CHAPTER 944

CRIMES AGAINST SEXUAL MORALITY

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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.

SEXUAL CRIMES WHICH AFFECT THE FAMILY.

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

944.06 Incest. Whoever marries or has nonmarital sexual intercourse 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 C felony.

History: 1977 c. 173.

FORNICATION; ADULTERY; GRATIFICATION.

944.15 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.

944.16 Adultery. Whoever does either of the following is guilty of a Class E 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.

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.

Section 944.17 (1), 1965 stats., is not unconstitutionally vague or overbroad. Jones v. State, 55 W (2d) 742, 200 NW (2d) 587.

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.

The word "publicly" in 944.20 (2) is susceptible to a construction which 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 sensibilities of unwilling adults in public. Reichenberger v. Warren, 319 F Supp. 1237.

944.205 Photographs, motion pictures, videotapes or other visual representations showing nudity. (1) In this section, "nudity" has the meaning given in s. 948.11 (1) (d).

(2) Whoever does any of the following is guilty of a Class E felony:

(a) Takes a photograph or makes a motion picture, videotape or other visual representation or reproduction that depicts nudity without the knowledge and consent of the person who is depicted nude, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the taking or making of the photograph, motion picture, videotape or other visual representation or reproduction.

(b) Possesses or distributes a photograph, motion picture, videotape or other visual representation or reproduction that depicts nudity and that was taken or made without the knowledge and consent of the person who is depicted nude, if the person knows or has reason to know that the photograph, motion picture, videotape or other visual representation or reproduction was taken or made

without the knowledge and consent of the person who is depicted nude.

(3) Notwithstanding sub. (2) (a) and (b), if the person in a photograph, motion picture, videotape or other visual representation or reproduction is a child and the making, possession or distribution of the photograph, motion picture, videotape or other visual representation or reproduction does not violate s. 948.05 or 948.12, a parent, guardian or legal custodian of the child may do any of the following:

(a) Make and possess the photograph, motion picture, videotape or other visual representation or reproduction of the child.

(b) Distribute a photograph, motion picture, videotape or other visual representation or reproduction made or possessed under par. (a) if the distribution is not for commercial purposes.

(4) This section does not apply to a person who receives a photograph, motion picture, videotape or other visual representation or reproduction of a child from a parent, guardian or legal custodian of the child under sub. (3) (b), if the possession and distribution are not for commercial purposes.

History: 1995 a. 249.

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.

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

(c) "Obscene material" means a writing, picture, sound recording or film 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.

(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.

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

(b) Has in his or her possession with intent to transfer or exhibit 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 D 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 D felony.

(5m) A contract printer or employe 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 employe, 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 employe, 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).

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

a. Is a technical college, is a school approved by the department of education under s. 38.51 or is a school described in s. 38.51 (9) (f), (g) or (h); 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 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).

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

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.

Sub. (1) (a) is unconstitutionally overbroad. State v. Princess Cinema of Milwaukee, 96 W (2d) 646, 292 NW (2d) 807 (1980).

Federal constitution does not mandate that juries be instructed to apply standards of hypothetical statewide community. Jenkins v. Georgia, 418 US 153.

This section, which proscribes the sale of materials which are "lewd, obscene or indecent" but does not specifically define sexual conduct prohibited, does not meet the constitutionally required standard of providing fair notice to a dealer in such materials that his public and commercial activities might bring prosecution. Amato v. Divine, 496 F (2d) 441.

Sub. (1) (a) meets First Amendment standards and is not unconstitutionally vague. Amato v. Divine, 558 F (2d) 364.

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

Order temporarily restraining state from enforcing the statute would not be vacated in light of U.S. Supreme Court's *Miller* decision on obscenity, since the probability that the express wording of this statute would be held unconstitutional was in fact greater after *Miller,* and its specificity requirement, than before. Detco, Inc. v. McCann, 365 F Supp. 176.

This statute as construed prior to May 8, 1974, was unconstitutional. Prosecutions under this statute for conduct occurring prior to such date are unconstitutional as violative of due process requirements of "fair notice." Detco, Inc. v. McCann, 380 F Supp. 1366.

This section, as interpreted in State ex rel. Chobot v. Circuit Court, 61 W (2d) 354, is constitutional. Castle News Co. v. Cahill, 461 F Supp. 174 (1978).

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.

PROSTITUTION.

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

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

(2) 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.

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

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

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

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

See note to Art. I, sec. 1, citing State v. Johnson, 74 W (2d) 169, 246 NW (2d) 503.

See note to 939.30, citing Sears v. State, 94 W (2d) 128, 287 NW (2d) 785 (1980).

See note to Art. I, sec. 1, citing State V. McCollum, 159 W (2d) 184, 464 NW (2d) 44 (Ct. App. 1990).

944.31 Patronizing prostitutes. 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 a Class A misdemeanor.

History: 1977 c. 173; 1979 c. 221; 1983 a. 17.

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 D felony.

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

Section 944.32, 1987 stats., prohibiting solicitation of prostitutes, does not violate right of free speech. Shillcutt v. State, 74 W (2d) 642, 247 NW (2d) 694.

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

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

944.33 Pandering. (1) Whoever does any of the following is guilty of a Class A misdemeanor:

(a) 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

(b) 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.

(2) If the person received compensation from the earnings of the prostitute, such person is guilty of a Class C felony.

(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 the accused's intent and disposition.

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

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

Conviction under (2) requires proof that defendant has authority to exclude those engaging in prostitution from use of place for prohibited acts. Shillcutt v. State, 74 W (2d) 642, 247 NW (2d) 694.

Under (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 such use on more−than−one occasion. Johnson v. State, 76 W (2d) 672, 251 NW (2d) 834.

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 employe 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 employe 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]