

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date 1/22/24

Bill No: HB 60-280

Sponsor: Stefani Lord and John Block **Agency Name and Code** 280 – Law Office of the Public Defender
Short Title: Crime of Desecration of a Dead Human Body **Number:** _____
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None known
Duplicates/Relates to Appropriation in the General Appropriation Act None known

SECTION III: NARRATIVE

BILL SUMMARY

HB 60 seeks to add three new crimes: (1) criminal desecration of a human body (fourth-degree felony); (2) criminal sexual contact (CSC) with a dead human body (third-degree felony); and (3) criminal sexual penetration (CSP) of a dead human body (second-degree felony).

- (1) Criminal Desecration of a Dead Human Body would outlaw unlawful dismemberment, disfigurement, mutilation, or burning of a dead human body or any unlawful act that causes a dead human body to be devoured or scattered.
- (2) CSC of a Dead Human Body would explicitly criminalize unlawful, intentional touching of clothed or unclothed intimate parts of a dead human body or intentionally causing a dead human body to touch the intimate parts of another person.
- (3) CSP of a Dead Human Body would explicitly criminalize the unlawful, intentional causing of a dead human body to engage in sexual intercourse, oral or anal sex, or any penetration (to any extent, with any object, regardless of emission) of the genitals or anus of a dead human body.

CSC and CSP of a Dead Human Body essentially track the language of NMSA 1978 §§ 30-9-11, 30-9-12, and 30-9-13. Criminal Desecration of a Dead Human Body is an entirely new formulation.

FISCAL IMPLICATIONS

This bill will likely have little fiscal impact. There do not appear to be many cases that would fall into this statute, though it does fill a gap in state law for those rare cases. The only potential fiscal increase might be for expert testimony/testing for both the prosecution and the defense to try to determine, in close cases, whether the victim was alive or dead at the time of the desecration or sexual act. Due to the small number of prosecutions, LOPD would likely be able to absorb some cases under the proposed law; however, any increase in the number of prosecutions brought about by the cumulative effect of this and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

SIGNIFICANT ISSUES

It does not appear necessary to create a new crime of this type in New Mexico for at least three reasons: (1) the acts covered by this bill are exceedingly rare; (2) the judiciary has already crafted a path to conviction for the most common (though still exceedingly rare) occurrences of

sexual act(s) covered by this bill; and (3) adding new crimes, especially those with the steep penalties proposed by this bill, is not an effective way to increase public safety.

The closest NM has to an “abuse of a corpse” statute is NMSA 1978, § 24-12-3 (2023), but it only applies to those who “conduct[] a post-mortem examination on an unclaimed body without express permission of the medical investigator” or who “unlawfully dispose[] of, use[] or sell[] an unclaimed body.” The “desecration” crime created by this bill would expand this prohibition to the general public and add further acts to the list of unlawful behavior with a corpse. Many jurisdictions have “abuse of a corpse” statutes for non-sexual acts committed upon a dead body, and so this part of the statute would bring NM in line with what seems to be a majority of states. This bill is also, on the whole, more specific and clearer than some states’ “abuse of a corpse” statutes, which eliminates some potential challenges to the statute during litigation. *See, e.g.*, Ohio Rev. Code Ann. § 2927.01 (making it a misdemeanor to “treat a human corpse in a way that the person knows would outrage reasonable family sensibilities”; making it a low-level felony to “treat a human corpse in a way that would outrage reasonable community sensibilities”).

However, this part of the bill, along with the rest of it, presents significant issues. One problem with the “desecration” crime as formulated in this bill is the criminalization of “any unlawful act that causes a dead human body to be devoured or scattered.” *See* Section 1(A). This prong would invite double jeopardy challenges, as well as proximate cause and vagueness challenges. For one, if the “unlawful act” that led to the body’s destruction by animals was the same act that led to the person’s death or that constituted a separate charge of tampering (at most, a third-degree felony), there would be a strong double jeopardy argument against multiple punishments for a single act.

The proximate cause and vagueness arguments would attack the foreseeability of the “devouring”/“scattering,” as well as what acts would be sufficient to “cause” that destruction. Merely leaving a body on the ground? Leaving it on the ground but hiding it so it won’t be found quickly? Would the natural processes of decay (including bacteria, insect, and worm activity) count? How much of the body would have to be eaten by a wild animal for it to have been “devoured” or “scattered”? “Devoured” and “scattered” are not words commonly used in criminal statutes and would likely invite litigation. This particular prong of the statute would be more appropriately handled within a regulatory/administrative scheme.

Next, “necrophilia” allegations appear to be extremely uncommon, even more uncommon than non-sexual abuses of a corpse. True, the few criminal courts in NM who have been faced with such allegations have struggled with the lack of a statute directly on point, in the context of deciding whether the current CSP statute applies only to a live person. *See, e.g.*, *State v. Martinez*, 2021-NMSC-012 (holding, as a matter of first impression, in circumstances where the perpetrator renders the victim physically helpless by killing the victim before committing criminal sexual penetration, the deceased victim is a legal “person” for the limited purpose of applying the CSP statute); *see also* Order Denying Defendant’s Motion to Dismiss Counts Four and Five of the Indictment as a Matter of Law, *State v. Lopez*, D-202-CR-2019-00374 (2d Jud. Dist. Ct. Feb. 6, 2020) (pre-*Martinez*, applying a “nexus” test from *State v. Montoya*, 2017-NMCA-033 (does a conviction for armed robbery lie when the victim dies before the taking?)). In each case, the Courts did lament that New Mexico did not have a necrophilia or abuse of a corpse statute because that might have made their legislative intent analysis somewhat easier.

