

935 LAW NOTE: THE DEFINITION OF “SEXUAL CONTACT” IN WISCONSIN CRIMINAL PROCEEDINGS

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I. Statutory Framework

Wisconsin law provides three distinct definitions of “sexual contact,” each set forth in a separate statutory section with its own scope and elements. Courts must identify and apply the correct definition based on the statute under which the defendant is charged. The three definitions are: (1) the general definition in § 939.22(34), which applies to offenses in chs. 939 to 948 and 951 except where the context manifestly requires a different construction or where the word is defined in § 948.01 for purposes of ch. 948; (2) the adult-victim definition in § 940.225(5)(b), which applies to sexual-assault offenses charged under § 940.225; and (3) the child-victim definition in § 948.01(5), which governs offenses under Chapter 948.

A. General Definition — § 939.22(34)

Section 939.22(34) applies to crimes in chapters 939 to 948 and 951, unless a particular statute clearly requires a different meaning or the term is separately defined in § 948.01 for purposes of chapter 948. It defines “sexual contact” as four categories of conduct undertaken for the purpose of sexual humiliation, degradation, arousal, or gratification.¹ The statute recognizes the following four categories:

- **Touching another’s intimate parts** (§ 939.22(34)(a)): Intentional touching by the defendant or, upon the defendant’s instruction, by a third person, of the complainant’s clothed or unclothed intimate parts with any part of the body, or with any object or device.
- **Touching the complainant with intimate parts** (§ 939.22(34)(b)): Intentional touching by the defendant or, upon the defendant’s instruction, by a third person, of any part of the complainant’s body (clothed or unclothed) with the intimate parts of the body, clothed or unclothed.
- **Emission on the complainant** (§ 939.22(34)(c)): Intentional penile ejaculation of ejaculate or the intentional emission of urine or feces by the defendant, or upon the defendant’s instruction, by a third person, upon any part of the body, clothed or unclothed, of another person.
- **Causing another to emit on the actor** (§ 939.22(34)(d)): Intentionally causing another person to ejaculate or emit urine or feces on any part of the actor’s body, whether clothed or unclothed.

Importantly, § 939.22(34) does not itself include conduct in which the complainant intentionally touches the defendant’s intimate parts. That circumstance is addressed separately in § 948.01(5) for child-victim offenses and in § 940.225(5)(b)1. for adult-victim offenses charged under § 940.225.

B. Adult Sexual Assault Definition — § 940.225(5)(b)

Section 940.225 governs sexual assault offenses involving adult complainants. Subsection (5)(b) provides a specialized definition of “sexual contact” that applies only to offenses charged under § 940.225. The definition has three subdivisions: subdivision 1., with subdivisions a., b., and c., addresses intentional touching; subdivision 2. addresses penile ejaculation or the emission of urine or feces onto the complainant’s body; and subdivision 3. addresses intentionally causing the complainant to emit onto the defendant’s body.

Subdivision 1. is distinctive because, in addition to conduct undertaken for the purpose of sexual degradation, humiliation, arousal, or gratification, it also includes touching that “contains the elements of actual or attempted battery under s. 940.19(1),” an alternative not found in the general definition in § 939.22(34) or the child-victim definition in § 948.01(5).

Subdivision 1. further expressly covers three forms of intentional touching: touching of the complainant’s intimate parts by the defendant under subd. 1.a.; touching by the complainant of the defendant’s or another person’s intimate parts at the defendant’s instruction or through the use or threat of force under subd. 1.b.; and, as added by 2023 Wis. Act 61, touching by the complainant of any person’s ejaculate, urine, or feces at the defendant’s instruction, through the use or threat of force, or as the result of an intentional act by the defendant under subd. 1.c. Because this definition is expressly limited to offenses under § 940.225, it should not be applied to other statutes that use the term “sexual contact.”² See Wis JI–Criminal 1219 for the pattern jury instruction treatment of § 940.225(5)(b)1.

C. Child-Victim Definition — § 948.01(5)

Section 948.01(5) provides a specialized definition of “sexual contact” for offenses against children under Chapter 948. Each alternative retains a purpose requirement, namely sexual degradation or humiliation of the complainant, or sexual arousal or gratification of the defendant. The statute also expands the scope of covered conduct beyond § 939.22(34) in several important respects. Specifically, “sexual contact” under § 948.01(5) includes:

- **Intentional touching of intimate parts** (§ 948.01(5)(a)1.–2.): Intentional touching, directly or through clothing by the use of any body part or object, of the complainant’s intimate parts by the defendant or, upon the defendant’s instruction, by another person (subd. 1.); and intentional touching by the complainant of the defendant’s intimate parts, or, upon the defendant’s instructions, the intimate parts of another person (subd. 2.).
- **Contact with ejaculate, urine, or feces** (§ 948.01(5)(a)3., created by 2023 Wis. Act 61): Touching by the complainant of the ejaculate, urine, or feces of any person, upon the intentional instructions of the defendant, upon the use or threat of force or violence by the defendant, or upon an intentional act of the defendant.
- **Defendant’s emission on the child** (§ 948.01(5)(b)): Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant, or, upon the

defendant's instruction, by another person upon any part of the body, clothed or unclothed, of the complainant. The "by another person upon the defendant's instruction" language was added by 2019 Wis. Act 16.

- **Causing the complainant to emit on the defendant** (§ 948.01(5)(c)): Intentionally causing the complainant to ejaculate or to emit urine or feces on any part of the defendant's body, whether clothed or unclothed, for the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant.

This expanded definition applies to all Chapter 948 offenses unless a more specific definition is provided elsewhere. Notably, it expressly includes conduct in which the child touches, or is caused by the defendant to touch the defendant's intimate parts, thereby covering scenarios omitted from § 939.22(34). See Wis JI–Criminal 2101A for the pattern jury-instruction treatment of § 948.01(5).

II. Elements and Components

All three definitions share three core components:

- **Intentional Conduct:** The act, whether touching, emission, or causing emission, must be intentional. Passive or accidental contact is not enough. However, intentionally allowing a child to engage in the touching may satisfy this requirement, because purposeful conduct may be inferred from the defendant's acquiescence.³
- **Involvement of Intimate Parts or Bodily Emissions:** Section 939.22(19) defines "intimate parts" as "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." The definition is not limited by the person's gender, and includes both male and female breasts. The statutes also extend to bodily emissions, specifically ejaculate, urine, or feces, whether (i) produced by the defendant through ejaculation or intentional emission, (ii) caused by the defendant to be produced by the complainant, or (iii)—under § 940.225(5)(b)1.c. and § 948.01(5)(a)3.—merely touched by the complainant (as distinct from being produced) upon the defendant's instruction, upon the use or threat of force or violence, or upon an intentional act of the defendant.⁴
- **Sexual Purpose:** The act must be committed for the purpose of the actor's sexual arousal or gratification, or to sexually degrade or humiliate the complainant. This purpose may be established through circumstantial evidence and does not require an admission by the defendant.⁵

III. When Each Definition Applies

A. Rule-Based Application of Sexual Contact Definitions

- **Charges Under Chapter 948.** When a defendant is charged under § 948.02 (sexual assault of a child) or any other Chapter 948 offense that criminalizes “sexual contact,” courts must apply the definition in § 948.01(5). § 939.22 expressly yields to § 948.01 definitions for ch. 948 purposes.⁶ This definition is broader than the general definition and includes scenarios in which the child touches the defendant’s intimate parts, as well as conduct involving bodily emissions.
- **Charges Under § 940.225.** When the charging statute is § 940.225, courts must apply the definition of “sexual contact” provided in § 940.225(5)(b). Section 940.225(5)(b) is a statute-specific definition that applies exclusively to offenses charged under § 940.225. See Wis JI–Criminal 1219. It parallels the general definition’s categories of touching, emission, and causing emission, and uniquely includes a battery-alternative under § 940.225(5)(b)1. (“contains the elements of actual or attempted battery under s. 940.19 (1)”). Subdivision 1.c., added by 2023 Wis. Act 61, covers the complainant’s touching of ejaculate, urine, or feces of any person upon the defendant’s instruction or coercion. Accordingly, for charges under § 940.225, the court should instruct using § 940.225(5)(b), not the general definition in § 939.22(34).
- **Charges Under Other Statutes Using “Sexual Contact”** (Including Chapter 940 Offenses Other Than § 940.225; Chapter 942; and Similar Statutes). For statutes that use the term “sexual contact” but do not supply a different definition (and are not charged under § 940.225 or Chapter 948), courts generally apply the general definition in § 939.22(34). This general definition encompasses intentional touching of intimate parts and bodily emission scenarios, but it does not cover instances in which the complainant touches the defendant’s intimate parts.
- **Mixed or Ambiguous Statutes.** When a statute incorporates language from both Chapter 948 and other chapters (e.g., persistent repeater provisions), courts must examine the statutory language to determine which definition of sexual contact the legislature intended to apply. The Wisconsin Supreme Court has clarified, for example, that “sexual contact” is not an element of child enticement; rather, it is one of six enumerated “modes of commission.”⁷ In such cases, the court need not define “sexual contact” when accepting a plea. For trial purposes, however, Wis JI–

Criminal 2134, 2134A, and 2134B continue to recommend that the term be defined for the jury.

