



History and Structure of Minnesota's Child Pornography Laws

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Staff Presentation
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History of Minnesota's child pornography laws

1941

- Chapter 617 organized
- "Offenses Against Chastity, Morals, & Decency"

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A vertical timeline graphic with a large blue 'M' shape on the left. The text 'By 1965' is written in white inside the 'M'. To the right of the 'M' are two white rounded rectangular boxes containing text. The top box contains two bullet points, and the bottom box is empty.

By 1965

- Most offenses repealed or moved into other chapters
- Ch. 617: "Abortion; Obscenity; Houses of Ill-Fame"

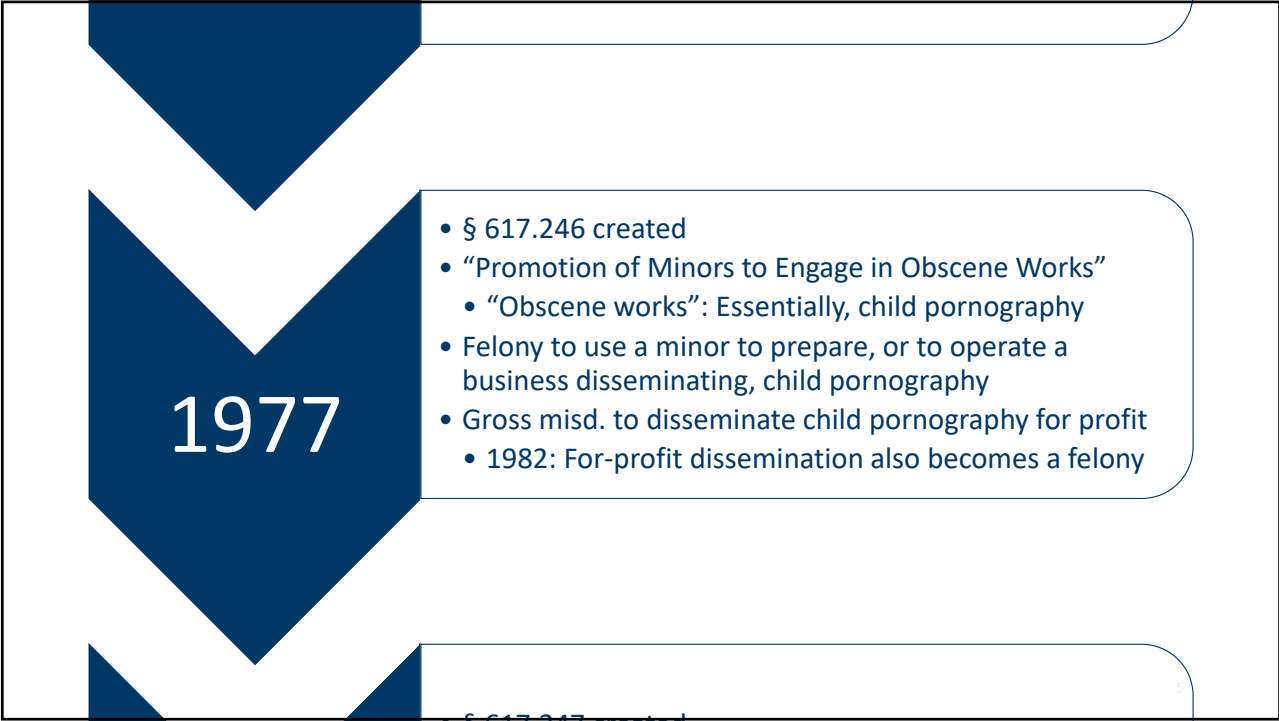


A vertical timeline graphic with a large blue 'M' shape on the left. The text '1969' is written in white inside the 'M'. To the right of the 'M' are two white rounded rectangular boxes containing text. The top box contains two bullet points, and the bottom box contains two bullet points.

1969

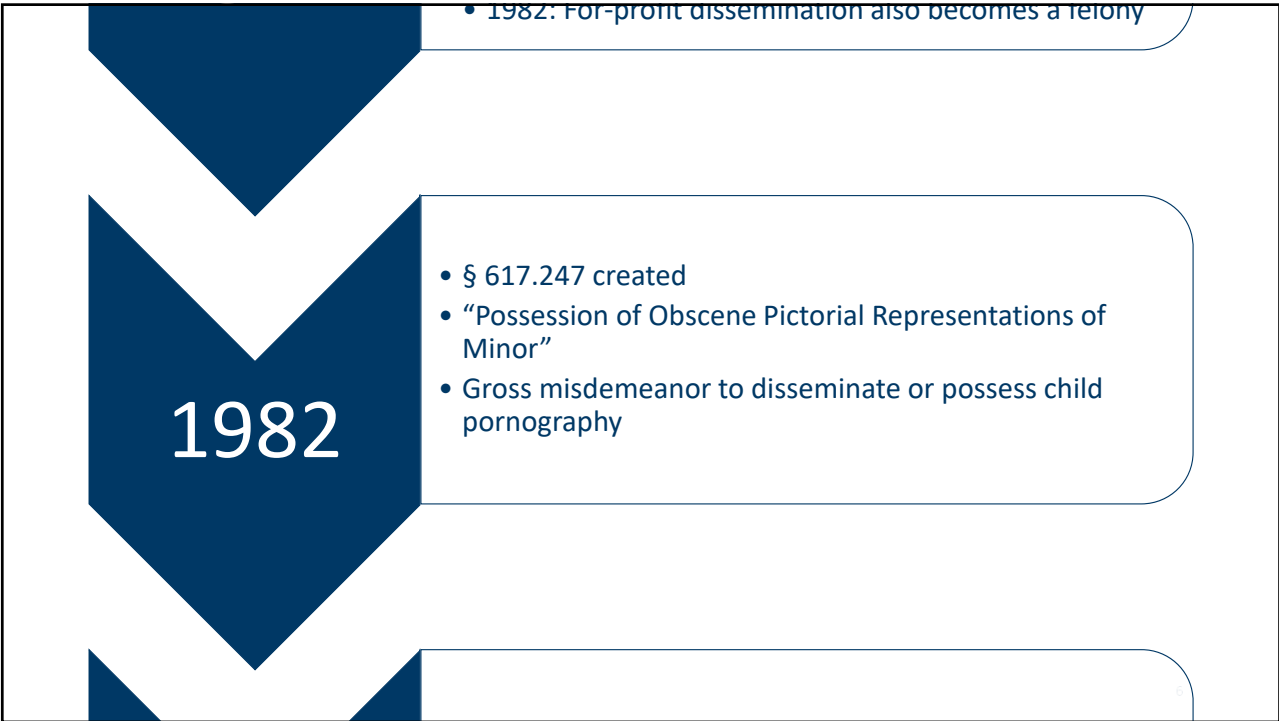
- First reference to children within "Obscenity" category
- Prohibited sale of explicit materials **to** minors

- § 617.246 created
- "Promotion of Minors to Engage in Obscene Works"



1977

- § 617.246 created
- “Promotion of Minors to Engage in Obscene Works”
 - “Obscene works”: Essentially, child pornography
- Felony to use a minor to prepare, or to operate a business disseminating, child pornography
- Gross misd. to disseminate child pornography for profit
 - 1982: For-profit dissemination also becomes a felony



1982

- § 617.247 created
- “Possession of Obscene Pictorial Representations of Minor”
- Gross misdemeanor to disseminate or possess child pornography

A graphic showing a large blue downward-pointing chevron shape on the left side of a white rectangular frame. Inside the chevron, the year "1999" is written in white. To the right of the chevron, a white rounded rectangular box contains a bullet point.

1999

- All child pornography offenses made felonies

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Current statutory framework

- Two statutes:
 - § 617.246 (“Use of Minors in Sexual Performance Prohibited”)
 - § 617.247 (“Possession of Pornographic Work Involving Minors”)
- Five crimes
- Three key definitions – all found in § 617.246
 - “Pornographic work”
 - “Sexual performance”
 - “Sexual conduct”

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“Pornographic work”

- A picture, photo, videotape, videodisc, or drawing of a **sexual performance**
- A visual depiction, including a photo, film, video, drawing, CGI image, etc., that—
 - Uses a minor to depict actual or simulated **sexual conduct**
 - Has been created, adapted, or modified to appear that an identifiable minor is engaging in **sexual conduct**, or
 - Is described or advertised, etc., in a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in **sexual conduct**

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A note on First Amendment boundaries

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the U.S. Supreme Court found these federal prohibitions to be overbroad and **unconstitutional**:

- “Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,” that “is, or **appears to be**, of a minor engaging in sexually explicit conduct.”
 - *Could Minnesota’s prohibition on “drawings” use a constitutional tune-up?*
- Depictions of sexually explicit conduct that are “advertised, promoted, presented, described, or **distributed in such a manner that conveys the impression** that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.”
 - *Could Minnesota’s nearly identical provision use a constitutional overhaul?*

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“Sexual performance”

- Play, dance, or other exhibition
- Presented before an audience (live), or for purposes of visual or mechanical reproduction (to be recorded)
- That uses a minor to depict actual or simulated **sexual conduct**

“Sexual conduct”

Any of the following:

- Any type of sexual intercourse, including bestiality,
- The sadomasochistic abuse, or binding/physical restraint, of someone who is nude, or clad in underwear or a revealing costume,
- Masturbation,
- Lewd exhibitions of the genitals, or
- Physical contact—
 - With pubic area, buttocks, or female breasts (clothed or unclothed)
 - By self, others, or animal
 - In an act of apparent sexual stimulation or gratification

§ 617.246, subd. 2: Use of minors

- To promote, employ, use, or permit a minor
 - *“Promote” includes producing, directing, publishing, manufacturing, issuing, or advertising*
 - *Also included: Assisting others in doing this*
- To engage in posing or modeling, alone or with others
- In any **sexual performance** or **pornographic work**
- If the person knows or has reason to know that the conduct intended is a sexual performance or pornographic work

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Observations about § 617.246, subd. 2: Use of minors

- This crime involves **either** sexual performance or child pornography
 - Could cover a wide variety of criminal behavior
- Among the five crimes in §§ 617.246 & 617.247, this is the only one that—
 - Requires the actual presence of a child, as opposed to an image of a child
 - Potentially involves a live sexual performance
 - Potentially involves **production** (rather than possession, dissemination, or reproduction) of child pornography
 - *But—does all production of child pornography necessarily involve “a minor ... engag[ing] in ... posing or modeling”?*

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§ 617.246, subd. 3: Operation or ownership of business

- To own or operate a business
- In which a **pornographic work** is disseminated* or reproduced
- If the person knows the content and character of the pornographic work

* “to an adult or a minor”

§ 617.246, subd. 4: Dissemination [for profit]

- To disseminate* a **pornographic work**
- For profit
- If the person knows or has reason to know the content and character of the pornographic work

* “to an adult or a minor”

§ 617.247, subd. 3: Dissemination

- To disseminate* [a] **pornographic work**
- If the person knows or has reason to know the content and character of the pornographic work

* “to an adult or a minor”

§ 617.247, subd. 4: Possession

- To possess—
 - A **pornographic work**, or
 - Any of the following containing a pornographic work:
 - Computer disk or computer
 - Any other storage system (electronic, magnetic, optical, etc.)
- If the person knows or has reason to know the content and character of the pornographic work

The knowledge requirement

“REASON TO KNOW”

- Does “reason to know” permit a **negligence** standard?
- Supreme Court: No, the Constitution requires at least **recklessness** here
- So, for child pornography possession: “Reason to know” requires **being aware of a substantial and unjustifiable risk** that a minor is involved
 - *State v. Mauer*, 741 N.W.2d 107 (Minn. 2007)

KNOWLEDGE FOR DISSEMINATION

- Does the knowledge requirement apply to the dissemination itself, or just to the content/character of the pornography?
- Court of Appeals: Defendant must **know he was disseminating**
 - *State v. McCauley*, 820 N.W.2d 577 (Minn. Ct. App. 2012), *review denied* (Minn. 2012)

Affirmative defense?