To be fair, *Martinez* did not definitively cover necrophilia *not* connected with the underlying death, since it requires a fact-specific “nexus” analysis. So, presumably, under a *Martinez*

analysis, a “grave-robbing” necrophilia case [reviewer is not aware of *any* such case in recent memory] would not be criminally punishable for the sexual acts, though “disturbing a marked burial ground” and “defacing a tomb” might apply. *See* NMSA 1978, § 30-12-12 (fourth-degree felony); § 30-12-13 (misdemeanor).

In short, it would seem that the bill seeks to address a “gap” in the state’s criminal law relating to necrophilia, but this gap is so rarely (if ever) at issue, and the most common scenario has already been addressed by *Martinez*. It is questionable whether there is any efficacy in adding crimes to the books for acts that almost never happen. It is a solution in search of a problem.

The central problem with this bill, if it were to be enacted, is the punishment levels, as compared to other existing crimes. As is clear from the above Ohio statute, most other states make “abuse of a corpse,” even when sexual, a *lesser* offense than the same acts committed against a living person. *See, e.g.*, Ind. Code § 35-45-11-2 (criminalizing “mutilation,” “sexual intercourse or other sexual conduct,” and “opening a casket with the intent” to mutilate or have sex with the body inside—but as a Level 6 felony, the lowest-level felony in the state). Similarly, these laws usually collapse what the bill here describes as CSC and CSP into a single offense (like Indiana’s “sexual intercourse or other sexual conduct” provision), properly invoking the question: what purpose is served by differentiating and ranking the sexual acts committed against a dead body? With a live person, penetration is more serious because penetration further offends their personal autonomy and dignity—in other words, their lived experience of the event and their memories of it later on matter and justify making penetration a more serious offense—but the same is not true of a dead human body.

This bill, by contrast, makes CSP more serious than CSC for a dead human being. It also makes CSC and CSP with a dead human body the *same* seriousness as, in that order, many versions of CSC or CSP with a live person. *See* NMSA 1978, §§ 30-9-11, 30-9-12, 30-9-13. In fact, this bill would make CSP of a corpse the same level of seriousness as gang rape of a living person or rape using force or coercion against a living teenager; even more strangely, this bill makes CSP of a corpse *more serious* than rape of an unconscious person, rape of a teenaged student by their teacher, or statutory rape. *See* § 30-9-11(E)-(G). This structure is not commensurate with the dignity and protections afforded to the living, especially children.

Most fundamentally, punishment has been one of the preferred methods in the legal system to address damaging and unwanted behavior. However, decades of empirical work about the effects of punishment (including [incarceration](#) and [capital punishment](#)) on violent crime show there is [no conclusive evidence](#) that *stricter* punishment deters criminal conduct. The research finds that the [certainty of punishment](#) is more important than its severity, and that punishment only deters if there is a [threshold level of certainty](#) of getting caught and punished. These insights have three implications for enforcement practice and for compliance systems that use sanctions: focus more on detecting violations than on stronger sanctions, communicate about law enforcement and surveillance work, and keep in mind that relying on tougher punishment alone is destined to fail.

From this perspective, this bill might add certainty of punishment, which may be a deterrent (though, again, of a crime that almost never occurs). But the strict level of punishment makes no sense within context of other jurisdictions’ similar offenses or, more importantly, within our communities’ values, which seek first and foremost to honor and protect living men, women, and children from the personal pain and indignity resulting from nonconsensual sexual activity.

PERFORMANCE IMPLICATIONS

This bill is unlikely to lead to a meaningful increase in arrests/prosecutions.

ADMINISTRATIVE IMPLICATIONS

In the small number of cases where this bill does apply, it may lead to more extensive scientific/expert-based litigation (and therefore costs, resources, and time) about time of death in relation to the unlawful act alleged.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None known.

TECHNICAL ISSUES

Reviewer is unaware whether this legislation is germane under Art. IV, Section 5. It is not a budget bill, and it is not currently included on the governor's website in the 2024 Legislative Messages. See <https://www.governor.state.nm.us/about-the-governor/legislative-messages/>. It was not vetoed in the prior session.

It is unclear from the bill where the sponsors intend for it to be chaptered. Because the language of two of the new crimes tracks the language used in other crimes in Chapter 30, Article 9, it should almost certainly go there.

If enacted, it would be desirable to add language that excludes appropriate processes used to prepare a body for burial, such as autopsy, embalming, burial without a casket, storing/scattering ashes, and culturally-specific rites. The word "unlawful" in the statute does a lot of work, but some of these post-death procedures are not explicitly allowed by NM law, therefore making it unclear whether they are "unlawful." This would also prospectively protect any alternative burial rites that might be approved by the state in the future. Cf. NMSA 1978, § 30-9-11(B) ("Criminal sexual penetration does not include medically indicated procedures").

OTHER SUBSTANTIVE ISSUES

Although not overtly indicated by the bill, there is cause to believe that the proposed crime could be used to prosecute recently pregnant people who do not seek medical care or follow a particular protocol for disposing of the remains from a miscarriage, as occurred in Ohio last month. See <https://www.cnn.com/2023/12/19/us/brittany-watts-miscarriage-criminal-charge/index.html>.

ALTERNATIVES

Keep the status quo, as this is such a rare occurrence and is largely covered by other legal means. Alternatively, lower the offense levels to be commensurate with the difference between the values offended by harm to a live person vs. a dead one. It would bring the bill more in line with other jurisdictions and community values to make desecration a misdemeanor, and sexual contact a fourth-degree felony.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS