

CHAPTER 944

CRIMES AGAINST SEXUAL MORALITY

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SEXUAL CRIMES WITHOUT CONSENT.

944.01 Rape. (1) Any male who has sexual intercourse with a female he knows is not his wife, by force and against her will, may be imprisoned not more than 30 years.

(2) In this section the phrase "by force and against her will" means either that her utmost resistance is overcome or prevented by physical violence or that her will to resist is overcome by threats of imminent physical violence likely to cause great bodily harm.

The term "utmost resistance" is a relative term which does not require that the useless be done, the doctrine applying only to a woman's counteraction to the physical force asserted by the man to commit the act of intercourse; but the test of whether a woman's "will to resist is overcome by threats of imminent physical violence likely to cause great bodily harm" is subjective, and need not be expressed in terms of fear and incapability to resist in every case. *State v. Herfel*, 49 W (2d) 513, 182 NW (2d) 232

Specific intent to have intercourse by force and against the victim's will is not an element of the crime and it is not error to refuse to instruct on that ground. *Brown v. State*, 59 W (2d) 200, 207 NW (2d) 602.

Intent to rape is not an element of the crime and there is no need to instruct as to intent. *Redepenning v. State*, 60 W (2d) 471, 210 NW (2d) 673.

944.02 Sexual intercourse without consent. Any male who has sexual intercourse under any of the following circumstances with a female he knows is not his wife may be imprisoned not more than 15 years:

(1) If she is incapable of resisting or consenting because of stupor or abnormal condition of the mind and he knows of her incapacity; or

(2) If she is mentally ill, mentally infirm or mentally deficient and he knows of her incapacity; or

(3) If she submits because she is deceived as to the nature of the act or because she believes

that the intercourse is marital and this deception or belief is intentionally induced by him.

SEXUAL CRIMES WHICH AFFECT THE FAMILY.

944.05 Bigamy. (1) Whoever does any of the following may be fined not more than \$1,000 or imprisoned not more than 5 years or both:

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

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

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

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

944.06 Incest. Whoever marries or has nonmarital sexual intercourse with a person he 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 may be imprisoned not more than 10 years.

SEXUAL CRIMES WHICH INVOLVE CHILDREN.

944.10 Sexual intercourse with a child. Any male who has sexual intercourse with a

female he knows is not his wife may be penalized as follows:

(1) If the female is under the age of 18, fined not more than \$1,000 or imprisoned not more than 5 years or both; or

(2) If the female is under the age of 16, and the male is 18 years of age or over, imprisoned not more than 15 years; or

(3) If the female is under the age of 12, and the male is 18 years of age or over, imprisoned not more than 30 years.

944.11 Indecent behavior with a child.

Any of the following may be imprisoned not more than 10 years:

(1) Any male who takes indecent liberties with a female under the age of 16; or

(2) Whoever takes indecent liberties with the privates of any person under the age of 18; or

(3) Whoever consents to the indecent use of his own privates by any person under the age of 18.

This section is not unconstitutional for vagueness and overbreadth *State v. Driscoll*, 53 W (2d) 699, 193 NW (2d) 851.

This section is not unconstitutionally vague. *Driscoll v. Schmidt*, 354 F Supp. 1225

944.12 Enticing a child for immoral purposes. Any person 18 years of age or over, who, with intent to commit a crime against sexual morality, persuades or entices any child under 18 years of age into any vehicle, building, room or secluded place may be imprisoned not more than 10 years.

SEXUAL CRIMES BETWEEN ADULTS WITH CONSENT.

944.15 Fornication. Whoever has sexual intercourse with a person not his spouse may be fined not more than \$200 or imprisoned not more than 6 months or both.

944.16 Adultery. Either of the following may be fined not more than \$1,000 or imprisoned not more than 3 years or both:

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

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

944.17 Sexual perversion. Whoever does either of the following may be fined not more than \$500 or imprisoned not more than 5 years or both:

(1) Commits an abnormal act of sexual gratification involving the sex organ of one person and the mouth or anus of another; or

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

(1) is not unconstitutionally vague or overbroad *Jones v. State*, 55 W (2d) 742, 200 NW (2d) 587.

OBSCENITY.

944.20 Lewd and lascivious behavior.

Whoever does any of the following may be fined not more than \$500 or imprisoned not more than one year in county jail or both:

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

(2) Publicly and indecently exposes a sex organ; or

(3) Openly cohabits and associates with a person he knows is not his spouse under circumstances that imply sexual intercourse.

