

Introduced by

1 A BILL for an Act to create and enact a new section to chapter 12.1-27.1 of the North Dakota
2 Century Code, relating to definitions pertaining to obscenity; and to amend and reenact
3 subdivision c of subsection 1 of section 12.1-20-24, sections 12.1-27.1-01, 12.1-27.1-03,
4 12.1-27.1-03.1, 12.1-27.1-03.4, 12.1-27.1-12, 12.1-27.2-01, 12.1-27.2-02, 12.1-27.2-03,
5 12.1-27.2-04, 12.1-27.2-04.1, 12.1-27.2-04.2, 12.1-27.2-05, and 12.1-27.2-06, and subsection
6 11 of section 12.1-32-02 of the North Dakota Century Code, relating to obscenity control, child
7 sexual abuse material, and presentence investigations.

8 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

9 **SECTION 1. AMENDMENT.** Subdivision c of subsection 1 of section 12.1-20-24 of the
10 North Dakota Century Code is amended and reenacted as follows:

11 c. "Sexual conduct" has the meaning prescribed in section ~~12.1-27.1-01~~12 of this Act.

12 **SECTION 2.** A new section to chapter 12.1-27.1 of the North Dakota Century Code is
13 created and enacted as follows:

14 **Definitions.**

15 As used in this chapter:

- 16 1. "Book" means any book, magazine, pamphlet, newspaper, or other article containing
17 printed, typewritten, or handwritten words.
- 18 2. "Disseminate" means to sell, lease, rent, advertise, broadcast, transmit, exhibit, or
19 distribute for pecuniary gain. The term includes any transmission of visual material
20 shown on a cable television system, whether or not accompanied by a soundtrack,
21 and any sound recording played on a cable television system.
- 22 3. "Material" means any physical object, including a book, sound recording, film, or
23 picture used as a means of presenting or communicating information, knowledge,
24 sensation, image, or emotion to or through a human being's receptive senses.

1 4. "Obscene material" and "obscene production" mean material or a production which:

2 a. Taken as a whole, the average person, applying contemporary North Dakota
3 standards, would find predominantly appeals to a prurient interest;

4 b. Depicts or describes in a patently offensive manner sexual conduct, whether
5 normal or perverted; and

6 c. Taken as a whole, the reasonable person would find lacking in serious literary,
7 artistic, political, or scientific value.

8 Whether material or a production is obscene must be judged with reference to an
9 ordinary adult, unless it appears from the character of the material or the

10 circumstances of its dissemination that the material or production is designed for

11 minors or other specially susceptible audience, in which case the material or

12 production must be judged with reference to that type of audience.

13 5. "Patently offensive" means so offensive on its face as to affront the contemporary
14 North Dakota standards of decency.

15 6. "Production" means any play, dance, or other exhibition presented before an
16 audience.

17 7. "Prurient interest" means a voyeuristic, lascivious, degrading, shameful, or morbid
18 interest in nudity, sex, or excretion going substantially beyond customary limits of
19 candor in description or representation of those matters.

20 8. "Sadomasochistic abuse" means a depiction or description of flagellation or torture by
21 or upon a person who is nude or clad in undergarments or in a bizarre or revealing
22 costume; or the condition of being fettered, bound, or otherwise physically restrained
23 on the part of one so clothed.

24 9. "Sexual conduct" means actual or simulated:

25 a. Sexual intercourse;

26 b. Sodomy;

27 c. Sexual bestiality;

28 d. Masturbation;

29 e. Sadomasochistic abuse;

30 f. Excretion; or

31 g. Lewd exhibition of the male or female genitals.

10. "Sexually expressive image" means a real, altered, or computer-generated photograph or visual representation that exhibits a nude or partially denuded human figure, as defined in section 12.1-27.1-03.1, or sexual conduct.

11. "Sodomy" means contact between the penis and the anus, the mouth and the penis, the mouth and the vulva, or the mouth and the anus.

SECTION 3. AMENDMENT. Section 12.1-27.1-01 of the North Dakota Century Code is amended and reenacted as follows:

12.1-27.1-01. Obscenity - Definitions-- Dissemination - Classification of offenses.