- Both statutes provide an affirmative defense:
 - “That the [sexual performance or] pornographic work was produced using only persons who were 18 years or older”
- In § 617.247, this affirmative defense **unconstitutionally** shifts the burden of persuasion to the defendant
 - *State v. Cannady*, 727 N.W. 403 (Minn. 2007)
- Outstanding questions:
 - *Is the affirmative defense found in § 617.246 unconstitutional as well?*
 - *Should both subdivisions be repealed?*

Common penalty aspects

A conviction for any of these offenses—

- Carries an enhanced maximum penalty if—
 - The offender had a previous conviction under these statutes,
 - The offender was a registered predatory offender, or
 - The violation involved a minor under the age of 13 years
- Carries, if sentenced to prison, a **five-year** conditional-release term upon release
 - If the person has a previous conviction under these statutes or the criminal sexual conduct statutes, the conditional release term is **15 years**
- Requires registration as a predatory offender
- Will enhance a future 5th Degree Criminal Sexual Conduct to a felony

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Maximum penalties (and current rankings)

OFFENSE	MAXIMUM PENALTY	GUIDELINES RANKING	ENHANCED MAXIMUM PENALTY	ENHANCED GUIDELINES RANKING
Use of minors	10 years/\$20,000	E	15 years/\$40,000	D
Own/operate business	10 years/\$20,000	E	15 years/\$40,000	D
Dissemination [for profit]	10 years/\$20,000	E	15 years/\$40,000	D
Dissemination	7 years/\$10,000	E	15 years/\$20,000	D
Possession	5 years/\$5,000	G	10 years/\$10,000	F

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Sentencing for multiple images

Multiple convictions for possession of multiple images, even if together on the same computer, may receive **multiple sentences**—

- Under the single course of conduct/multiple victim rule—
 - When the images involve **multiple victims**
 - *State v. Rhoades*, 690 N.W.2d 135 (Minn. Ct. App. 2004)
 - But, if sentencing concurrently, felony weights are assigned to only two offenses, per Guidelines § 2.B.1.e(2)
- As separate behavioral incidents—
 - When the images were **downloaded at substantially different times** (e.g., days apart) and the offenses were not in furtherance of each other
 - *State v. Bakken*, 883 N.W.2d 264 (Minn. 2016)

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Felonies related to, but different from, child pornography

SOLICITATION OF CHILDREN TO ENGAGE IN SEXUAL CONDUCT

- § 609.352, subs. 2 & 2a
- Crimes requiring **sex-related intent**:
 - Soliciting sexual conduct
 - Electronically communicating about sexual conduct
 - Electronically **distributing material/image relating to sexual conduct**
- Victim must be (or be believed to be) **under 16**
- 3-yr. stat. max.; ranked at SL G

SURREPTITIOUS OBSERVATION DEVICE (MINOR VICTIM AND SEXUAL INTENT)

- § 609.746, subd. 1(f)
- Installing/using a **device** for observing, **photographing, recording**, etc.
- With **sexual intent** and intent to intrude upon/interfere with privacy
- In a house/place where a person has an expectation of privacy and **has/is likely to expose intimate parts/underwear**
- If 36 mo. older than **minor victim**
- 4-yr. stat. max.; ranked at SL G

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617.246 USE OF MINORS IN SEXUAL PERFORMANCE PROHIBITED.

Subdivision 1. **Definitions.** (a) For the purpose of this section, the terms defined in this subdivision have the meanings given them.

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

(c) "Promote" means to produce, direct, publish, manufacture, issue, or advertise.

(d) "Sexual performance" means any play, dance or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that uses a minor to depict actual or simulated sexual conduct as defined by clause (e).

(e) "Sexual conduct" means any of the following:

(1) an act of sexual intercourse, normal or perverted, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal;

(2) sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed;

(3) masturbation;

(4) lewd exhibitions of the genitals; or

(5) physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(f) "Pornographic work" means:

(1) an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor; or

(2) any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means that:

(i) uses a minor to depict actual or simulated sexual conduct;

(ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or

(iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.

For the purposes of this paragraph, an identifiable minor is a person who was a minor at the time the depiction was created or altered, whose image is used to create the visual depiction.

Subd. 2. **Use of minor.** (a) It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage minors in posing or modeling alone or with others in any sexual performance or pornographic work if the person knows or has reason to know that the conduct intended is a sexual performance or a pornographic work.

Any person who violates this paragraph is guilty of a felony and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both.

(b) A person who violates paragraph (a) is guilty of a felony and may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than \$40,000, or both, if:

(1) the person has a prior conviction or delinquency adjudication for violating this section or section 617.247;

(2) the violation occurs when the person is a registered predatory offender under section 243.166; or

(3) the violation involved a minor under the age of 13 years.

Subd. 3. Operation or ownership of business. (a) A person who owns or operates a business in which a pornographic work, as defined in this section, is disseminated to an adult or a minor or is reproduced, and who knows the content and character of the pornographic work disseminated or reproduced, is guilty of a felony and may be sentenced to imprisonment for not more than ten years, or to payment of a fine of not more than \$20,000, or both.

(b) A person who violates paragraph (a) is guilty of a felony and may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than \$40,000, or both, if:

(1) the person has a prior conviction or delinquency adjudication for violating this section or section 617.247;

(2) the violation occurs when the person is a registered predatory offender under section 243.166; or

(3) the violation involved a minor under the age of 13 years.

Subd. 4. Dissemination. (a) A person who, knowing or with reason to know its content and character, disseminates for profit to an adult or a minor a pornographic work, as defined in this section, is guilty of a felony and may be sentenced to imprisonment for not more than ten years, or to payment of a fine of not more than \$20,000, or both.

(b) A person who violates paragraph (a) is guilty of a felony and may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than \$40,000, or both, if:

(1) the person has a prior conviction or delinquency adjudication for violating this section or section 617.247;

(2) the violation occurs when the person is a registered predatory offender under section 243.166; or

(3) the violation involved a minor under the age of 13 years.

Subd. 5. Consent; mistake. Neither consent to sexual performance by a minor or the minor's parent, guardian, or custodian nor mistake as to the minor's age is a defense to a charge of violation of this section.

Subd. 6. Affirmative defense. It shall be an affirmative defense to a charge of violating this section that the sexual performance or pornographic work was produced using only persons who were 18 years or older.

Subd. 7. Conditional release term. Notwithstanding the statutory maximum sentence otherwise applicable to the offense or any provision of the sentencing guidelines, when a court commits a person to the custody of the commissioner of corrections for violating this section, the court shall provide that after the person has been released from prison, the commissioner shall place the person on conditional release

for five years. If the person has previously been convicted of a violation of this section, section 609.342, 609.343, 609.344, 609.345, 609.3451, 609.3453, or 617.247, or any similar statute of the United States, this state, or any state, the commissioner shall place the person on conditional release for 15 years. The terms of conditional release are governed by section 609.3455, subdivision 8.

History: 1977 c 371 s 1; 1982 c 604 s 2; 1983 c 204 s 11; 1984 c 628 art 3 s 7-9; 1986 c 444; 1999 c 217 s 1-5; 2006 c 260 art 1 s 38; 2013 c 96 s 6; 1Sp2019 c 5 art 4 s 12-15

617.247 POSSESSION OF PORNOGRAPHIC WORK INVOLVING MINORS.

Subdivision 1. **Policy; purpose.** It is the policy of the legislature in enacting this section to protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct which involves minors. It is therefore the intent of the legislature to penalize possession of pornographic work depicting sexual conduct which involve minors or appears to involve minors in order to protect the identity of minors who are victimized by involvement in the pornographic work, and to protect minors from future involvement in pornographic work depicting sexual conduct.

Subd. 2. **Definitions.** For purposes of this section, the following terms have the meanings given them:

(a) "Pornographic work" has the meaning given to it in section 617.246.

(b) "Sexual conduct" has the meaning given to it in section 617.246.

Subd. 3. **Dissemination prohibited.** (a) A person who disseminates pornographic work to an adult or a minor, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than seven years or to payment of a fine of not more than \$10,000, or both.