See note to Art. 1, sec. 1, citing *Reichenberger v. Warren*, 319 F Supp. 1237

944.21 Lewd, obscene or indecent matter, pictures and performances.

(1) Whoever intentionally does any of the following may be fined not more than \$5,000 or imprisoned not more than 5 years or both:

(a) Imports, prints, advertises, sells, has in his possession for sale, or publishes, exhibits, or transfers commercially any lewd, obscene or indecent written matter, picture, sound recording, or film; or

(b) Has in his possession any lewd, obscene or indecent sound recording or motion picture film; or

(c) Has in his possession, with intent to transfer or exhibit to a person under the age of 18 years, any matter prohibited by this section; or

(d) Advertises, produces or performs in any lewd, obscene or indecent performance.

(2) Whoever requires, as a condition to the purchase of periodicals, that a retailer accept material known by the distributor to be lewd, obscene or indecent may be fined not more than \$5,000 or imprisoned not more than 5 years or both.

Tests of obscenity discussed. *State v. Amato*, 49 W (2d) 638, 183 NW (2d) 29.

Obscenity tests and the scope of appellate review discussed. *Court v. State*, 51 W (2d) 683, 188 NW (2d) 475.

The manner in which the store was operated and the publications displayed can be used to show knowledge by the defendant. "Pandering" includes more than active solicitation through advertising. *Orito v. State*, 55 W (2d) 161, 197 NW (2d) 763.

Sufficiency of obscenity complaint and correctness of jury instructions discussed. *State v. Simpson*, 56 W (2d) 27, 201 NW (2d) 558.

See note to 968.01, citing *State v. Schneider*, 60 W (2d) 563, 211 NW (2d) 630.

Definition of obscenity restated and may be retroactively applied. *State ex rel. Chobot v. Circuit Court*, 61 W (2d) 354, 212 NW (2d) 690.

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

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

944.22 Possession of lewd, obscene or indecent matter. Whoever knowingly has in his possession any lewd, obscene or indecent written matter or a lewd, obscene or indecent picture may be fined not more than \$1,000 or imprisoned in the county jail not more than one year or both.

See note to Art. 1, sec. 3, citing *Brown v. Ceci*, 331 F Supp 718.

944.23 Making lewd, obscene or indecent drawings. Whoever makes any lewd, obscene or indecent drawing or writing in any public place may be fined not more than \$100 or imprisoned not more than 60 days or both.

944.25 Exposing minors to harmful materials. (1) DEFINITIONS. In this section:

(a) "Minor" means any person under the age of 18 years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

1. Predominantly appeals to the prurient, shameful or morbid interest of minors; and

2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

3. Is utterly without redeeming social importance for minors.

(g) "Knowledge of the nature of the material" means:

1. Knowledge of the character and content of any material described herein; or

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2. Knowledge or information that the material described herein has been adjudged to be harmful to minors in a proceeding instituted under sub. (2) or (10), or is the subject of a pending proceeding instituted under sub. (2) or (10).

(h) "Knowledge of the minor's age" means:

1. Knowledge or information that the person is a minor, or

2. Reason to know, or a belief or ground for belief which warrants further inspection or inquiry of the age of the minor.

(i) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(j) "Harmful material" means:

1. Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse, and which is harmful to minors, or

2. Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in subd. 1, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse, and which, taken as a whole, is harmful to minors.

(2) COMMENCEMENT OF CIVIL PROCEEDING. Whenever the attorney general or a district attorney has reasonable cause to believe that any person is engaged in selling or exhibiting harmful material to minors, or may become engaged in selling or exhibiting harmful material to minors, the attorney general or the district attorney for the county in which such material is offered for sale or exhibition shall institute an action in the circuit court for that county for adjudication of the question of whether such material is harmful to minors.

(3) FILING AND FORM OF COMPLAINT. The action under sub. (2) shall be commenced by the filing of a complaint to which shall be attached as an exhibit a true copy of the allegedly harmful material. The complaint shall:

(a) Be directed against such material by name or description;

(b) Allege that such material is harmful to minors;

(c) Designate as respondents and list the names and addresses, if known, of any person in this state preparing, selling or commercially distributing or exhibiting such material to minors; or giving away or offering to give away such material to minors; or possessing such material with the apparent intent to sell or commercially distribute or give away or offer to give away such material to minors;

(d) Seek an adjudication that such material is harmful to minors; and

(e) Seek a permanent injunction against any respondent prohibiting him from selling, commercially distributing or exhibiting or giving away such material to minors or from permitting minors to inspect such material.

