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An Examination of Wyoming's Indecent Liberties Statute and Proposals for Reform

INTRODUCTION

An eighteen-year-old and his sixteen-year-old girlfriend begin to regularly engage in consensual sexual intercourse. Then after several months, just as with many high school romances, the relationship ends somewhat bitterly. In dealing with the emotion of the breakup, the sixteen-year-old girl confides in her mother that she had been sexually active with her boyfriend. The girl's mother then takes the girl to the police and wants the boyfriend charged criminally. In 1985, Justice Cardine, dissenting in *McArtor v. State*, referred to a similar scenario involving "consensual sexual intercourse between a boy eighteen years of age and a girl one day shy of being eighteen years of age."¹ Justice Cardine pointed out the inconsistencies between Wyoming's indecent liberties statute and other Wyoming statutes involving sexual assault.²

Several Wyoming statutes potentially apply where sexual crimes are committed against children. These statutes are contained in Title 14 and Title 6 of the Wyoming statutes. Title 14 is "Children" while Title 6 is "Sexual Assault."³ Wyoming's sexual assault statutes currently contain three degrees of sexual assault and a sexual battery statute.⁴ Wyo-

1. *McArtor v. State*, 699 P.2d 288, 296-97 (Wyo. 1985) (Cardine, J., dissenting).

2. *Id.* at 296-99.

3. Compare WYO. STAT. ANN. §§ 14-3-104 to 105 (LexisNexis 2001) with WYO. STAT. ANN. §§ 6-2-301 to 313 (LexisNexis 2001).

4. For purposes of this analysis WYO. STAT. ANN. § 6-2-302 (LexisNexis 2001) (sexual assault in the first degree) will often be referred to as "first degree sexual assault," WYO. STAT. ANN. § 6-2-303 (LexisNexis 2001) (sexual assault in the second degree) will often be referred to as "second degree sexual assault," WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001) (sexual assault in the third degree) will often be referred to as "third degree sexual assault," and WYO. STAT. ANN. § 6-2-305 (Michie 1996) (repealed 1997) (sexual assault in the fourth degree) will often be referred to as "fourth degree sexual assault."

Wyoming's first degree sexual assault statute provides:

(a) Any actor who inflicts sexual intrusion on a victim commits a sexual assault in the first degree if:

(i) The actor causes submission of the victim through the actual application, reasonably calculated to cause submission of the victim, of physical force or forcible confinement;

(ii) The actor causes submission of the victim by threat of death, serious bodily injury, extreme physical pain or kidnapping to be inflicted on anyone and the victim reasonably believes that the actor has the present ability to execute these threats;

(iii) The victim is physically helpless, and the actor knows or reasonably should know that the victim is physically helpless and that the victim has not consented; or

(iv) The actor knows or reasonably should know that the victim through a mental illness, mental deficiency or developmental disability is incapable of appraising the nature of the victim's conduct.

WYO. STAT. ANN. § 6-2-302(a) (LexisNexis 2001).

Wyoming's second degree sexual assault statute provides:

(a) Any actor who inflicts sexual intrusion on a victim commits sexual assault in the second degree if, under circumstances not constituting sexual assault in the first degree:

(i) The actor causes submission of the victim by threatening to retaliate in the future against the victim or the victim's spouse, parents, brothers, sisters or children, and the victim reasonably believes the actor will execute this threat. "To retaliate" includes the kidnapping, death, serious bodily injury or extreme physical pain;

(ii) The actor causes submission of the victim by any means that would prevent resistance by a victim of ordinary resolution;

(iii) The actor administers, or knows that someone else administered to the victim, without the prior knowledge or consent of the victim, any substance which substantially impairs the victim's power to appraise or control his conduct;

(iv) The actor knows or should reasonably know that the victim submits erroneously believing the actor to be the victim's spouse;

(v) At the time of the commission of the act the victim is less than twelve (12) years of age and the actor is at least four (4) years older than the victim;

(vi) The actor is in a position of authority over the victim and uses this position of authority to cause the victim to submit; or

(vii) The actor inflicts sexual intrusion in treatment or examination of a victim for or in a manner substantially inconsistent with reasonable medical practices.

(b) A person is guilty of sexual assault in the second degree if he subjects another to sexual contact and causes serious bodily injury to the victim under any of the circumstances in W.S. 6-2-302 (a)(i) through (iv) [first degree sexual assault] or paragraphs (a)(i) through (vi) of this section.

WYO. STAT. ANN. § 6-2-303 (LexisNexis 2001).

Wyoming's third degree sexual assault statute provides:

(a) An actor commits sexual assault in the third degree if, under circumstances not constituting sexual assault in the first or second degree:

(i) The actor is at least four (4) years older than the victim and inflicts sexual intrusion on a victim under the age of sixteen (16) years; or

(ii) The actor is an adult and subjects a victim under the age of fourteen (14) years to sexual contact without inflicting sexual intrusion on the victim and without causing serious bodily injury to the victim;

ming's immoral or indecent acts statute, section 14-3-105, deals with immoral or indecent acts against children and is commonly referred to as Wyoming's indecent liberties statute. Specifically, 14-3-105 states,

[e]xcept under circumstances constituting sexual assault in the first, second or third degree as defined by W.S. 6-2-302 [first degree sexual assault] through 6-2-304 [third degree sexual assault], any person knowingly taking immodest, immoral or indecent liberties with any child or knowingly causing or encouraging any child to cause or encourage another child to commit with him any immoral or indecent act is guilty of a felony.⁵

These statutes have been revised over the years. Yet, the sexual assault statutes in Title 6 and the indecent liberties statute in Title 14 overlap and are inconsistent with one another.

Wyoming's indecent liberties statute is inconsistent with and

(iii) The actor subjects a victim to sexual contact under any of the circumstances of W.S. 6-2-302(a)(i) through (iv) [first degree sexual assault] or 6-2-303(a)(i) through (vi) [second degree sexual assault] without inflicting sexual intrusion on the victim and without causing serious bodily injury to the victim.

WYO. STAT. ANN. § 6-2-304(a) (LexisNexis 2001).

Wyoming's sexual battery statute, a misdemeanor, provides:

(a) Except under circumstances constituting a violation of W.S. 6-2-302 [first degree sexual assault] through 6-2-304 [third degree sexual assault], 6-2-502 [aggravated assault and battery] or 14-3-105 [indecent liberties], an actor who unlawfully subjects another person to any sexual contact is guilty of sexual battery.