- **Special Statutes with Independent Definitions.** Certain offenses include their own definition of “sexual contact” or use alternative language. For example, § 944.18(1)(d) defines “sexual contact” for purposes of the bestiality/sexual-contact-with-an-animal statute in a manner entirely distinct from §§ 939.22(34), 940.225(5)(b), and 948.01(5). The charging statute should always be reviewed carefully to determine whether a specific definition is provided or incorporated.

B. Practical Checklist for Determining the Applicable Definition of Sexual Contact

Use the following guide to determine which statutory definition of “sexual contact” applies, based on the offense charged:

- **§ 940.225(2)(a), (3)** – Sexual Assault by Contact (adult victim): Apply the definition of sexual contact in § 940.225(5)(b). See Wis JI–Criminal 1218B (third degree) and 1219 (fourth degree).
- **§§ 948.02(1)–(2)** – First-/Second-Degree Sexual Assault of a Child by Contact: Apply the child-specific definition in § 948.01(5). See Wis JI–Criminal 2101A.
- **§ 948.025** – Repeated Sexual Assault of a Child: Apply § 948.01(5)
- **§ 948.093** – Underage Sexual Activity: Apply § 948.01(5). Although § 948.093 does not expressly cross-reference § 948.01(5), § 948.093 is a Chapter 948 offense and § 939.22 directs that where a word is defined in § 948.01 for purposes of ch. 948, that definition controls.⁸
- **§ 948.07** – Child Enticement: Do not treat “sexual contact” as an element for Bangert plea-colloquy purposes. Instead, identify the specific improper purpose(s) alleged (e.g., intent to have sexual contact, intent to have sexual intercourse) and instruct accordingly. Note: Wis JI–Criminal 2134, 2134A, and 2134B still recommend defining “sexual contact” for trial purposes even though it is not a strict “element.”⁹

- **§ 948.085 and § 948.095** – Sexual Assault of a Child Placed in Substitute Care; Sexual Assault of a Child by a School Staff Person: Apply § 948.01(5).
- **Other Chapter 948 Offenses** (e.g., sexual exploitation of a child under § 948.05; incest with a child under § 948.06; sexual assault of a child placed in substitute care under § 948.085): Apply § 948.01(5) unless the offense statute includes its own definition of “sexual contact.” Always review the specific statute for alternative language.
- **§ 944.18** – Sexual Contact with an Animal: Apply the independent definition in § 944.18(1)(d), not §§ 939.22(34), 940.225(5)(b), or 948.01(5).

IV. Case Law Synthesis

The following sections organize Wisconsin case law by recurring issues related to sexual contact.

A. Intent and Purpose Requirements

- **Sexual Purpose Element:** Courts consistently require the State to prove that the conduct was undertaken for the purpose of either (1) the actor’s sexual arousal or gratification, or (2) the sexual humiliation or degradation of the complainant. This element may be established through circumstantial evidence and does not require direct proof of the defendant’s subjective intent. In State v. Drusch, 139 Wis. 2d 312, 407 N.W.2d 328 (Ct. App. 1987), the court held that the defendant’s intent to obtain sexual gratification may be inferred from his conduct—specifically, repeatedly lifting young girls with a hand between their legs, lying about his identity to the children, and lying to police about his contact. The decision reinforces that juries may draw reasonable inferences about sexual purpose from the totality of the circumstances.¹⁰
- **Allowing vs. Initiating Contact:** The Court of Appeals has rejected the view that “sexual contact” requires the defendant to affirmatively initiate the physical touching. In State v. Traylor, 170 Wis. 2d 393, 489 N.W.2d 626 (Ct. App. 1992), the court held that intentionally allowing a child to make oral contact with the defendant’s penis constituted “intentional touching” within the meaning of § 948.01(5). The court reasoned that by permitting the contact—without intervening

or withdrawing—the defendant engaged in purposeful conduct from which a jury could infer the requisite sexual intent.¹¹