(4) EXAMINATION BY THE COURT. (a) Upon the filing of the complaint described in sub. (3), the attorney general or the district attorney shall present the same, together with the material attached thereto, as soon as practicable to the court for its examination and reading.

(b) If after such examination and reading the court finds no probable cause to believe such material to be harmful to minors, the court shall cause an endorsement to that effect to be placed and dated upon the complaint and shall thereupon dismiss the action.

(c) If after such examination and reading the court finds probable cause to believe such material to be harmful to minors, the court shall cause an endorsement to that effect to be placed and dated upon the complaint whereupon it shall be the responsibility of the attorney general or the district attorney, promptly to request the clerk of the court to issue summons and to copy such endorsement upon such number of duplicates of such complaint as are needed for the service of summons, to each copy of which summons shall be attached a copy of such complaint as so endorsed. Service of such summons and endorsed complaint shall be made upon the respondents thereto in any manner provided by law.

(5) APPEARANCE, ANSWER AND TRIAL DATE.

(a) On or before the return date specified in the summons issued under sub. (4), or within 15 days after receiving notice of the issuance of such summons, the author, publisher or any person interested in sending or causing to be sent, bringing or causing to be brought, into this state for sale or commercial distribution or exhibition, or any person in this state preparing, selling, exhibiting or commercially distributing, or possessing with intent to sell or commercially distribute or exhibit, the material exhibited to the endorsed complaint, may appear and may intervene as a respondent and file an answer.

(b) If, after service of summons has been effected upon all respondents, no person appears and files an answer on or before the return date specified in the summons, the court may forthwith adjudge whether the material so exhibited to the endorsed complaint is harmful to minors and enter an appropriate final judgment.

(c) Upon the expiration of the time for filing answers by all respondents, the court shall, upon its own motion, or upon the application of any

party who has appeared and filed an answer, set a date for the trial of the issues joined.

(6) PUBLIC POLICY, PROCEDURE AND EVIDENCE. (a) The public policy of this state requires that all proceedings prescribed in this section, other than criminal actions under sub. (10), be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of the press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable, except as hereinafter provided, to the trial of the issues framed by the complaint and answers.

(b) Every person appearing and answering shall be entitled, upon request, to a trial of any issue with an advisory jury and the court, with the consent of all parties, may order a trial of any issue with a jury whose verdict shall have the same effect as in cases at law.

(7) JUDGMENT. If the court or jury finds the material exhibited to the complaint not to be harmful to minors, the court shall enter judgment accordingly and shall dismiss the complaint. If the court or jury finds the material exhibited to the complaint to be harmful to minors, the court shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof, enter a permanent injunction against any respondent prohibiting him from selling, commercially distributing or giving away such material to minors or from permitting minors to inspect such material.

(8) INJUNCTIONS. (a) In any action in which an injunction is sought under this section, any respondent named in the complaint, or any person who becomes a respondent by virtue of intervention under sub. (5), shall be entitled to a trial of the issues within one day after joinder of issue, and a decision shall be rendered by the court or jury within 2 days of the conclusion of the trial. If the issues are being tried before a jury and the jury is not able to render a decision within 2 days of the conclusion of the trial, then notwithstanding any other provision of this section, the jury shall be dismissed and a decision shall be rendered by the court within 2 days of the conclusion of the trial.

(b) No preliminary injunction shall be issued without at least 2 days' notice to the respondents.

(c) If the court, pursuant to sub. (4), finds probable cause to believe the exhibited material to be harmful to minors, and so endorses the complaint, the court may, upon the motion of the attorney general or the district attorney, issue a temporary restraining order against any respondent prohibiting him from selling, commercially distributing or exhibiting or giving away such material to minors or from permitting

minors to inspect such material. No temporary restraining order shall be granted without notice to the respondents unless it clearly appears from specific facts shown by affidavit or by the verified complaint that one or more of the respondents are engaged in the sale or exhibition of harmful material to minors and that immediate and irreparable injury to the morals and general welfare of minors in this state will result before notice can be served and a hearing had thereon. Every temporary restraining order shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its own terms within such time after entry, not to exceed 3 days, as the court fixes unless within the time so fixed the respondent against whom the order is directed consents that it may be extended for a longer period. If a restraining order is granted without notice, a motion for a preliminary injunction shall be set down for hearing within 2 days after the granting of such order and shall take precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the attorney general or the district attorney shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.