(b) A person who violates paragraph (a) is guilty of a felony and may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than \$20,000, or both, if:

(1) the person has a prior conviction or delinquency adjudication for violating this section or section 617.246;

(2) the violation occurs when the person is a registered predatory offender under section 243.166; or

(3) the violation involved a minor under the age of 13 years.

Subd. 4. **Possession prohibited.** (a) A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$5,000, or both.

(b) A person who violates paragraph (a) is guilty of a felony and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$10,000, or both, if:

(1) the person has a prior conviction or delinquency adjudication for violating this section or section 617.246;

(2) the violation occurs when the person is a registered predatory offender under section 243.166; or

(3) the violation involved a minor under the age of 13 years.

Subd. 5. **Exception.** This section does not apply to the performance of official duties by peace officers, court personnel, or attorneys, nor to licensed physicians, psychologists, or social workers or persons acting at the direction of a licensed physician, psychologist, or social worker in the course of a bona fide treatment or professional education program.

Subd. 6. **Consent.** Consent to sexual performance by a minor or the minor's parent, guardian, or custodian is not a defense to a charge of violation of this section.

Subd. 7. **Second offense.** If a person is convicted of a second or subsequent violation of this section within 15 years of the prior conviction, the court shall order a mental examination of the person. The examiner shall report to the court whether treatment of the person is necessary.

Subd. 8. **Affirmative defense.** It shall be an affirmative defense to a charge of violating this section that the pornographic work was produced using only persons who were 18 years or older.

[See Note.]

Subd. 9. **Conditional release term.** Notwithstanding the statutory maximum sentence otherwise applicable to the offense or any provision of the sentencing guidelines, when a court commits a person to the custody of the commissioner of corrections for violating this section, the court shall provide that after the person has been released from prison, the commissioner shall place the person on conditional release for five years. If the person has previously been convicted of a violation of this section, section 609.342, 609.343, 609.344, 609.345, 609.3451, 609.3453, or 617.246, or any similar statute of the United States, this state, or any state, the commissioner shall place the person on conditional release for 15 years. The terms of conditional release are governed by section 609.3455, subdivision 8.

History: 1982 c 604 s 3; 1983 c 204 s 12; 1986 c 444; 1999 c 217 s 6-10; 2001 c 197 s 4,5; 1Sp2001 c 8 art 8 s 28; 2006 c 260 art 1 s 39; 2013 c 96 s 7; 1Sp2019 c 5 art 4 s 16-18

NOTE: Subdivision 8 was found unconstitutional in *State v. Cannady*, 727 N.W.2d 403 (Minn. 2007).

**609.352 SOLICITATION OF CHILDREN TO ENGAGE IN SEXUAL CONDUCT;
COMMUNICATION OF SEXUALLY EXPLICIT MATERIALS TO CHILDREN.**

Subdivision 1. **Definitions.** As used in this section:

(a) "child" means a person 15 years of age or younger;

(b) "sexual conduct" means sexual contact of the individual's primary genital area, sexual penetration as defined in section 609.341, or sexual performance as defined in section 617.246; and

(c) "solicit" means commanding, entreating, or attempting to persuade a specific person in person, by telephone, by letter, or by computerized or other electronic means.

Subd. 2. **Prohibited act.** A person 18 years of age or older who solicits a child or someone the person reasonably believes is a child to engage in sexual conduct with intent to engage in sexual conduct is guilty of a felony and may be sentenced as provided in subdivision 4.

Subd. 2a. **Electronic solicitation of children.** A person 18 years of age or older who uses the Internet, a computer, computer program, computer network, computer system, an electronic communications system, or a telecommunications, wire, or radio communications system, or other electronic device capable of electronic data storage or transmission to commit any of the following acts, with the intent to arouse the sexual desire of any person, is guilty of a felony and may be sentenced as provided in subdivision 4:

(1) soliciting a child or someone the person reasonably believes is a child to engage in sexual conduct;

(2) engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct; or

(3) distributing any material, language, or communication, including a photographic or video image, that relates to or describes sexual conduct to a child or someone the person reasonably believes is a child.