1. A person is guilty of a class C felony if, knowing of its character, the person disseminates obscene material or if the person produces, transports, or sends obscene material with intent that it be disseminated.
2. A person is guilty of a class C felony if the person presents or directs an obscene ~~performance~~production for pecuniary gain or participates in any portion of a ~~performance~~production which contributes to the obscenity of the ~~performance~~production as a whole.
3. A person is guilty of a class C felony if the person, as owner or manager of an establishment licensed under section 5-02-01, permits an obscene ~~performance~~production in the establishment. A person is guilty of a class C felony if that person participates, whether or not for compensation, in an obscene ~~performance~~production in an establishment licensed under section 5-02-01.
4. a. In addition to the penalty provided in subsection 1, 2, or 3, any person who violates subsection 1, 2, or 3 in the course of a commercial or for-profit activity or transaction in which the offender had or shared ownership, control, managerial responsibility, or a financial interest other than wages is subject to the following penalty:
 - (1) For an individual, a fine not to exceed ten thousand dollars; or
 - (2) For a corporation, limited liability company, association, partnership, or other legal entity, a fine not to exceed twenty-five thousand dollars.
- b. In addition to the penalty provided in subsection 1, 2, or 3, the court shall impose the following penalty upon the conviction of a person or entity described in subdivision a for a second or subsequent offense under subsection 1, 2, or 3:

- 1 (1) For an individual, a fine not to exceed fifty thousand dollars; or
2 (2) For a corporation, limited liability company, association, partnership, or other
3 legal entity, a fine not to exceed one hundred thousand dollars.

4 5. ~~As used in this chapter, the terms "obscene material" and "obscene performance"~~
5 ~~mean material or a performance which:~~

6 a. ~~Taken as a whole, the average person, applying contemporary North Dakota~~
7 ~~standards, would find predominantly appeals to a prurient interest;~~

8 b. ~~Depicts or describes in a patently offensive manner sexual conduct, whether~~
9 ~~normal or perverted; and~~

10 c. ~~Taken as a whole, the reasonable person would find lacking in serious literary,~~
11 ~~artistic, political, or scientific value.~~

12 ~~Whether material or a performance is obscene must be judged with reference to~~
13 ~~ordinary adults, unless it appears from the character of the material or the~~
14 ~~circumstances of its dissemination that the material or performance is designed for~~
15 ~~minors or other specially susceptible audience, in which case the material or~~
16 ~~performance must be judged with reference to that type of audience.~~

17 6. ~~As used in this chapter, "disseminate" means to sell, lease, rent, advertise, broadcast,~~
18 ~~transmit, exhibit, or distribute for pecuniary gain. "Disseminate" includes any~~
19 ~~transmission of visual material shown on a cable television system, whether or not~~
20 ~~accompanied by a soundtrack, and any sound recording played on a cable television~~
21 ~~system.~~

22 7. ~~As used in this chapter, the term "material" means any physical object, including, but~~
23 ~~not limited to, any type of book, sound recording, film, or picture used as a means of~~
24 ~~presenting or communicating information, knowledge, sensation, image, or emotion to~~
25 ~~or through a human being's receptive senses.~~

26 8. ~~As used in this chapter, the term "patently offensive" means so offensive on its face as~~
27 ~~to affront the contemporary North Dakota standards of decency.~~

28 9. ~~As used in this chapter, the term "performance" means any play, dance, or other~~
29 ~~exhibition presented before an audience.~~

30 10. ~~As used in this chapter, the term "prurient interest" means a voyeuristic, lascivious,~~
31 ~~degrading, shameful, or morbid interest in nudity, sex, or excretion that goes~~

1 substantially beyond customary limits of candor in description or representation of
2 these matters.

3 11. ~~As used in this chapter, the term "sexual conduct" means actual or simulated:~~

4 a. ~~Sexual intercourse;~~

5 b. ~~Sodomy;~~

6 c. ~~Sexual bestiality;~~

7 d. ~~Masturbation;~~

8 e. ~~Sadomasochistic abuse;~~

9 f. ~~Excretion; or~~

10 g. ~~Lewd exhibition of the male or female genitals.~~

11 ~~As used in this subsection, the term "sodomy" means contact between the penis and~~
12 ~~the anus, the mouth and the penis, the mouth and the vulva, or the mouth and the~~
13 ~~anus. As used in this subsection, the term "sadomasochistic abuse" means a depiction~~
14 ~~or description of flagellation or torture by or upon a person who is nude or clad in~~
15 ~~undergarments or in a bizarre or revealing costume; or the condition of being fettered,~~
16 ~~bound, or otherwise physically restrained on the part of one so clothed.~~