(9) CONTEMPT. Any respondent, or any officer, agent, servant, employe or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice, by personal service or otherwise, of any injunction or restraining order entered under sub. (7) or (8), and who disobeys any of the provisions thereof, shall be guilty of contempt of court and upon conviction may be fined not more than \$250 or imprisoned for not more than 6 months or both.

(10) CRIMINAL PROVISIONS CONCERNING REGULAR SALES OF HARMFUL MATERIAL TO MINORS. (a) Subject to par. (b), no person with knowledge of the nature of the material, and with knowledge of the minor's age, shall sell, exhibit or loan for monetary consideration to a minor any material which is harmful to minors. Upon conviction thereof such person may be fined not more than \$500 or be imprisoned in the county jail for not more than one year for each offense or both.

(b) No criminal proceeding shall be commenced against any person pursuant to par. (a) unless, prior to the sale or loan which is the subject of such proceeding, such person:

1. Had written notice from the attorney general or the district attorney that the material which is the subject of such proceeding has been adjudged harmful to minors under sub. (7) or (10), or

2. Has been subject to an order entered under sub. (7) prohibiting such person from selling, commercially distributing or exhibiting or giving away to minors, or from permitting minors to inspect the harmful material which is the subject of such criminal proceeding, or any other harmful material.

(11) DEFENSES AND EXCEPTIONS. No person shall be guilty of contempt under sub. (9) or shall be subject to prosecution under this section:

(a) For any sale or exhibition to a minor where such person had reasonable cause to believe that the minor involved was 18 years old or more, and such minor exhibited to such person a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was 18 years old or more;

(b) For any sale or exhibition where a minor is accompanied by a parent or guardian, or accompanied by an adult and such person has no reason to suspect that the adult accompanying the minor is not the minor's parent or guardian;

(c) Where such person is a bona fide school, museum or public library or is acting in his capacity as an employe of such organization or as a retail outlet affiliated with and serving the educational purposes of such organization.

(12) EXTRADITION. If any person is convicted of contempt under sub. (9) or convicted under sub. (10) and cannot be found in this state, the governor or any person performing the functions of governor by authority of the law, shall, unless such person shall have appealed from the judgment of contempt or conviction and such appeal has not been finally determined, demand his extradition from the executive authority of the state in which such person is found.

History: 1971 c. 40; 1973 c. 12

Constitutionality of a bill prohibiting dissemination of obscene materials to minors discussed. 58 Atty. Gen. 214, 230.

PROSTITUTION

944.30 Prostitution. Any female who intentionally does any of the following may be fined not more than \$500 or imprisoned not more than one year or both:

(1) Has or offers to have nonmarital sexual intercourse for any thing of value; or

(2) Commits or offers to commit an act of sexual perversion for any thing of value; or

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

This section is not unconstitutional as applying only to women. *State v. Mertes*, 60 W (2d) 414, 210 NW (2d) 741.

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944.31 Patronizing prostitutes. Any male who enters or remains in any place of prostitution with intent to have nonmarital sexual intercourse or to commit an act of sexual perversion may be fined not more than \$100 or imprisoned not more than 3 months or both.

944.32 Soliciting prostitutes. Whoever intentionally solicits or causes any female to practice prostitution or establishes any female in a place of prostitution may be fined not more than \$1,000 or imprisoned not more than 5 years or both. If the female is under the age of 18, the defendant may be fined not more than \$2,000 or imprisoned not more than 10 years or both.

944.33 Pandering. (1) Whoever does any of the following may be fined not more than \$200 or imprisoned not more than 6 months or both:

(a) Solicits another to have nonmarital sexual intercourse or to commit an act of sexual perversion with a female he knows is a prostitute; or

(b) With intent to facilitate another in having nonmarital intercourse or committing an act of sexual perversion with a prostitute, directs or

transports him to a prostitute or directs or transports a prostitute to him.

(2) If the accused received compensation from the earnings of the prostitute, he may be fined not more than \$5,000 or imprisoned not more than 10 years or both.

(3) In a prosecution under this section, it is competent for the state to prove other similar acts by the accused for the purpose of showing his intent and disposition.

944.34 Keeping place of prostitution. Whoever intentionally does any of the following may be fined not more than \$5,000 or imprisoned not more than 5 years or both:

(1) Keeps a place of prostitution; or

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

944.35 Evidence of place of prostitution.

Evidence that a place has a general reputation as a place of prostitution or that, at or about the time in question, it was frequently visited at unseasonable hours by a number of men not residents therein is admissible on the issue of whether it is a place of prostitution.