

**NEW MEXICO  
STATUTES  
1978**

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**ANNOTATED**

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**Chapter 30:  
Criminal Offenses**

**Pamphlet 50:  
Criminal Code  
30-1-1 through 30-28-3**



**1984 REPLACEMENT PAMPHLET**

Pamphlet 50 includes laws enacted through the First Special Session and Second Regular Session of the Thirty-Sixth Legislature (1984), and annotations through 674 P.2d 749, 105 S. Ct. 751, 725 F.2d 106, 575 F.Supp. 796, 99 F.R.D. 657, 35 B.R. 430, and 83 Op. Att'y Gen. No. 6.

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SEXUAL OFFENSES

30-9-11

**History:** 1953 Comp., § 40A-9-18, enacted by Laws 1963, ch. 303, § 9-18.

**Cross-references.** — For provisions on forcible entry and unlawful detainer, see 35-10-1 NMSA 1978 et seq. For Uniform Owner-Resident Relations Act, see 47-8-1 NMSA 1978 et seq.

**Recovery of rent barred.** — Where building was leased with intent that it be used as a house of prostitution, and the house was so used, the lessor could not recover rent. *McRae v. Cassan*, 15 N.M. 496, 110 P. 574 (1910).

### 30-9-10. Definitions.

As used in Sections 30-9-10 through 30-9-16 NMSA 1978:

A. "force or coercion" means:

- (1) the use of physical force or physical violence;
- (2) the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute such threats;
- (3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute such threats; or

(4) perpetrating criminal sexual penetration or criminal sexual conduct [contact] when the perpetrator knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless, or suffers from a mental condition which renders the victim incapable of understanding the nature or consequences of the act. Physical or verbal resistance of the victim is not an element of force or coercion;

B. "great mental anguish" means psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an in-patient or out-patient basis, and is characterized by extreme behavioral change or severe physical symptoms;

C. "personal injury" means bodily injury to a lesser degree than great bodily harm and includes, but is not limited to, disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ;

D. "position of authority" means that position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child; and

E. "spouse" means a legal husband or wife, unless the couple is living apart or either husband or wife has filed for separate maintenance or divorce.

**History:** 1953 Comp., § 40A-9-20, enacted by Laws 1975, ch. 109, § 1; 1979, ch. 28, § 1.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Requiring complaining witness in prosecution for sex crime to submit to psychiatric examination, 18 A.L.R.3d 1433.

Rape or similar offense based on intercourse with woman who is allegedly mentally deficient, 31 A.L.R.3d 1227.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 A.L.R.3d 854.

### 30-9-11. Criminal sexual penetration.

Criminal sexual penetration is the unlawful and intentional causing of a person, other than one's spouse, to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse, or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

A. Criminal sexual penetration in the first degree consists of all criminal sexual penetration perpetrated:

- (1) on a child under thirteen years of age; or
- (2) by the use of force or coercion which results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

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B. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

- (1) on a child thirteen to sixteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit;
- (2) by the use of force or coercion which results in personal injury to the victim;
- (3) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;
- (4) in the commission of any other felony; or
- (5) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree is guilty of a second degree felony.

C. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony.

**History:** 1953 Comp., § 40A-9-21, enacted by Laws 1975, ch. 109, § 2.

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- V. Sodomy.
- VI. Instructions.

#### I. GENERAL CONSIDERATION.

##### A. In General.

**Cross-references.** — For assault with intent to commit a violent felony, see 30-3-3 NMSA 1978. As to sexual exploitation of children, see 30-6A-3 NMSA 1978. For provision that testimony of a victim hereunder need not be corroborated, see 30-9-15 NMSA 1978. As to limitations on testimony regarding victim's past sexual conduct, see 30-9-16 NMSA 1978.

**Trial of co-defendants.** — Whether separate trials are to be held for defendants jointly indicted for attempted forcible rape was a matter to be addressed to and resolved by the sound discretion of the trial court. *State v. Pope*, 78 N.M. 282, 430 P.2d 779 (Ct. App. 1967).

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For article, "Rape Law: The Need For Reform," see 5 N.M.L. Rev. 279 (1975).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 1 to 30; 70 Am. Jur. 2d Sodomy §§ 1 to 16.

Liability of parent or person in loco parentis for rape of minor child, 19 A.L.R.2d 460; 41 A.L.R.3d 904.

Blood grouping tests on issue of identity in rape prosecution, 46 A.L.R.2d 1037.

Entrapment to commit offense of sodomy, 52 A.L.R.2d 1194.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children and the like, 62 A.L.R.2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy, 62 A.L.R.2d 1083.

Assault with intent to commit unnatural sex act upon minor as affected by the latter's consent, 65 A.L.R.2d 748.

Intercourse accomplished under pretext of medical treatment, 70 A.L.R.2d 824.

Applicability of rape statute concerning children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 A.L.R.2d 874.

Incest as included within charge of rape, 76 A.L.R.2d 484.

Criminal responsibility of husband as for rape or assault to commit rape, on wife, 84 A.L.R.2d 1017.

Rape by fraud or impersonation, 91 A.L.R.2d 591.

Mistake or lack of information as to victim's age as defense to statutory rape, 8 A.L.R.3d 1100.

### 30-28-1. Attempt to commit a felony.

Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.

Whoever commits attempt to commit a felony upon conviction thereof, shall be punished as follows:

- A. if the crime attempted is a capital or first degree felony, the person committing such attempt is guilty of a second degree felony;
- B. if the crime attempted is a second degree felony, the person committing such attempt is guilty of a third degree felony;
- C. if the crime attempted is a third degree felony, the person committing such attempt is guilty of a fourth degree felony; and
- D. if the crime attempted is a fourth degree felony, the person committing such attempt is guilty of a misdemeanor.

No person shall be sentenced for an attempt to commit a misdemeanor.

**History:** 1953 Comp., § 40A-28-1, enacted by Laws 1963, ch. 303, § 28-1.

#### ANNOTATIONS

**Single intent crime.** — The crime of attempt to commit a felony requires the specific intent to commit the underlying crime. *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46, *aff'd in part, rev'd in part*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

**Legal adequacy.** — If a jury could have found a defendant guilty of attempted second degree murder without determining that he intended to kill his ex-wife, it could have convicted him of an attempt to commit reckless or unintentional second degree murder, a crime that does not exist. *State v. Carrasco*, 2007-NMCA-152, 143 N.M. 62, 172 P.3d 611, cert. quashed, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

**Child abuse.** — There is such a crime as attempt to commit child abuse when the theory of the case is intentional child abuse. *State v. Herrera*, 2001-NMCA-073, 131 N.M. 22, 33 P.3d 22, cert. denied, 131 N.M. 64, 33 P.3d 284, 182.

**Sufficient evidence.** — Where a videotape of a transaction in which the victim's ATM card was inserted into an ATM machine showed that the person using the ATM machine had tattoos on the person's arms, the jury was able to compare stills of the videotape with the tattoos on defendant's arms; and several days after the victim's purse had been stolen, the victim's driver's license was found in defendant's vehicle, and defendant told a police officer that defendant tried to use the victim's ATM card, but the machine ate it, the evidence was sufficient to support defendant's conviction for attempt to commit unauthorized use of an ATM card of another. *State v. Verdugo*, 2007-NMCA-095, 142 N.M. 267, 164 P.3d 966, cert. quashed, 2008-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Where defendant purchased nine gallons of iodine and possessed over 5,000 pseudoephedrine pills, a quart of acetone, scales, and an air purifier; and most of the pills had been removed from their blister packs,