WYO. STAT. ANN. § 6-2-313(a) (LexisNexis 2001). *See also* the definitions section of Wyoming's sexual assault statutes that provides in part:

(vii) "Sexual intrusion" means:

(A) Any intrusion, however slight, by any object or any part of a person's body, except the mouth, tongue or penis into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification or abuse; or

(B) Sexual intercourse, cunnilingus, fellatio, analingus or anal intercourse with or without emission.

WYO. STAT. ANN. § 6-2-301(a)(vii) (LexisNexis 2001).

5. WYO. STAT. ANN. § 14-3-105(a) (LexisNexis 2001). Wyoming's indecent liberties statute further provides that, "[e]xcept as provided by subsection (b) of this section [which provides for enhanced penalties under certain circumstances], a person convicted under this section shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) or imprisoned in the penitentiary not more than ten (10) years, or both." *Id.*

overlaps Wyoming's sexual assault statutes for several reasons. Third degree sexual assault establishes an age of consent of sixteen and requires that the defendant be at least four years older than the victim. However, the indecent liberties statute contains neither of these requirements. Furthermore, Wyoming's indecent liberties statute does not define what acts constitute immoral, immodest or indecent behavior. Because of the statute's general language, the court is plagued with endless interpretive challenges. Despite these challenges, the Wyoming Supreme Court has repeatedly upheld the statute as constitutional.⁶ Nonetheless, challenges to Wyoming's indecent liberties statute continue.

In *Pierson v. State*, the Wyoming Supreme Court delivered an important decision that raises the question of what constitutes valid consent and whether particular behavior is indecent in light of that consent.⁷ Pierson was a thirty-six-year-old man who was having consensual sexual relations with a sixteen-year-old girl.⁸ Chief Justice Taylor noted that consent "must also be considered in light of the facts relevant to the victim's ability, *in fact*, to give an informed consent and the defendant's actions to secure the consent of the minor."⁹

Although the *Pierson* decision did not specifically address scenarios like the one described by Justice Cardine in *McArtor*, the court did establish beyond any doubt that sexual activity involving a sixteen-year-old or seventeen-year-old does not constitute a per se violation of Wyoming's indecent liberties statute.¹⁰ Thus, without some further codification of what constitutes valid consent and what constitutes an indecent liberty, the meaning of these terms is still nebulous.

Because both Title 6 and the indecent liberties statute can potentially apply to sexual crimes against children and because of the vague language found in the indecent liberties statute, the Wyoming Legislature needs to modify the indecent liberties statute in an effort to comprehensively address illegal sexual behavior involving children and at the same time rectify the statutes' inconsistencies and overlapping effects. To this end, the Legislature should repeal, move, or otherwise incorporate the indecent liberties statute under Wyoming's existing sexual assault framework found in Title 6.¹¹

6. See *infra* notes 23-41 and accompanying text.

7. *Pierson v. State*, 956 P.2d 1119 (Wyo. 1998).

8. *Id.*

9. *Id.* at 1125-26.

10. *Id.* at 1125.

11. Chief Justice Larry Lehman of the Wyoming Supreme Court has emphasized the need for reform of Wyoming's indecent liberties law. In *Misenheimer v. State*, 27

This comment will discuss the history of Wyoming's indecent liberties statute and Wyoming's sexual assault statutes.¹² Next, the comment will analyze Wyoming's indecent liberties statute.¹³ Finally, the comment will propose changes to the indecent liberties statute, including a recommendation to integrate unlawful sexual behavior involving children into Wyoming's sexual assault framework.

BACKGROUND

In 1890 Wyoming enacted a rape statute that stated, "whoever unlawfully has carnal knowledge of a woman forcibly and against her will, or of a woman or female child under the age of eighteen years, either with or without her consent, is guilty of rape. . . ."¹⁴ In 1957 Wyoming enacted the Child Protection Act that criminalized additional acts of a sexual nature with children.¹⁵ As part of the Child Protection Act, Wyoming adopted the indecent liberties statute.¹⁶ Then in 1977, Wyoming's former rape laws were repealed and replaced with Wyoming's sexual assault statutes.¹⁷ Although Wyoming's sexual assault statutes have been amended several times, those sexual assault statutes still exist today and include sexual assaults against children under sixteen.¹⁸ Even with the development of Wyoming's current sexual assault statutes, the Wyoming Legislature did not repeal or substantially amend section 14-3-105, indecent liberties. The remainder of this section will discuss the history of Wyoming's indecent liberties statute and sexual assault statutes since 1957.

P.3d 273, 282 (Wyo. 2001), Chief Justice Lehman in a specially concurring opinion stated:

Imagine this scenario. A boy and a girl, both high school seniors just short of their eighteenth birthdays, engage in consensual sex. After today's opinion, *both* could potentially be found guilty of indecent liberties, a felony conviction that includes drastic collateral consequences in addition to imprisonment for up to ten years. I do not believe this is a desirable result.

Id.

Chief Justice Lehman then respectfully suggested to the legislature that it re-examine the statute and its potential to be applied in ways that are absurd. *Id.*

12. WYO. STAT. ANN. §§ 6-2-301 to 313, 14-3-105 (LexisNexis 2001).

13. See WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001).

14. 1890-91 Wyo. Sess. Laws ch. 6, § 1.

15. WYO. STAT. ANN. § 14-28 (1957) (current version at WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001)).

16. *Id.*

17. WYO. STAT. ANN. §§ 6-4-301 to 6-4-306 (1977) (current version at WYO. STAT. ANN. §§ 6-2-301 to 6-2-313 (LexisNexis 2001)).

18. See *supra* note 4 and accompanying text.

History of Wyoming's Indecent Liberties Statute

In 1957, the Wyoming Legislature enacted the Child Protection Act that contained a provision making, immodest, immoral or indecent liberties with a child a felony.¹⁹ That statute has commonly been referred to as the "indecent liberties" statute. The provision contained language identifying the actor as "any person, including but not limited to parent, guardian or custodian." The 1977 statute contained the same language.²⁰ However, in 1978 the identification of the actor was shortened to "any person" and the statute was renumbered to 14-3-105.²¹

"Immodest, immoral, and indecent acts" have never been expressly defined in any version of Wyoming's indecent liberties statute. The statute's general language has resulted in several constitutional attacks. Despite numerous attacks on the indecent liberties statute, the Wyoming Supreme Court has repeatedly held that the statute is not unconstitutionally vague.²² For example, in *Sorenson v. State*, decided in 1979, the adult defendant rubbed the breasts of a twelve-year-old girl.²³ Declining to rule the statute unconstitutionally vague, the Wyoming Supreme Court held, "a person of ordinary intelligence can weigh his contemplated conduct against a prohibition of taking immodest, immoral or indecent liberties or assault against a child and know whether or not such contemplated conduct is proscribed by it."²⁴

19. Theodore E. Lauer, *The Wyoming Criminal Code Revisited: Reflections After Fifteen Years*, 33 LAND & WATER L. REV. 523, 560 (1998); see also WYO. STAT. ANN. § 14-28 (1957) (current version at WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001)). The 1957 version of Wyoming's immoral or indecent acts statute stated:

It shall be unlawful for any person, including but not limited to parent, guardian or custodian knowingly to take immodest, immoral or indecent liberties with any such child or knowingly to cause or encourage any such child to cause or encourage another child to commit with him or her any immoral or indecent act.

Id.

The offense was classified as a felony and the offender was subject to a fine of, "not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1000.00) or imprisonment in the penitentiary not to exceed ten (10) years, or by both such fine and imprisonment" *Id.*

20. Compare WYO. STAT. ANN. § 14-28 (1957) (current version at WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001)) with WYO. STAT. ANN. § 14-2-112 (1977) (current version at WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001)).

21. WYO. STAT. ANN. § 14-3-105 (Michie 1978) (current version at WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001)).

22. Lauer, *supra* note 19, at 560.

23. *Sorenson v. State*, 604 P.2d 1031 (Wyo. 1979).

24. *Id.* at 1035; see also *Griego v. State*, 761 P.2d 973, 975 (Wyo. 1988) (declining to overrule their holding in *Sorenson*).

Several later cases have declined to overrule the holding in *Sorenson*. In 1988, in *Britt v. State*, the Wyoming Supreme Court upheld *Sorenson*.²⁵ *Britt* involved a male defendant who touched the crotch of two teenage boys.²⁶ The court reasoned, "a person of ordinary intelligence would know that the rubbing and grabbing of the penises of thirteen and fourteen year-old boys is clearly conduct which is forbidden as 'immodest, immoral or indecent liberties.'"²⁷

In 1993, in *Ochoa v. State*, the Wyoming Supreme Court again upheld *Sorenson*.²⁸ Ochoa was an adult male who engaged in what he claimed was consensual sexual intercourse with a girl under the age of sixteen.²⁹ The appellant in *Ochoa* argued that consensual sexual intercourse is a fundamental right, so the statute should not apply to his situation.³⁰ The court refused to consider Ochoa's contention because the sexual intercourse did not involve two consenting adults.³¹ The court reasoned, "[w]e have repeatedly interpreted this statute to apply where an adult engaged in sexual intercourse with a minor."³²

In 1995, the Wyoming Supreme Court again upheld the constitutionality of the statute in *Lovato v. State*.³³ Lovato was an adult male who engaged in anal intercourse with a male minor.³⁴ Lovato contended that he could not have known that having anal intercourse with a child constituted indecent liberties with a child.³⁵ Rejecting Lovato's contention, the court ruled, "[w]e do not see any difference between the cases where an adult has vaginal intercourse with a child and the cases where an adult has anal intercourse with a child."³⁶

In 2001, *Schmidt v. State* involved an adult male who masturbated in the presence of an eleven-year-old girl.³⁷ Schmidt argued the statute was unconstitutionally vague and that the statute should not apply

25. *Britt v. State*, 752 P.2d 426, 428 (Wyo. 1988).

26. *Id.* at 427.

27. *Id.* at 428.

28. *Ochoa v. State*, 848 P.2d 1359 (Wyo. 1993).

29. *Id.*

30. *Id.* at 1363.

31. *Id.*

32. *Id.*; see also *McArtor v. State*, 699 P.2d 288 (Wyo. 1985); *Auclair v. State*, 660 P.2d 1156 (Wyo. 1983); *Ketcham v. State*, 618 P.2d 1356 (Wyo. 1980).

33. *Lovato v. State*, 901 P.2d 408 (Wyo. 1995).

34. *Id.*

35. *Id.* at 413.

36. *Id.*

37. *Schmidt v. State*, 29 P.3d 76 (Wyo. 2001).

where the minor's private parts were not subjected to the misconduct.³⁸ The Wyoming Supreme Court again ruled that the statute was not unconstitutionally vague and reasoned, "it is not necessary that the child's private parts be subjected to the misconduct, and some acts, which may not be indecent in themselves, may be made so by words and circumstances."³⁹

In a subsequent 2001 case, *Misenheimer v. State*, the Wyoming Supreme Court held that the indecent liberties statute was not unconstitutionally vague when the offender and victim are both minors.⁴⁰ The court reasoned, "[t]he policy behind §14-3-105 is to protect children from exploitation; we cannot imagine that the legislature intended to withdraw the protection of the law from the victim in order to protect the offender."⁴¹

As illustrated, Wyoming's indecent liberties statute has been repeatedly challenged as void for vagueness. However, the court has consistently held that the statute provides sufficient notice to a person of ordinary intelligence that his contemplated conduct is prohibited by statute.⁴² Although the constitutionality of Wyoming's immoral or indecent acts statute is well settled in the context of void-for-vagueness challenges, the statute has been subject to other controversies.

For example, victim consent has been raised as an issue pertaining to the culpability of an offender who has been charged with immoral or indecent acts. In *Pierson v. State*, the Wyoming Supreme Court addressed the issue of consent in the context of an indecent liberties charge.⁴³ *Pierson* involved a thirty-six-year-old offender who had consensual sexual intercourse with a sixteen-year-old girl.⁴⁴ *Pierson* argued that since third degree sexual assault provides an age of consent of sixteen and the victim in this case was sixteen and consented, the conduct was not indecent.⁴⁵ *Pierson* ultimately sets the age of consent found in Wyoming's third degree sexual assault statute (sixteen) on a collision course with Wyoming's indecent liberties statute, which applies to anyone under eighteen.⁴⁶

38. *Id.*

39. *Id.* at 84.

40. *Misenheimer v. State*, 27 P.3d 273 (Wyo. 2001).

41. *Id.* at 280.

42. *See Sorenson, v. State*, 604 P.2d 1031, 1035 (Wyo. 1979).

43. *Pierson v. State*, 956 P.2d 1119 (Wyo. 1998).

44. *Id.*

45. *Id.* at 1124.

46. Compare WYO. STAT. ANN. § 6-2-304(a)(i) (LexisNexis 2001) (third degree sexual assault) with WYO. STAT. ANN. § 14-3-105(c) (LexisNexis 2001) (indecent liber-

In *Pierson*, the Wyoming Supreme Court held that when a minor victim is at least sixteen years old and consents to sexual contact, the consent is not necessarily "informed consent."⁴⁷ Even though a person of sixteen is deemed to have the capacity to consent to sexual contact or intercourse under Wyoming's third degree sexual assault statute, consent under these circumstances may not preclude an indecent liberties charge.⁴⁸ The court previously held that the term "indecent liberties" relies on society's common sense.⁴⁹ Furthermore the court has held, "'consent' must also be considered in light of the facts relevant to the victim's ability, *in fact*, to give an informed consent and the defendant's actions to secure the consent of the minor."⁵⁰ The court noted some of the factors relevant to the victim's ability to consent include, "the victim's relative maturity; experience; whether the minor is emancipated; the extent of parental involvement in the minor's decisions; and evidence of the defendant's manipulation or coercion of the minor."⁵¹ However, the court emphasized that the holding, "in no way vitiates our previous determinations that the consent of the minor is not a complete defense to the charge of taking indecent liberties."⁵²

In the wake of the *Pierson* decision, a bill was introduced in the Wyoming House of Representatives that proposed to change the age of consent found in Wyoming's third degree sexual assault statute from sixteen to eighteen years of age.⁵³ The bill also proposed a change to the penalty portion of the indecent liberties statute.⁵⁴ Under the proposed House bill, the penalty for indecent liberties would have been enhanced if the actor were four years older than the victim, regardless of the minor victim's age.⁵⁵ However, the bill did not pass.

ties).

47. *Pierson v. State*, 956 P.2d 1119, 1125-26 (Wyo. 1998).

48. *See id.*; WYO. STAT. ANN. § 6-2-304(a)(i) (LexisNexis 2001) (third degree sexual assault).

49. *Sorenson v. State*, 604 P.2d 1031, 1034 (Wyo. 1979).

50. *Pierson*, 604 P.2d at 1125-26.

51. *Id.* at 1126.

52. *Id.*

53. H.R. 0102, 56th Leg., Gen. Sess. (Wyo. 2001); *see* WYO. STAT. ANN. § 6-4-304(a)(i) (LexisNexis 2001).

54. H.R. 0102, 56th Leg., Gen. Sess. (Wyo. 2001); *see* WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001); WYO. STAT. ANN. § 6-2-301 (LexisNexis 2001). In 1996 the legislature amended the indecent liberties statute to provide enhanced penalties of life without parole if the victim was under sixteen, the actor was more than four years older than the victim, and the actor had two or more previous convictions for crimes involving sexual assault or indecent liberties. WYO. STAT. ANN. § 14-3-105 (Michie 1996) (current version at WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001)).

55. H.R. 0102, 56th Leg., Gen. Sess. (Wyo. 2001); *See* WYO. STAT. ANN. § 14-3-105(b) (LexisNexis 2001). Wyoming's current indecent liberties law provides enhanced

History of Wyoming's Sexual Assault Laws

In 1957 Wyoming's rape statute included both forcible rape and sex with children. It was nearly identical to the rape statute that existed in 1890. Then in 1977, Wyoming's former rape laws, including sex with children, were repealed and replaced with Wyoming's current sexual assault statutes. The current statutes include both felony and misdemeanor provisions. These "modern" sexual assault statutes proscribe behavior typically thought of as rape or other crimes involving sexual intrusion. The sexual assault statutes also apply to some behavior involving sexual contact. Some of the crimes involving either sexual intrusion or sexual contact also pertain to sex crimes against children. This section will discuss Wyoming's sexual assault provisions involving both sexual intrusion and sexual contact, and compare them with Wyoming's indecent liberties statute.

1. Sexual Assault Provisions Involving Sexual Intrusion

In 1957, Wyoming's rape statute existed with almost no change from the original 1890 version.⁵⁶ However, in 1957 Wyoming adopted the Child Protection Act that criminalized additional acts of a sexual nature with children. In 1977, Wyoming adopted a "modern" sexual assault law, which encompassed various sexual acts in addition to "carnal knowledge."

penalties under certain circumstances:

(b) An actor convicted under subsection (a) of this section shall be punished by life imprisonment without parole if:

(i) The circumstances of the crime involve a victim who was under the age of sixteen (16) at the time of the offense and an actor who was at least four (4) years older than the victim; and

(ii) The actor has two (2) or more previous convictions for any of the following designated offenses, which convictions resulted from charges separately brought and which arose out of separate occurrences in this state or elsewhere:

(A) A conviction under W.S. 6-2-302 (first degree sexual assault) through 6-2-304 (third degree sexual assault) or a criminal statute containing the same or similar elements as a crime defined by W.S. 6-2-302 through 6-2-304;

(B) repealed by Laws 1997, ch. 135, § 2.

(C) A conviction under W.S. 14-3-105(a), or a criminal statute containing the same or similar elements as the crime defined by W.S. 14-3-105(a), if the circumstances of the crime involved a victim who was under the age of sixteen (16) at the time of the offense and an actor who was at least four (4) years older than the victim.

Id.

56. WYO. STAT. ANN. § 6-63 (1957) (repealed 1977).

Wyoming's current sexual assault statutes apply in a wide variety of contexts, including using a position of authority over a person, administering substances that makes a victim unable to consent, and forcible rape. They include both sexual intrusion and sexual contact. They also include sexual assaults on children under sixteen by persons at least four years older than the victim.

Currently Wyoming has three degrees of felony sexual assault.⁵⁷ The definitions of sexual contact and sexual intrusion are particularly important in distinguishing between the various degrees of sexual assault.⁵⁸ "Sexual contact" means touching, with the intention of sexual arousal, gratification or abuse, of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or of the clothing covering the immediate area of the victim's or actor's intimate parts."⁵⁹ "Sexual intrusion" is defined as "any intrusion, however slight, by any object or any part of a person's body, except the mouth, tongue or penis, into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification or abuse."⁶⁰ The mouth, tongue or penis are excluded under the first part of the definition because the second part of the definition includes use of the mouth, tongue or penis using terms that are more succinct. Thus, sexual intrusion also includes "[s]exual intercourse, cunnilingus, fellatio, analingus or anal intercourse with or without emission."⁶¹

First degree sexual assault has a somewhat narrow application. Generally, circumstances constituting a violation of Wyoming's first degree sexual assault statute are use of force, threat of force, or inflicting sexual intrusion on a victim who is helpless or mentally incapable of refusing consent.⁶²

Wyoming's second degree sexual assault statute has a much broader application. Second degree sexual assault applies to circumstances where an actor inflicts "sexual intrusion" by using threats of future retaliation, by administering a substance that impairs the victim, by causing submission because the actor is in a position of authority over the victim, or by inflicting sexual intrusion on a victim who is less than twelve years old and the actor is at least four years older than the vic-

57. See *supra* note 4.

58. WYO. STAT. ANN. § 6-2-301 (LexisNexis 2001).

59. WYO. STAT. ANN. § 6-2-301(a)(vi) (LexisNexis 2001).

60. WYO. STAT. ANN. § 6-2-301(a)(vii)(A) (LexisNexis 2001).

61. WYO. STAT. ANN. § 6-2-301(a)(vii)(B) (LexisNexis 2001).

62. WYO. STAT. ANN. § 6-2-302 (LexisNexis 2001).

tim.⁶³ The statute also applies when an actor subjects a person of any age to sexual contact and causes serious bodily injury under any of the circumstances of first degree sexual assault.⁶⁴

A violation of Wyoming's third degree sexual assault statute occurs under any of three scenarios. The first involves an actor who inflicts sexual intrusion and is at least four years older than a victim who is under age sixteen.⁶⁵ The second involves an actor who is an adult and subjects a victim under age fourteen to sexual contact without sexual intrusion and without inflicting bodily injury.⁶⁶ The third exists when an actor subjects a victim of any age to sexual contact under any of the circumstances of first degree sexual assault or second degree sexual assault (e.g., without valid consent), without inflicting sexual intrusion and without causing bodily injury.⁶⁷

2. Sexual Assault Provisions Involving Sexual Contact

Wyoming's misdemeanor provision under the chapter entitled "sexual assault" applies in instances of unwanted sexual touching. This statute will be referred to as Wyoming's sexual contact statute. Wyoming's sexual contact statute has been revised several times over the last quarter century. In 1977, fourth degree sexual assault occurred when an actor who was at least four years older than a victim under age sixteen inflicted sexual penetration or sexual intrusion.⁶⁸ The offense was classi-

63. A violation of Wyoming's second degree sexual assault statute also occurs when the actor causes submission of the victim by any means that would prevent resistance by a victim of ordinary resolution, when the actor knows or should reasonably know that the victim submits erroneously believing the actor to be the victim's spouse, or when the actor inflicts sexual intrusion in treatment or examination of a victim for or in a manner substantially inconsistent with reasonable medical practices. WYO. STAT. ANN. § 6-2-303 (LexisNexis 2001).

64. WYO. STAT. ANN. § 6-2-303(b) (LexisNexis 2001).

65. WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001).

66. *Id.*

67. *Id.*

68. The 1977 version of fourth degree sexual assault stated: "An actor who is at least four (4) years older than the victim and who inflicts sexual penetration or sexual intrusion on a victim under the age of sixteen (16) years is guilty of sexual assault in the fourth degree." WYO. STAT. ANN. § 6-4-305 (1977) (repealed 1997) (before its repeal the statute was renumbered to § 6-2-305 in 1983). Sexual penetration was defined in 1977 as, "sexual intercourse, cunnilingus, fellatio, analingus or anal intercourse with or without emission." WYO. STAT. ANN. § 6-4-301(a)(ix) (1977) (current version at 6-2-301(a)(vii)(B) (LexisNexis 2001).

fied as a misdemeanor.⁶⁹ Ironically, in 1977, third degree sexual assault made unwanted sexual contact with persons of any age a felony.⁷⁰

In 1982, the Legislature switched Wyoming's third degree and fourth degree sexual assault statutes. Wyoming's fourth degree sexual assault made unwanted sexual contact a misdemeanor.⁷¹ Wyoming's third degree sexual assault made sexual intrusion on a victim under the age of sixteen by an actor at least four years older than the victim a felony.⁷²

In 1984, the Legislature amended the fourth degree sexual assault statute in an attempt to resolve the duplication between sexual assault and immodest, immoral and indecent liberties.⁷³ The 1984 amendment excluded crimes constituting a violation of Wyoming's indecent liberties statute from being charged under the fourth degree sexual assault statute.⁷⁴ The amendment also added the words, "without inflicting sexual intrusion" and "without causing serious bodily injury to the victim."⁷⁵ Furthermore, the 1984 amendment added a provision within the

69. WYO. STAT. ANN. § 6-4-306(a) (1977) (current version at § 6-4-306(a) (LexisNexis 2001)).

70. WYO. STAT. ANN. § 6-4-304 (1977) (current version at WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001)); WYO. STAT. ANN. § 6-4-306(a)(iii) (1977) (current version at WYO. STAT. ANN. § 6-2-306(a)(iii) (LexisNexis 2001)).

71. WYO. STAT. ANN. § 6-2-305 (Michie 1983) (repealed 1997); *see also* the definitional section of Wyoming's sexual assault statutes which defines "sexual contact" as, "touching, with the intention of sexual arousal, gratification or abuse, of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or of the clothing covering the immediate area of the victim's or actor's intimate parts." WYO. STAT. ANN. § 6-2-301(a)(vi) (Michie 1983) (current version at WYO. STAT. ANN. § 6-2-301(a)(vi) (LexisNexis 2001)).

72. WYO. STAT. ANN. § 6-2-306(a)(iii) (Michie 1983) (current version at WYO. STAT. ANN. § 6-2-306(a)(iii) (LexisNexis 2001)).

73. Lauer, *supra* note 19, at 558.

74. The 1984 amendment added to Wyoming's fourth degree sexual assault statute added the words, "[e]xcept under circumstances constituting a violation of W.S. 14-3-105 [indecent liberties]." WYO. STAT. ANN. § 6-2-305 (Michie 1984) (repealed 1997); *see also* the 1978 version of Wyoming's indecent liberties statute which stated:

Any person knowingly taking immodest, immoral or indecent liberties with any child or knowingly causing or encouraging any child to cause or encourage another child to commit with him any immoral or indecent act is guilty of a felony, and upon conviction shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) or imprisoned in the penitentiary not more than ten (10) years, or both.

WYO. STAT. ANN. § 14-3-105 (Michie 1978) (current version at WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001)).

75. WYO. STAT. ANN. § 6-2-305 (Michie 1984) (repealed 1997).

third degree sexual assault statute, making sexual contact with a victim under the age of twelve by an adult, without inflicting sexual intrusion on the victim and without causing serious bodily injury to the victim, a felony.⁷⁶ Thus, some sexual contact previously classified as a misdemeanor reached felony status.⁷⁷

In 1996, the Legislature added a new subsection to the penalties for sexual assault.⁷⁸ The new subsection provided that if an offender was being sentenced for two or more separate acts of first or second degree sexual assault, or had only one previous conviction for first or second degree sexual assault, a fourth degree sexual assault conviction became a felony punishable by imprisonment for not more than five years.⁷⁹ The new subsection also provided for life imprisonment without parole for a conviction of fourth degree sexual assault if the offender had two or more previous convictions under either the indecent liberties statute, where the victim of the indecent liberties was under sixteen and the actor was at least four years older than the victim, or under any felony sexual assault.⁸⁰

In 1997, the Wyoming Legislature again made significant changes to Wyoming's third and fourth degree sexual assault statutes.⁸¹ The penalties for third degree sexual assault were enlarged.⁸² Fourth de-

76. WYO. STAT. ANN. § 6-2-306 (Michie 1984) (current version at WYO. STAT. ANN. § 6-2-306 (LexisNexis 2001)); WYO. STAT. ANN. § 6-2-304 (Michie 1984) (current version at WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001)).

77. In 1997, the Legislature changed the victim age in this provision from twelve to fourteen. WYO. STAT. ANN. § 6-2-304 (Michie 1997) (current version at WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001)).

78. WYO. STAT. ANN. § 6-2-306(c) (Michie 1996) (current version at § 6-2-306(c) (LexisNexis 2001)).

79. WYO. STAT. ANN. § 6-2-306(c) (Michie 1996) (current version at § 6-2-305(c) (LexisNexis 2001)).

80. WYO. STAT. ANN. § 6-2-306(d) (Michie 1996) (current version at WYO. STAT. ANN. § 6-2-306(d) (LexisNexis 2001)).

81. Lauer, *supra* note 19, at 559.

82. Before the 1997 amendment, the punishment for a single conviction of third degree sexual assault was a maximum of five (5) years imprisonment, but the penalty under the 1997 amendment was increased to a maximum of fifteen (15) years. An actor convicted of third degree sexual assault who had been previously convicted of a crime equivalent to first degree sexual assault or second degree sexual assault faced a maximum penalty of ten (10) years imprisonment, but the penalty under the 1997 amendment was enlarged to a maximum of twenty (20) years. However, under both versions of the statute, a person convicted of a second third degree sexual assault offense faces no enhanced penalty, but upon a third conviction of third degree sexual assault faces life imprisonment without parole. Compare WYO. STAT. ANN. § 6-2-306 (Michie 1996) with WYO. STAT. ANN. § 6-2-306 (Michie 1997) (current version at WYO. STAT. ANN. § 6-2-306 (LexisNexis 2001)).

gree sexual assault was repealed.⁸³ The repeal of fourth degree sexual assault left Wyoming with no statute that provided misdemeanor penalties for nonconsensual sexual contact. Instead, nonconsensual sexual contact became part of third degree sexual assault, a felony.⁸⁴

In 2001, the Legislature passed a sexual battery statute.⁸⁵ Much like the repealed fourth degree sexual assault, Wyoming's 2001 sexual battery statute created a misdemeanor category of sexual contact.⁸⁶ However, in contrast to its predecessor, neither sexual battery nor the penalty section of the sexual assault statutes contains any enhanced penalty provision for repeated violations of Wyoming's sexual battery statute.⁸⁷

ANALYSIS

Two complaints commonly surface regarding Wyoming's indecent liberties statute.⁸⁸ The first is that the language is too vague to give proper notice of the prohibited behavior.⁸⁹ The second pertains to issues of age. Age issues include age of the offender, age of the victim, age differentials between the two, and the age of consent when indecent liberties is compared to Wyoming's sexual assault statutes.⁹⁰

83. Before its repeal, Wyoming's fourth degree sexual assault statute stated in relevant part, "any actor who subjects a victim to sexual contact under any of the circumstances of W.S. 6-2-302(a)(i) through (iv) or 6-2-303(a)(i) through (vi) without inflicting sexual intrusion on the victim and without causing serious bodily injury to the victim commits sexual assault in the fourth degree." WYO. STAT. ANN. § 6-2-305 (Michie 1988) (repealed 1997).

84. WYO. STAT. ANN. § 6-2-304 (Michie 1997) (current version at WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001)).

85. Wyoming's sexual battery statute states in relevant part, "[e]xcept under circumstances constituting a violation of W.S. 6-2-302 [first degree sexual assault] through 6-2-304 [third degree sexual assault], 6-2-502 [aggravated assault and battery] or 14-3-105 [indecent liberties], an actor who unlawfully subjects another person to any sexual contact is guilty of sexual battery." WYO. STAT. ANN. § 6-2-313(a) (LexisNexis 2001); see also Wyoming's repealed fourth degree sexual assault statute, WYO. STAT. ANN. § 6-2-305 (Michie 1988) (repealed 1997).

86. WYO. STAT. ANN. § 6-2-313(b) (LexisNexis 2001); see also WYO. STAT. ANN. § 6-2-305 (Michie 1988) (repealed 1997).

87. WYO. STAT. ANN. § 6-2-313 (LexisNexis 2001); see also WYO. STAT. ANN. § 6-2-306 (LexisNexis 2001). The penalties for sexual assault statute has no enhanced penalty provision for repeated violations of Wyoming's sexual battery law. *Id.*

88. WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001).

89. See *supra* notes 23-41 and accompanying text.

90. See *Pierson v. State*, 956 P.2d 1119 (Wyo. 1998) (involving a thirty-six-year-old defendant and a sixteen-year-old consenting victim); see also *Ketcham v. State*, 618 P.2d 1356 (Wyo. 1980) (involving an eighteen year old defendant and a fourteen year old victim).