17 12. ~~As used in this chapter, the term "book" means any book, magazine, pamphlet,~~
18 ~~newspaper, or other article made out of paper and containing printed, typewritten, or~~
19 ~~handwritten words.~~

20 13. ~~As used in this chapter, "sexually expressive image" means a real, altered, or~~
21 ~~computer-generated photograph or visual representation that exhibits a nude or~~
22 ~~partially denuded human figure, as defined in section 12.1-27.1-03.1, or sexual~~
23 ~~conduct.~~

24 **SECTION 4. AMENDMENT.** Section 12.1-27.1-03 of the North Dakota Century Code is
25 amended and reenacted as follows:

26 **12.1-27.1-03. Promoting obscenity to minors - Minor performingengaging in obscene**
27 **performanceproduction - Classification of offenses.**

28 1. It is a class C felony for a person, knowing of its character, to recklessly promote to a
29 minor any material or performanceproduction which is harmful to minors, or to admit a
30 minor to premises where a performanceproduction harmful to minors is exhibited or
31 takes place.

2. It is a class C felony to permit a minor to ~~participate~~engage in a performance which ~~is~~production harmful to minors.

SECTION 5. AMENDMENT. Section 12.1-27.1-03.1 of the North Dakota Century Code is amended and reenacted as follows:

12.1-27.1-03.1. Objectionable materials or performanceproduction - Display to minors - Definitions - Penalty.

1. A person is guilty of a class B misdemeanor if ~~he~~the person willfully displays at newsstands or any other business establishment frequented by minors, or where minors are or may be invited as a part of the general public, any photograph, book, paperback book, pamphlet, or magazine, the exposed cover or available content of which exploits, is devoted to, or is principally made up of depictions of nude or partially denuded human figures posed or presented in a manner to exploit sex, lust, or perversion for commercial gain.
2. As used in this section:
 - a. "Nude or partially denuded human figures" means less than completely and opaquely covered human genitals, pubic regions, female breasts or a female breast, if the breast or breasts are exposed below a point immediately above the top of the areola, or human buttocks; and includes human male genitals in a discernibly turgid state even if completely and opaquely covered.
 - b. "Where minors are or may be invited as a part of the general public" includes any public roadway or public walkway.
 - c. The above shall not be construed to include a bona fide school, college, university, museum, public library, or art gallery.

SECTION 6. AMENDMENT. Section 12.1-27.1-03.4 of the North Dakota Century Code is amended and reenacted as follows:

12.1-27.1-03.4. Restrictions on adult-oriented performancesproduction - Penalty.

1. As used in this section:
 - a. "Adult-oriented performanceproduction" means a performanceproduction that, regardless of whether or not performedproduced for consideration, is intended to appeal to a prurient interest and features:
 - (1) The purposeful exposure, whether complete or partial, of:

(a) A human genital, the pubic region, the human buttocks, or a female breast, if the breast is exposed below a point immediately above the top of the areola; or

(b) Prosthetic genitalia, breasts, or buttocks; or

(2) Sexual conduct.

b. "Public property" means real property in which a state agency or a political subdivision has an ownership interest.

2. A person is guilty of a class A misdemeanor for a first offense and a class C felony for a second or subsequent offense if the person organizes an adult-oriented performanceproduction:

a. On public property; or

b. At a business establishment frequented by minors, or where minors are or may be invited as a part of the general public.

SECTION 7. AMENDMENT. Section 12.1-27.1-12 of the North Dakota Century Code is amended and reenacted as follows:

12.1-27.1-12. State pre-emption of local laws regulating obscenity.

This chapter is applicable throughout the state, and a political subdivision may not enact new, or enforce existing, ordinances or resolutions regulating or prohibiting the dissemination of obscene materials, or controlling obscene or adult-oriented performancesproductions, except ordinances authorized by section 5-02-09, section 58-03-11, chapter 11-33, or chapter 40-47.

SECTION 8. AMENDMENT. Section 12.1-27.2-01 of the North Dakota Century Code is amended and reenacted as follows:

12.1-27.2-01. Definitions.

As used in this chapter:

1. "Child sexual abuse material" means a production of sexual conduct involving a minor.

2. "Computer-generated image" means an image or visual representation created through the use of artificial intelligence or other computer program.

2-3. "Minor" means an individual under eighteen years of age or a computer-generated image used, created, adapted, altered, or modified to appear to depict an individual under eighteen years of age by face, likeness, or other distinguishing characteristics.

1 ~~3.4.~~ "Obscene sexual performance~~production~~" means any performance ~~which~~ a production
2 that includes sexual conduct by a minor child sexual abuse material in any obscene
3 material or obscene performance~~production~~, as defined in section ~~12.1-27.1-012~~ of
4 this Act.

5 ~~4.5.~~ "Performance~~Production~~" means any ~~a~~ play, motion picture, photograph, dance, or
6 other visual representation, or any part of a ~~performanceproduction~~.

7 ~~5.6.~~ "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail,
8 deliver, transfer, transmit, ship, transport, publish, distribute, circulate, disseminate,
9 present, exhibit, or advertise.

10 ~~6.7.~~ "Sexual conduct" means actual or simulated:

- 11 a. Sexual intercourse;
- 12 b. Sodomy, as defined under section ~~12.1-27.1-012~~ of this Act;
- 13 c. Sexual bestiality;
- 14 d. Masturbation;
- 15 e. Sadomasochistic abuse, as defined under section ~~12.1-27.1-012~~ of this Act;
- 16 f. Lewd exhibition of the buttocks, breasts, or genitals;
- 17 g. Nude or partially denuded human figure, as defined in section 12.1-27.1-03.1, if
18 depicted for the purpose of the sexual stimulation or the sexual gratification of
19 any individual who may view such depiction; or
- 20 h. Physical contact with a person's clothed or unclothed genitals, pubic area,
21 buttocks, or breasts. It is not necessary that the minor know that he or she is
22 participating in the described conduct, or any aspect of it.

23 ~~7.~~ "Sexual performance" means any performance ~~which includes sexual conduct by a~~
24 ~~minor~~.

25 8. "Simulated" means the explicit depiction of any of the conduct set forth in
26 subsection ~~47~~ which creates the appearance of actual sexual conduct and which
27 exhibits any nude or partially denuded human figure, as defined in section
28 12.1-27.1-03.1.

29 **SECTION 9. AMENDMENT.** Section 12.1-27.2-02 of the North Dakota Century Code is
30 amended and reenacted as follows:

1 **12.1-27.2-02. Use of a minor in a sexual performance**Child sexual abuse material
2 **production.**

3 1. A person is guilty of a class A felony if, knowing the character and content of a
4 performanceproduction, that person employs, authorizes, or induces a minor to
5 engage in sexual conduct during a performanceproduction or, if being a parent, legal
6 guardian, or custodian of a minor, that person consents to the ~~participation~~
7 by involvement of the minor in sexual conduct during a performanceproduction.

8 2. An adult is guilty of a class A felony if, with the intent to persuade, induce, entice, or
9 coerce a minor to engage in a sexual performanceproduction, the adult portrays the
10 adult to be a minor.

11 **SECTION 10. AMENDMENT.** Section 12.1-27.2-03 of the North Dakota Century Code is
12 amended and reenacted as follows:

13 **12.1-27.2-03. Promoting or directing an obscene sexual performance by a minor**child
14 **sexual abuse material.**

15 A person is guilty of a class A felony if, knowing the character and content of a
16 performanceproduction, that person produces, directs, or promotes any obscene
17 performanceproduction which includes sexual conduct by a person who was a minor at the time
18 of the performanceproduction.

19 **SECTION 11. AMENDMENT.** Section 12.1-27.2-04 of the North Dakota Century Code is
20 amended and reenacted as follows:

21 **12.1-27.2-04. Promoting a sexual performance by a minor**child sexual abuse material.

22 A person is guilty of a class B felony if, knowing the character and content of a
23 performanceproduction, that person produces, directs, or promotes any performanceproduction
24 which includes sexual conduct by a person who was a minor at the time of the
25 performanceproduction.

26 **SECTION 12. AMENDMENT.** Section 12.1-27.2-04.1 of the North Dakota Century Code is
27 amended and reenacted as follows:

28 **12.1-27.2-04.1. Possession of certain materials prohibited**child sexual abuse material.

29 1. A person is guilty of a class C felony if, knowing of its character and content, that
30 person knowingly possesses ~~any~~ a motion picture, computer-generated image,

1 photograph, or other visual representation that includes ~~sexual conduct by a~~
2 ~~minor~~child sexual abuse material.

3 2. An individual violating this section is guilty of a class B felony if:

- 4 a. The offense involved twenty or more images;
5 b. The offense involved sadistic or masochistic conduct or other depictions of
6 violence;
7 c. The offense involved sexual bestiality;
8 d. The offense involves a prepubescent minor or a minor under twelve years of age;
9 or
10 e. The individual has previously been convicted of an offense subject to registration
11 under section 12.1-32-15.

12 3. This section does not impose liability on the provider of an interactive computer
13 service, as defined in 47 U.S.C. 230, or an internet service provider, cloud computer
14 provider, cybersecurity provider, communication service provider, or information
15 service or telecommunication service network, as defined in 47 U.S.C. 153, for any
16 content provided by another person.

17 **SECTION 13. AMENDMENT.** Section 12.1-27.2-04.2 of the North Dakota Century Code is
18 amended and reenacted as follows:

19 **12.1-27.2-04.2. ~~Sexual performance by a minor~~Child sexual abuse material -**
20 **Enhanced penalties.**

- 21 1. Notwithstanding the provisions of sections 12.1-32-01 and 12.1-32-01.1 relating to
22 fines, a person who commits an offense under this chapter and who acts in the course
23 of a commercial or for-profit activity or transaction in which the offender had or shared
24 ownership, control, managerial responsibility, or a financial interest other than wages
25 is subject to the following penalty:
26 a. For an individual, a fine not to exceed ten thousand dollars; or
27 b. For a corporation, limited liability company, association, partnership, or other
28 legal entity, a fine not to exceed twenty-five thousand dollars.
29 2. Notwithstanding the provisions of sections 12.1-32-01 and 12.1-32-01.1 relating to
30 fines, the court shall impose the following fine upon the conviction of a person or entity
31 described in subsection 1 for a second or subsequent offense under this chapter:

- a. For an individual, a fine not to exceed fifty thousand dollars; or
- b. For a corporation, limited liability company, association, partnership, or other legal entity, a fine not to exceed one hundred thousand dollars.

SECTION 14. AMENDMENT. Section 12.1-27.2-05 of the North Dakota Century Code is amended and reenacted as follows:

12.1-27.2-05. ~~Sexual performance by a minor~~Child sexual abuse material - Affirmative defenses.

It is an affirmative defense to a prosecution under this chapter that:

1. The defendant in good faith reasonably believed the person appearing in the ~~performance~~production was eighteen years of age or older, if the minor was in fact fifteen years of age or older; or
2. The material or ~~performance~~production involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other appropriate purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a similar interest in the material or ~~performance~~production.

SECTION 15. AMENDMENT. Section 12.1-27.2-06 of the North Dakota Century Code is amended and reenacted as follows:

12.1-27.2-06. Proof of age of minor.

When it becomes necessary under this chapter to determine whether a minor ~~participated in~~is depicted in a sexual ~~performance~~production, the trier of fact may base its determination on personal inspection of the minor, inspection of a photograph or motion picture of the sexual ~~performance~~production, testimony by a witness to the sexual ~~performance~~production as to the age of the minor based upon the minor's appearance, expert testimony based upon the appearance of the minor in the sexual ~~performance~~production, or any other method authorized by law or by rule.

SECTION 16. AMENDMENT. Subsection 11 of section 12.1-32-02 of the North Dakota Century Code is amended and reenacted as follows:

11. Before sentencing a defendant on a felony charge under section 12.1-20-03, 12.1-20-03.1, 12.1-20-11, 12.1-27.2-02, 12.1-27.2-03, 12.1-27.2-04, or

~~12.1-27.2-05~~12.1-27.2-04.1, a court shall order the department of corrections and rehabilitation to conduct a presentence investigation and to prepare a presentence report. A presentence investigation for a charge under section 12.1-20-03 must include a risk assessment. A court may order the inclusion of a risk assessment in any presentence investigation. In all felony or class A misdemeanor offenses, in which force, as defined in section 12.1-01-04, or threat of force is an element of the offense or in violation of section 12.1-22-02, or an attempt to commit the offenses, a court, unless a presentence investigation has been ordered, must receive a criminal record report before the sentencing of the defendant. Unless otherwise ordered by the court, the criminal record report must be conducted by the department of corrections and rehabilitation after consulting with the prosecuting attorney regarding the defendant's criminal record. The criminal record report must be in writing, filed with the court before sentencing, and made a part of the court's record of the sentencing proceeding.