Subd. 2b. **Jurisdiction.** A person may be convicted of an offense under subdivision 2a if the transmission that constitutes the offense either originates within this state or is received within this state.

Subd. 3. **Defenses.** (a) Mistake as to age is not a defense to a prosecution under this section.

(b) The fact that an undercover operative or law enforcement officer was involved in the detection or investigation of an offense under this section does not constitute a defense to a prosecution under this section.

Subd. 4. **Penalty.** A person convicted under subdivision 2 or 2a is guilty of a felony and may be sentenced to imprisonment for not more than three years, or to payment of a fine of not more than \$5,000, or both.

History: 1986 c 445 s 3; 2000 c 311 art 4 s 3,4; 2007 c 54 art 2 s 7; 2009 c 59 art 1 s 6

609.746 INTERFERENCE WITH PRIVACY.

Subdivision 1. **Surreptitious intrusion; observation device.** (a) A person is guilty of a gross misdemeanor who:

(1) enters upon another's property;

(2) surreptitiously gazes, stares, or peeps in the window or any other aperture of a house or place of dwelling of another; and

(3) does so with intent to intrude upon or interfere with the privacy of a member of the household.

(b) A person is guilty of a gross misdemeanor who:

(1) enters upon another's property;

(2) surreptitiously installs or uses any device for observing, photographing, recording, amplifying, or broadcasting sounds or events through the window or any other aperture of a house or place of dwelling of another; and

(3) does so with intent to intrude upon or interfere with the privacy of a member of the household.

(c) A person is guilty of a gross misdemeanor who:

(1) surreptitiously gazes, stares, or peeps in the window or other aperture of a sleeping room in a hotel, as defined in section 327.70, subdivision 3, a tanning booth, or other place where a reasonable person would have an expectation of privacy and has exposed or is likely to expose their intimate parts, as defined in section 609.341, subdivision 5, or the clothing covering the immediate area of the intimate parts; and

(2) does so with intent to intrude upon or interfere with the privacy of the occupant.

(d) A person is guilty of a gross misdemeanor who:

(1) surreptitiously installs or uses any device for observing, photographing, recording, amplifying, or broadcasting sounds or events through the window or other aperture of a sleeping room in a hotel, as defined in section 327.70, subdivision 3, a tanning booth, or other place where a reasonable person would have an expectation of privacy and has exposed or is likely to expose their intimate parts, as defined in section 609.341, subdivision 5, or the clothing covering the immediate area of the intimate parts; and

(2) does so with intent to intrude upon or interfere with the privacy of the occupant.

(e) A person is guilty of a felony and may be sentenced to imprisonment for not more than two years or to payment of a fine of not more than \$5,000, or both, if the person:

(1) violates this subdivision after a previous conviction under this subdivision or section 609.749; or

(2) violates this subdivision against a minor under the age of 18, knowing or having reason to know that the minor is present.

(f) A person is guilty of a felony and may be sentenced to imprisonment for not more than four years or to payment of a fine of not more than \$5,000, or both, if: (1) the person violates paragraph (b) or (d) against a minor victim under the age of 18; (2) the person is more than 36 months older than the minor victim; (3) the person knows or has reason to know that the minor victim is present; and (4) the violation is committed with sexual intent.

(g) Paragraphs (b) and (d) do not apply to law enforcement officers or corrections investigators, or to those acting under their direction, while engaged in the performance of their lawful duties. Paragraphs (c) and (d) do not apply to conduct in: (1) a medical facility; or (2) a commercial establishment if the owner of the establishment has posted conspicuous signs warning that the premises are under surveillance by the owner or the owner's employees.

Subd. 2. [Repealed, 1993 c 326 art 2 s 34]

Subd. 3. [Repealed, 1993 c 326 art 2 s 34]

History: 1979 c 258 s 19; 1987 c 307 s 4; 1989 c 261 s 6; 1992 c 571 art 6 s 14; 1994 c 636 art 2 s 47; 1995 c 226 art 2 s 22; 1997 c 239 art 5 s 11; 2005 c 136 art 17 s 43; 1Sp2019 c 5 art 4 s 11