The Wyoming Legislature needs to reform the indecent liberties statute to provide the requisite guidance as to what behaviors constitute immodest, immoral and indecent liberties. In addition, the issues concerning age and consent need to be specifically addressed to provide a more comprehensive and consistent policy regarding the impact of age and consent on the sexual assault and indecent liberties statutes. This section analyzes Wyoming's indecent liberties statute and some of the potential injustices created by it.⁹¹ This section will conclude by proposing changes to Wyoming's indecent liberties statute.

1. Vagueness

Void-for-vagueness challenges stem from contentions that the vagueness of the law violates due process under the Fifth and Fourteenth Amendments of the United States Constitution.⁹² The Wyoming Supreme Court has held that a law is void for vagueness if "it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" or "if it encourages arbitrary and erratic arrests and convictions."⁹³

The Wyoming Supreme Court has reviewed countless cases challenging the indecent liberties statute based on void-for-vagueness grounds.⁹⁴ In each challenge however, the court held that the statute pro-

91. WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001).

92. Lori L. Brand, Note, *CRIMINAL LAW- Wyoming's Indecent Liberties Statute-Victim Consent is Now a "Relevant Fact for Jury Deliberation;" Did Pierson Put a Bandage on Wyoming's Criminal Code Bullet Wound? Pierson v. State, 956 P.2d 1119 (Wyo. 1998)*, 34 LAND & WATER L. REV. 187, 196 (1999); See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

93. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); see also Brand, *supra* note 92, at 196.

94. See *Sorenson v. State*, 604 P.2d 1031 (Wyo. 1979) (involving a defendant that rubbed the breasts of a twelve-year-old girl); see also *Britt v. State*, 752 P.2d 426 (Wyo. 1988) (touching the genitals of two teenage boys); *Griego v. State*, 761 P.2d 973 (Wyo. 1988) (fondling the breasts of a fourteen year old girl); *Ochoa v. State*, 848 P.2d 1359 (Wyo. 1993) (involving a defendant that had consensual sexual intercourse with two separate minor victims in separate incidents); *McArtor v. State*, 699 P.2d 288 (Wyo. 1985) (involving a defendant who engaged in consensual sexual intercourse with a sixteen year old); *Ketcham v. State*, 618 P.2d 1356 (Wyo. 1980) (involving a defendant who was less than four years older than the fourteen year old victim with whom he engaged in sexual intercourse); *Lovato v. State*, 901 P.2d 408 (Wyo. 1995) (having anal intercourse with a minor); *Schmidt v. State*, 29 P.3d 76 (Wyo. 2001) (involving a defendant that masturbated in the presence of an eleven year old girl); *Misenheimer v. State*, 27 P.3d 273 (Wyo. 2001) (involving a seventeen year old defendant that had consensual sexual intercourse with a thirteen year old girl); *Pierson v. State*, 956 P.2d 1119 (Wyo. 1998) (involving consensual sexual intercourse between an adult and a sixteen year old girl).

vides sufficient notice to a person of ordinary intelligence that his contemplated conduct is prohibited by statute. The court has ruled, “[l]iberties’ are such as common sense of society would regard as indecent and improper.”⁹⁵

Although Wyoming’s indecent liberties statute has withstood void-for-vagueness challenges, the language of the statute itself provides very little specific guidance. This leaves the trier of fact to determine “on an ad hoc basis whether the defendant has engaged in conduct that ‘the common sense of society would regard as indecent and improper.’”⁹⁶

The language utilized in Wyoming’s indecent liberties statute can be compared with that used by other states. For example, North Carolina has an indecent liberties statute that uses broad, general language similar to that of Wyoming.⁹⁷ The North Carolina statute prohibits behavior that is “immoral, improper, or indecent,” and prohibits acts that are “lewd and lascivious.”⁹⁸ Georgia also maintains a “child molestation” statute that contains the “immoral or indecent acts” language in the text of the statute.⁹⁹ As in Wyoming, neither of these statutes specifically

95. *Sorenson v. State*, 604 P.2d 1031, 1034 (Wyo. 1979) (citing *People v. Healy*, 251 N.W. 393 (Mich. 1933)). The court in *Sorenson* also explained: “[A] person of ordinary intelligence can weigh his contemplated conduct against a prohibition of taking immodest, immoral or indecent liberties or assault against a child and know whether or not such contemplated conduct is proscribed by it.” *Sorenson*, 604 P.2d at 1035; see also *State v. Stuhr*, 96 P.2d 479, 482 (1939) (declaring that “indecent liberties” is self-defining).

96. *Brand*, *supra* note 92, at 205 (quoting *Sorenson v. State*, 604 P. 2d 1031, 1035 (Wyo. 1979)).

97. In North Carolina:

A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. GEN. STAT. § 14-202.1(a) (2001);

see also *Brand*, *supra* note 92, at 191-92; Charles A. Phipps, *Children, Adults, Sex and the criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 136 n.196 (1997).

98. N.C. GEN. STAT. § 14-202.1(a) (2001).

99. GA. CODE ANN. § 16-6-4(a) (2001). Georgia’s child molestation statute states:

A person commits the offense of child molestation when he or she does any

defines the acts included as immoral or indecent or lewd and lascivious. This leaves prosecutors and courts alike in the position to determine ad hoc what behavior falls within the parameters of the statute. However, unlike Wyoming, both the North Carolina and Georgia statutes have an additional requirement of specific intent to arouse or gratify sexual desire.¹⁰⁰

This leaves Wyoming in a unique position. The Wyoming statute combines very broad language and no specific intent requirement. Wyoming attempted to alleviate the potential overlap and confusion between the indecent liberties statute with the sexual assault statutes when the Legislature added the language "except under circumstances constituting sexual assault in the first, second or third degree. . . ." ¹⁰¹ However, confusion and overlap between the indecent liberties statute and the sexual assault statutes still exists.

2. Age

The age component of Wyoming's indecent liberties statute is also a source of controversy.¹⁰² A critical element of "indecent liberties with a minor" is the term "minor." This statute revolves around age and exposing minors to or involving minors in sexual behavior. A variety of age issues have been raised in cases appealed to the Wyoming Supreme Court. Specifically, the court has dealt with age of the offender, age of the victim, age differentials between the two, and the age of consent when indecent liberties is compared to Wyoming's sexual assault statutes.¹⁰³

Comparatively, Wyoming's sexual assault statutes also contain components relating to age of the victim. The Wyoming Supreme Court has said that indecent liberties is not a lesser-included offense of Wyoming's sexual assault statutes.¹⁰⁴ However, the statutes seem to share at least one policy consideration. In *Sorenson v. State* the court held that the purpose of the indecent liberties statute was to protect the morals of

immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.