- **Child Enticement vs. Sexual Assault:** In State v. Hendricks, 2018 WI 15, 379 Wis. 2d 549, 906 N.W.2d 666, the Wisconsin Supreme Court clarified that “sexual contact” is not an element of the crime of child enticement under § 948.07. Rather, it is one of six enumerated “modes of commission.” The offense centers on the act of enticement itself, not the nature of the underlying conduct. As a result, courts are not required to define “sexual contact” during plea colloquies¹² for child-enticement charges, although Wis JI–Criminal 2134, 2134A, and 2134B continue to recommend defining the term at trial. However, when the charge is sexual assault of a child, the purpose element is essential, and trial courts must ensure it is properly instructed and supported by the evidence.

B. Body-Part Coverage and the Definition of “Intimate Parts”

- **Male Breasts Are Covered:** In State v. Forster, 2003 WI App 29, 260 Wis. 2d 149, 659 N.W.2d 144, the defendant contended that touching a 15-year-old boy’s chest did not constitute “sexual contact.” The Court of Appeals rejected this claim, holding that the statutory definition of “intimate parts” in § 939.22(19) includes the breast of “any human being.”¹³ The court emphasized that the absence of a gender distinction reflects a legislative intent to cover male breasts.
- **“Vaginal Area” Is a Permissible Instruction:** In State v. Morse, 126 Wis. 2d 1, 374 N.W.2d 388 (Ct. App. 1985), the court held that the trial court did not improperly broaden the scope of § 939.22(19) by instructing that “intimate part” included “the vaginal area.”¹⁴ Jury instructions may refer to the “vaginal area” without error or ambiguity.¹⁵
- **Other Covered Body Parts:** The statutory definition of “intimate parts” in § 939.22(19) also expressly includes the buttock, anus, groin, scrotum, penis, vagina, and pubic mound. Courts apply these terms in accordance with their plain and commonly understood meanings, consistent with legislative definitions.

C. Contextual Proof and Circumstantial Evidence

- **Use of Other-Acts Evidence:** In State v. Friedrich, 135 Wis. 2d 1, 398 N.W.2d 763 (1987), the Wisconsin Supreme Court upheld the admissibility of prior sexual conduct to establish motive and plan. The court stressed that proving “sexual contact” requires showing that the touching was for the purpose of sexual gratification, and that evidence of similar prior acts can be highly probative in demonstrating that intent.¹⁶ The “greater latitude” rule further supports admissibility in sex-crime cases, especially those involving children. See State v. Davidson, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606.

D. Jury Instruction Considerations and Plea Colloquy Issues

- **Purpose Element Must Be Conveyed:** Wisconsin courts have consistently emphasized that juries—and defendants entering pleas—must be informed that “sexual contact” requires a specific sexual purpose. In State v. Jipson, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18, the Court of Appeals permitted the defendant to withdraw his plea because the colloquy failed to advise him that second-degree sexual assault of a child requires proof that the contact was for sexual gratification, humiliation, arousal, or degradation.¹⁷ Similarly, in State v. Nichelson, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998), the court reversed the circuit court’s order denying plea withdrawal after concluding that the trial court had not properly ensured the defendant understood this essential element during the plea colloquy.¹⁸
- **No Purpose Requirement for Child Enticement:** As clarified in State v. Hendricks, 2018 WI 15, “sexual contact” is not an element of the offense of child enticement under § 948.07. Rather, it is one of six “modes of commission.” Accordingly, courts are not required to define “sexual contact” during plea proceedings for child enticement charges, but defining it at trial remains the Committee’s recommended practice.¹⁹

V. Comparison of Statutory Definitions of “Sexual Contact”

Aspect	§ 939.22(34) General Definition (JI Criminal 934)	§ 940.225(5)(b) Adult Sexual Assault Definition (JI Criminal 1200A, 1219)	§ 948.01(5) Child Victim Definition (JI Criminal 2101A)
Applicable Offenses / Scope	Default definition for “sexual contact” in chs. 939 to 948 and 951, unless the context of a specific section manifestly requires a different construction OR the word is defined in § 948.01 for purposes of ch. 948. See § 939.22. Examples: human trafficking (§ 940.302), prostitution-related offenses (§ 944.30(1m)(e)), patronizing prostitutes (§ 944.31).	Applies exclusively to offenses charged under § 940.225 (Sexual assault — adult victim). See § 940.225(5)(b). Examples: first-/second-/third-/fourth-degree sexual assault (§ 940.225(1), (2), (3), (3m)); sexual assault by certain professionals/staff under § 940.225.	Applies to offenses in Chapter 948 (Crimes Against Children) whenever those offenses criminalize “sexual contact.” See § 948.01. Examples: sexual assault of a child (§ 948.02); repeated sexual assault of the same child (§ 948.025); sexual assault of a child placed in substitute care (§ 948.085); sexual assault of a child by a school staff person (§ 948.095); underage sexual activity (§ 948.093).
Purpose / Intent Element	The act must be done “for the purpose of sexual humiliation, degradation, arousal, or gratification.” § 939.22(34). A single, general-purpose clause applies to all four paragraphs (a)–(d).	Each subdivision recites its own purpose requirement. For § 940.225(5)(b)1. (intentional touching), the purposes are: (i) “sexually degrading or sexually humiliating the complainant,” (ii) “sexually arousing or gratifying the defendant,” or (iii) UNIQUE: the touching “contains the elements of actual or attempted battery under s. 940.19 (1).” This battery alternative is found only in § 940.225(5)(b)1. — not in § 939.22(34) or § 948.01(5).	Each subdivision recites the purpose: “for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.” § 948.01(5)(a), (b), (c). Substantively identical to the general definition’s purpose requirement, but more specific in naming “complainant” and “defendant.”

Terminology Used	“The defendant”; “another person” (for the victim); “a third person” (for someone acting at the defendant’s instruction). <i>Does not use the word “child” — because if the offense is in ch. 948, § 948.01(5) controls by virtue of § 939.22 (intro.).</i>	“The defendant”; “the complainant”; “another person” (for a third-party actor or additional intimate-parts target).	“The defendant”; “the complainant” (the child); “another person” (for a third-party actor or additional intimate-parts target). <i>Section 948.01(1) generally defines “child” as a person under 18. The exception for a person who has attained age 17 applies when that person is being prosecuted as the alleged offender; it does not exclude a 17-year-old complainant from the definition when another person is being prosecuted.</i>
Touching of Complainant’s Intimate Parts by Defendant (or Directed Third Person)	✓ § 939.22(34)(a) Intentional touching by the defendant or, upon the defendant’s instruction, by a third person, of the clothed or unclothed intimate parts of another person with any part of the body, clothed or unclothed, or with any object or device.	✓ § 940.225(5)(b)1.a. Intentional touching by the defendant or, upon the defendant’s instruction, by another person, by the use of any body part or object, of the complainant’s intimate parts. <i>Minor difference: “any body part or object” (no separate “device” term).</i>	✓ § 948.01(5)(a)1. Intentional touching by the defendant or, upon the defendant’s instruction, by another person, by the use of any body part or object, of the complainant’s intimate parts. <i>Minor difference: “any body part or object” (no separate “device” term).</i>
Touching of Complainant’s Body With Defendant’s Intimate Parts	✓ § 939.22(34)(b) Intentional touching by the defendant or, upon the defendant’s instruction, by a third person, of any part of the body of another person with the intimate parts of the body, clothed or unclothed. <i>Example: defendant rubs their genitals on the victim’s arm or leg.</i>	● Covered indirectly Section 940.225(5)(b)1.a. covers touching of the complainant’s intimate parts “by the use of any body part” — which captures most such cases (the defendant’s intimate parts touching the complainant’s intimate parts). However, if the defendant’s intimate parts touch a non-intimate part of the complainant’s body (e.g., arm, leg), subdivision 1.a. would not reach that conduct unless it “contains the elements of actual or attempted battery” under subd. 1. (intro.).	● Covered indirectly Section 948.01(5)(a)1. covers touching of the complainant’s intimate parts “by the use of any body part” — which captures most such cases. If the defendant’s intimate parts touch a non-intimate part of the child’s body (e.g., arm, leg), neither subdivision (a)1. nor (a)2. literally reaches the conduct. There is no statutory equivalent to § 939.22(34)(b) in ch. 948.

	X Not included Section 939.22(34) does not enumerate a scenario in which the complainant is the one doing the touching of the defendant's intimate parts. <i>For offenses prosecuted under § 940.225 or ch. 948, this scenario is captured by the more specific definitions; for other statutes using § 939.22(34), the conduct may still be chargeable as sexual assault (§ 940.225) or another offense.</i>	✓ § 940.225(5)(b)1.b. Intentional touching by the complainant, upon the defendant's instruction, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.	✓ § 948.01(5)(a)2. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person. <i>NOTE: The defendant's "instructions" requirement applies only to touching a third person's intimate parts. The child's touching of the defendant's own intimate parts falls within subd. (a)2. without any instruction requirement. See also <u>State v. Traylor</u>, 170 Wis. 2d 393, 489 N.W.2d 626 (Ct. App. 1992) (allowing child-initiated contact satisfies "intentional touching").</i>
	✓ § 939.22(34)(c) Intentional penile ejaculation of ejaculate, or intentional emission of urine or feces, by the defendant or, upon the defendant's instruction, by a third person, upon any part of the body (clothed or unclothed) of another person.	✓ § 940.225(5)(b)2. Intentional penile ejaculation of ejaculate, or intentional emission of urine or feces, by the defendant or, upon the defendant's instruction, by another person, upon any part of the body (clothed or unclothed) of the complainant. <i>The "upon the defendant's instruction, by another person" language was added by 2005 Wis. Act 435.</i>	✓ § 948.01(5)(b) Intentional penile ejaculation of ejaculate, or intentional emission of urine or feces, by the defendant or, upon the defendant's instruction, by another person, upon any part of the body (clothed or unclothed) of the complainant. <i>The "upon the defendant's instruction, by another person" language was added by 2019 Wis. Act 16, creating parity with § 940.225(5)(b)2.</i>

	✓ § 939.22(34)(d) Intentionally causing another person to ejaculate or emit urine or feces on any part of the actor's body, whether clothed or unclothed. <i>Uses "actor's body" (consistent with § 939.22 terminology) rather than "defendant's body."</i>	✓ § 940.225(5)(b)3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.	✓ § 948.01(5)(c) For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.
	✗ Not included Section 939.22(34) contains no parallel provision. The general definition does not reach this conduct. <i>For offenses not prosecuted under § 940.225 or ch. 948, this scenario is not covered.</i>	✓ § 940.225(5)(b)1.c. Touching by the complainant of the ejaculate, urine, or feces of any person upon: (i) the intentional instructions of the defendant; (ii) the use or threat of force or violence by the defendant; or (iii) an intentional act of the defendant. <i>Added by 2023 Wis. Act 61 (effective Dec. 8, 2023).</i>	✓ § 948.01(5)(a)3. Touching by the complainant of the ejaculate, urine, or feces of any person upon: (i) the intentional instructions of the defendant; (ii) the use or threat of force or violence by the defendant; or (iii) an intentional act of the defendant. <i>Added by 2023 Wis. Act 61 (effective Dec. 8, 2023).</i>
	✗ Not included The general definition requires a sexual-humiliation, degradation, arousal, or gratification purpose. There is no battery-based alternative.	✓ UNIQUE: § 940.225(5)(b)1. (intro.) The intentional touching under subd. 1. is sexual contact if it is either (i) for one of the sexual purposes, OR (ii) "contains the elements of actual or attempted battery under s. 940.19 (1)." <i>This alternative is unique to § 940.225(5)(b)1. It does NOT appear in § 939.22(34) or § 948.01(5).</i>	✗ Not included The child-victim definition requires a sexual-humiliation, degradation, arousal, or gratification purpose. There is no battery-based alternative.

	Supplied by § 939.22(19): “the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being.” <i>Applies to §§ 939.22(34), 940.225(5)(b), and 948.01(5) alike. See <u>State v. Forster</u>, 2003 WI App 29, 260 Wis. 2d 149 (includes male breasts); <u>State v. Morse</u>, 126 Wis. 2d 1 (instruction may refer to the “vaginal area” without error).</i>	Same definition — § 939.22(19) applies by virtue of § 939.22 (intro.).	Same definition — § 939.22(19) applies to ch. 948 because § 948.01 does not supply a separate definition of “intimate parts.” See § 939.22 (intro.).
	Explicit. § 939.22(34)(a)–(c) repeatedly use the formulation “clothed or unclothed.”	Explicit. § 940.225(5)(b)1. expressly covers intentional touching “whether direct or through clothing,” and this language governs all three sub-subdivisions (a., b., and c.). In addition, § 940.225(5)(b)2. and 3. use the phrase “clothed or unclothed” in describing the body of the complainant or defendant.	Explicit. § 948.01(5)(a) expressly covers intentional touching “whether direct or through clothing,” and this language governs all three sub-subdivisions (1., 2., and 3.). In addition, § 948.01(5)(b) uses the phrase “clothed or unclothed” in describing the body of the complainant. <i>Touching “through clothing” qualifies as intentional touching.</i>
	Each of paragraphs (a)–(d) requires intentional conduct by the defendant (or the third person acting on the defendant’s instruction). <i>“Intentionally” has the meaning designated in § 939.23.</i>	Each subdivision requires intentional conduct. <i>“Allowing” a child-initiated touch can satisfy intentional touching. See <u>State v. Traylor</u> (though that case arose under § 948.01(5); the Committee has not extended <u>Traylor</u> to § 940.225 in the absence of clear authority).</i>	Each subdivision requires intentional conduct. <i>“Allowing” a child-initiated touch may satisfy intentional touching. <u>State v. Traylor</u>, 170 Wis. 2d 393 (Ct. App. 1992).</i>
	Wis JI–Criminal 934 (defining “sexual contact” under § 939.22(34) for offenses other than § 940.225 and ch. 948).	Wis JI–Criminal 1200A (definition used within the § 940.225 offense instructions, such as JI-Criminal 1208 and 1218B). Wis JI–Criminal 1219 builds the definition alternatives directly into the fourth-degree sexual-assault instruction.	Wis JI–Criminal 2101A (definition used within the sexual-assault-of-a-child instructions, including JI-Criminal 2101, 2102, 2104, 2106, and 2134).

Key Statutory History	• Original structure traced to 1987 Wis. Act 332. • 1995 Wis. Act 69 added par. (c) (emission on another). • 2005 Wis. Act 273 added par. (d) (causing another to emit on the actor). • 2005 Wis. Act 435 added “by the defendant or, upon the defendant’s instruction, by a third person” to (a), (b), and (c).	• Origin: 1975 sexual assault reform (ch. 184, Laws of 1975). • Ch. 309, Laws of 1981 (structural refinement after <u>State v. Nye</u>, 105 Wis. 2d 63). • 1995 Wis. Act 69 added subd. 2. (emission on complainant). • 2005 Wis. Act 273 added subd. 3. (causing complainant to emit). • 2005 Wis. Act 435 added “upon the defendant’s instruction, by another person” language. • 2023 Wis. Act 61 added subd. 1.c. (complainant touching ejaculate/urine/feces).	• Created by 1987 Wis. Act 332 (creation of ch. 948). • 2005 Wis. Act 273 added (5)(c) (causing complainant to emit on defendant). • 2005 Wis. Act 435 added “upon the defendant’s instruction” language to (5)(a). • 2019 Wis. Act 16 added “or, upon the defendant’s instruction, by another person” to (5)(b). • 2023 Wis. Act 61 created (5)(a)3. (complainant touching ejaculate/urine/feces).
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COMMENT

Wis JI–Criminal 935 was approved by the Committee in June 2026.

2023 Wisconsin Act 61 [effective date: December 8, 2023] created § 940.225(5)(b)1.c. and § 948.01(5)(a)3., thereby expanding the definition of “sexual contact” in both chapters. The new language captures situations in which the complainant intentionally touches another person’s ejaculate, urine, or feces, and the defendant either: (1) intentionally instructed the complainant to do so, (2) used or threatened force or violence, or (3) otherwise caused the act by an intentional act of the defendant. For cases arising on or after December 8, 2023, courts must incorporate this new alternative definition when supported by the evidence. See Wis JI–Criminal 2101A for an example of how the child-victim instruction has been updated to reflect this change.

2019 Wisconsin Act 16. Act 16 amended § 948.01(5)(b) to add the language “or, upon the defendant’s instruction, by another person,” mirroring the 2005 Wis. Act 435 amendment to § 940.225(5)(b)2. Thus, under both the adult and child definitions, penile ejaculation or emission of urine or feces may be committed by the defendant or by a third person acting on the defendant’s instruction.

Indirect digital contact (e.g., remote contact facilitated by electronic means). No reported Wisconsin cases address whether remote or digital touching (e.g., instructing a child via video to touch themselves or to touch intimate parts of a third person) constitutes “sexual contact” within § 948.01(5). Under § 948.01(5)(a)1., the statute requires “intentional touching by the defendant or, upon the defendant’s instruction, by another person.” Whether a child directed remotely to touch his or her own intimate parts is “another person” acting “upon the defendant’s instruction” is an open question in Wisconsin. However, subdivision (5)(a)2. (touching by the complainant of the defendant’s intimate parts) and subdivision (5)(a)3. (touching by the complainant of any person’s ejaculate, urine, or feces upon the defendant’s intentional instructions) provide alternative grounds where applicable. In any event, such conduct will typically also support charges under § 948.07 (child enticement) and § 948.075 (use of a computer to facilitate a child sex crime).

Overlap with emerging offenses. The legislature continues to update ch. 948. Practitioners should monitor statutory changes and adjust instructions accordingly.

Legislative History. The modern framework of “sexual contact” evolved through a series of targeted statutory amendments:

- **Pre-1988 framework.** The term “sexual contact” has been defined in § 940.225(5) since the 1975 sexual assault reform (ch. 184, Laws of 1975). The definition was refined by Chapter 309, Laws of 1981 (eliminating certain language held problematic in State v. Nye, 105 Wis. 2d 63, 312 N.W.2d 826 (1981)).
- **1987 Wisconsin Act 332.** Created Chapter 948 (Crimes Against Children) and the child-specific definition of “sexual contact” in § 948.01(5).
- **1995 Wisconsin Act 69:** Introduced § 939.22(34)(c), covering intentional penile ejaculation or emission on another person. The parallel § 948.01(5)(b) was likewise structured. This Act also created a new type of third-degree sexual assault based on the emission alternative. See Wis JI–Criminal 1218B.
- **2005 Wisconsin Act 273:** Added § 939.22(34)(d) (causing another to emit on the actor’s body), § 940.225(5)(b)3., and § 948.01(5)(c), addressing scenarios in which the complainant is caused to emit on the defendant.
- **2005 Wisconsin Act 435:** Broadened liability in § 939.22(34) and § 940.225(5)(b) by adding language covering acts “by the defendant or, upon the defendant’s instruction, by a third person” (or “by another person”).
- **2019 Wisconsin Act 16:** Extended the “by another person upon the defendant’s instruction” language to § 948.01(5)(b), creating parity with § 940.225(5)(b)2. for penile ejaculation and emission alternatives in child-victim cases.

- **2023 Wisconsin Act 61:** Created § 940.225(5)(b)1.c. and § 948.01(5)(a)3., adding scenarios in which the complainant intentionally touches ejaculate, urine, or feces of any person upon the defendant's intentional instructions, upon the use or threat of force or violence by the defendant, or upon an intentional act of the defendant.

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1. See § 939.22(34) (intro.).
 2. See Wis JI–Criminal 1200A.
 3. State v. Traylor, 170 Wis. 2d 393, 404, 489 N.W.2d 626 (Wis. Ct. App. 1992).
 4. State v. Forster, 2003 WI App 29, 260 Wis. 2d 149, ¶13, 659 N.W.2d 144.
 5. State v. Drusch, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Wis. Ct. App. 1987).
 6. See § 939.22 (intro.)
 7. State v. Hendricks, 2018 WI 15, 379 Wis. 2d 549, ¶22, 906 N.W.2d 666.
 8. See also State v. Colton M., 2015 WI App 94, 366 Wis. 2d 119, 875 N.W.2d 642 (applying § 948.01(5) to a sub. (1)(e) prosecution).
 9. See State v. Hendricks, 2018 WI 15, supra, at ¶ 33.
 10. See State v. Drusch, supra.
 11. See State v. Traylor, supra.
 12. See State v. Hendricks, supra.
 13. See State v. Forster, supra.
 14. State v. Morse, 126 Wis. 2d 1, 4, 374 N.W.2d 388 (Wis. Ct. App. 1985).
 15. State v. Morse, supra at 6.
 16. State v. Friedrich, 135 Wis. 2d 1, 21, 398 N.W.2d 763 (1987).
 17. State v. Jipson, 2003 WI App 222, 267 Wis. 2d 467, ¶ 1, 671 N.W.2d 18.
 18. State v. Nicholson, 220 Wis. 2d 214, 582 N.W.2d 460 (Wis. Ct. App. 1998).
 19. See State v. Hendricks, supra.