not prevented from deviating from the *Miller v. California,* 413 U.S. 15, language in regulating obscenity. Jury instructions that use synonymous or explanatory terms not used in *Miller* are not improper. County of Kenosha v. C. & S. Management, Inc. 223 Wis. 2d 373, 588 N.W.2d 236 (1999), 97−0642.

A telephone survey regarding community standards is irrelevant. A relevant survey must address whether the material at issue depicts acts in a patently offensive manner and appeals to the prurient interest. County of Kenosha v. C. & S. Management, Inc. 223 Wis. 2d 373, 588 N.W.2d 236 (1999), 97−0642.

Contemporary community standards must be applied by juries in accordance with their own understanding of the average tolerance of the average person in their community. The community to be considered is the state. Material is obscene if it appeals to prurient interest, not if it intends or attempts to appeal to prurient interest. State v. Tee & Bee, Inc. 229 Wis. 2d 446, 600 N.W.2d 230 (Ct. App. 1999), 98−0602.

The federal constitution does not mandate that juries be instructed to apply standards of a hypothetical statewide community. Jenkins v. Georgia, 418 U.S. 153 (1974).

A motion picture cannot be seized without a prior adversary hearing. Detco, Inc. v. Neelen, 356 F. Supp. 289 (1973).

Behind the Curtain of Privacy: How Obscenity Law Inhibits the Expression of Ideas About Sex and Gender. Peterson. 1998 WLR 625.

From Ulysses to Portnoy: A pornography primer. Eich, 53 MLR 155.

944.23 Making lewd, obscene or indecent drawings. Whoever makes any lewd, obscene or indecent drawing or writing in public or in a public place is guilty of a Class C misdemeanor.

History: 1977 c. 173.

944.25 Sending obscene or sexually explicit electronic messages. (1) In this section:

(a) "Electronic mail solicitation" means an electronic mail message, including any attached program or document, that is sent for the purpose of encouraging a person to purchase property, goods, or services.

(b) "Obscene material" has the meaning given in s. 944.21 (2) (c).

(c) "Sexually explicit conduct" has the meaning given in s. 948.01 (7).

(2) Whoever sends an unsolicited electronic mail solicitation to a person that contains obscene material or a depiction of sexually explicit conduct without including the words "ADULT ADVERTISEMENT" in the subject line of the electronic mail solicitation is guilty of a Class A misdemeanor.

History: 2001 a. 16.

SUBCHAPTER V

PROSTITUTION

944.30 Prostitution. (1m) Any person who intentionally does any of the following is guilty of a Class A misdemeanor:

(a) Has or offers to have or requests to have nonmarital sexual intercourse for anything of value.

(b) Commits or offers to commit or requests to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another for anything of value.

(c) Is an inmate of a place of prostitution.

(d) Masturbates a person or offers to masturbate a person or requests to be masturbated by a person for anything of value.

(e) Commits or offers to commit or requests to commit an act of sexual contact for anything of value.

(2m) If the person under sub. (1m) has not attained the age of 18 years and if the court determines that the best interests of the person are served and society will not be harmed, the court may enter a consent decree under s. 938.32 or a deferred prosecution agreement in accordance with s. 938.245, 971.39, or 971.40.

History: 1977 c. 173; 1979 c. 221; 1983 a. 17; 1993 a. 213; 2013 a. 362.

In order for a female prostitute to avoid prosecution upon equal protection grounds, it must be shown that the failure to prosecute male patrons was selective, persistent, discriminatory, and without justifiable prosecutorial discretion. State v. Johnson, 74 Wis. 2d 169, 246 N.W.2d 503 (1976).

Prosecuting for solicitation under s. 939.30, rather than for prostitution under this section, did not deny equal protection. Sears v. State, 94 Wis. 2d 128, 287 N.W.2d 785 (1980).

A prostitution raid focusing only on female participants amounts to selective prosecution in violation of equal protection. The applicable constitutional analysis is discussed. State v. McCollum, 159 Wis. 2d 184, 464 N.W.2d 44 (Ct. App. 1990).

As long as someone compensates another for engaging in nonmarital sex, the elements of prostitution are met. The person making payment need not engage in the sexual act. State v. Kittilstad, 231 Wis. 2d 245, 603 N.W.2d 732 (1999), 98−1456.

Since sub. (1) [now sub. (1m) (a)] requires a request for nonmarital sexual intercourse be coupled with the offer of anything of value, evidence that the defendant was willing to pay to watch the witness masturbate did not satisfy sub. (1). State v. Turnpaugh, 2007 WI App 222, 305 Wis. 2d 722, 741 N.W.2d 488, 06−2301.

944.31 Patronizing prostitutes. Except as provided in s. 948.081, any person who enters or remains in any place of prostitution with intent to have nonmarital sexual intercourse or to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact with a prostitute is guilty of the following:

NOTE: Section 944.31 (intro.) is shown as affected by 2017 Wis. Acts 128 and 131 and as merged by the legislative reference bureau under s. 13.92 (2) (i).

(1) For a first or 2nd violation, a Class A misdemeanor.

(2) For a 3rd or subsequent violation, a Class I felony.

History: 1977 c. 173; 1979 c. 221; 1983 a. 17; 2017 a. 128, 131; s. 13.92 (2) (i).

944.32 Soliciting prostitutes. Except as provided under s. 948.08, whoever intentionally solicits or causes any person to practice prostitution or establishes any person in a place of prostitution is guilty of a Class H felony.

History: 1977 c. 173; 1987 a. 332; 2001 a. 109.

Section 944.32, 1985 stats., prohibiting solicitation of prostitutes, does not violate right of free speech. Shillcutt v. State, 74 Wis. 2d 642, 247 N.W.2d 694 (1976).

This section is not unconstitutionally vague or overbroad and its penalty is not disproportionate. State v. Johnson, 108 Wis. 2d 703, 324 N.W.2d 447 (Ct. App. 1982).

Monetary gain is not an element of the crime. State v. Huff, 123 Wis. 2d 397, 367 N.W.2d 226 (Ct. App. 1985).

944.33 Pandering. Whoever does any of the following is guilty of a Class A misdemeanor:

(1) Solicits another to have nonmarital sexual intercourse or to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact with a person the solicitor knows is a prostitute; or

(2) With intent to facilitate another in having nonmarital intercourse or committing an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact with a prostitute, directs or transports the person to a prostitute or directs or transports a prostitute to the person.

History: 1977 c. 173; 1979 c. 221, 355; 1983 a. 17; 1993 a. 486; 2001 a. 109; 2013 a. 362.

944.34 Keeping place of prostitution. Whoever intentionally does any of the following is guilty of a Class H felony:

(1) Keeps a place of prostitution; or

(2) Grants the use or allows the continued use of a place as a place of prostitution.

History: 1977 c. 173; 2001 a. 109.

A conviction under sub. (2) requires proof that the defendant has authority to exclude those engaging in prostitution from the use of the place for prohibited acts. Shillcutt v. State, 74 Wis. 2d 642, 247 N.W.2d 694 (1976).

Under sub. (2), "grants the use" requires the prosecution to prove a single affirmative approval of the use of the premises as a place of prostitution, while "allows the continued use of" requires proof of intentional but passive acquiescence or toleration of the use on more than one occasion. Johnson v. State, 76 Wis. 2d 672, 251 N.W.2d 834 (1977).

944.36 Solicitation of drinks prohibited. Any licensee, permittee or bartender of a retail alcohol beverage establishment covered by a license or permit issued under ch. 125 who permits an entertainer or employee to solicit a drink of any alcohol beverage, as defined in s. 125.02 (1), or any other drink from a customer

on the premises, or any entertainer or employee who solicits such drinks from any customer, is guilty of a Class B misdemeanor.

History: 1975 c. 39 s. 675x; 1975 c. 199; Stats. 1975 s. 944.36; 1977 c. 173; 1981 c. 79.

Legislative Council Note, 1981: The amendment to s. 944.36 reflects the combining of s. 66.054 and ch. 176 into one chapter, ch. 125, and the definition of "alcohol beverage" in that chapter. [Bill 300−A]