Id.

100. N.C. GEN. STAT. § 14-202.1(a) (2001) (for the purpose of arousing or gratifying sexual desire); GA. CODE ANN. § 16-6-4(a) (2001) (to arouse or satisfy the sexual desires of either the child or the person).

101. WYO. STAT. ANN. § 14-3-105(a) (LexisNexis 2001).

102. See *supra* note 90 and accompanying text.

103. See *supra* note 90 and accompanying text.

104. See *Derksen v. State*, 845 P.2d 1383, 1388 (Wyo. 1993).

the child.¹⁰⁵ It appears from looking at portions of Wyoming's third degree sexual assault statute, the Legislature must have had protection of children under sixteen years old in mind.¹⁰⁶ Otherwise, the Legislature would not have included in the statute that third degree sexual assault occurs if "the actor is at least four (4) years older than the victim and inflicts sexual intrusion on a victim under the age of sixteen (16) years."¹⁰⁷ One scholar notes that other states have statutes that apply to victims under eighteen years of age, but sixteen is still the most common age of consent.¹⁰⁸ Third degree sexual assault also makes a distinction for victims under age fourteen, making it a crime for an adult to subject a victim under fourteen years old to sexual contact without sexual intrusion.¹⁰⁹ This would constitute a sexual battery if the victim were an adult.¹¹⁰ A person commits second degree sexual assault if the actor subjects a victim who is less than twelve years old to sexual intrusion and the actor is at least four years older than the victim.¹¹¹

Probably the most contentious age issue is the age of the victim. Various sections of the Wyoming statutes define a child differently or use a variety of other terms related to age. For example, despite the distinction for victims under age sixteen found in the third degree sexual assault statute, the indecent liberties statute applies to acts committed against children under eighteen years old.¹¹² To achieve fairness and consistency, these statutes have to balance the age of the victim with the age of the offender, with the age differential between the two, and what the appropriate penalties should be within certain combinations of these age considerations.

To add further confusion, the term "child" is defined many different ways within the Wyoming statutes. Wyoming's adoption statute defines the term "child" as "the minor person to be adopted."¹¹³ Wyoming's child protective services statutes and Wyoming's sexual exploitation of children statute define a "child" as "any person under the age of eighteen (18)."¹¹⁴ Wyoming's statutes for termination of parental rights,

105. *Sorenson v. State*, 604 P.2d 1031, 1035 (Wyo. 1979).

106. *See* WYO. STAT. ANN. § 6-2-304(a)(i) (LexisNexis 2001).

107. WYO. STAT. ANN. § 6-2-304(a)(i) (LexisNexis 2001).

108. Phipps, *supra* note 97, at 62.

109. WYO. STAT. ANN. § 6-2-304(a)(ii) (LexisNexis 2001).

110. WYO. STAT. ANN. § 6-2-313(a) (LexisNexis 2001).

111. WYO. STAT. ANN. § 6-2-303(a)(v) (LexisNexis 2001).

112. *Compare* WYO. STAT. ANN. § 14-3-105(c) (LexisNexis 2001) *with* WYO. STAT. ANN. § 6-2-304(a)(i) (LexisNexis 2001).

113. WYO. STAT. ANN. § 1-22-101(a)(ii) (LexisNexis 2001).

114. WYO. STAT. ANN. § 14-3-202(a)(iii) (LexisNexis 2001); WYO. STAT. ANN. § 6-4-303(a)(i) (LexisNexis 2001).

the Child Protection Act, the Juvenile Justice Act, and the Children in Need of Supervision Act all define "child" as "an individual who is under the age of majority."¹¹⁵ Wyoming's Interstate Compact on Placement of Children defines "child" as "a person who, by reason of minority, is legally subject to parental, guardianship or similar control."¹¹⁶ Finally, Wyoming's child-endangering statute defines a "child" as "a person under the age of sixteen (16) years."¹¹⁷

Several other statutes imply that a child is a person under sixteen years old. For example, Wyoming's family violence statute defines "adult" as "a person who is sixteen (16) years of age or older, or legally married."¹¹⁸ Wyoming's felony murder rule states that a person who "in the perpetration of, or attempt to perpetrate, any . . . kidnapping or abuse of a child under the age of sixteen (16) years, kills any human being is guilty of murder in the first degree."¹¹⁹ An example that directly relates to this analysis is Wyoming's statute dealing with soliciting to engage in illicit sexual relations. That statute states, "anyone who solicits, procures or knowingly encourages anyone under the age of sixteen (16) years to engage in illicit sexual penetration or sexual intrusion . . . is guilty of a felony" ¹²⁰

Even within the same statute, the term child can have different meanings. In the definitions section of Wyoming's Children in Need of Supervision Act, "child" is a person who is under the age of majority, but "child in need of supervision" is a child who has not reached his seventeenth birthday.¹²¹ This section implies that once a child reaches the age of seventeen he no longer needs supervision.

Although definitional inconsistencies exist, some statutory terms related to age are clearly defined. Examples include the "age of majority" and the term "minor." Wyoming's age of majority statute states, "[u]pon becoming eighteen (18) years of age, an individual reaches the age of majority and as an adult acquires all rights and responsibilities

115. WYO. STAT. ANN. § 14-2-308(a)(iii) (LexisNexis 2001) (Termination of Parental Rights); WYO. STAT. ANN. § 14-3-402(a)(iii) (LexisNexis 2001) (Child Protection Act); WYO. STAT. ANN. § 14-6-201(a)(iii) (LexisNexis 2001) (Juvenile Justice Act); WYO. STAT. ANN. § 14-6-402(a)(iii) (LexisNexis 2001) (Children in Need of Supervision Act).

116. WYO. STAT. ANN. § 14-5-101(a) (LexisNexis 2001).

117. WYO. STAT. ANN. § 6-4-403(d) (LexisNexis 2001).

118. WYO. STAT. ANN. § 35-21-102(a)(i) (LexisNexis 2001).

119. WYO. STAT. ANN. § 6-2-101(a) (LexisNexis 2001).

120. WYO. STAT. ANN. § 14-3-104 (LexisNexis 2001). A person convicted under this statute shall be imprisoned for a term of not more than five (5) years. *Id.*

121. WYO. STAT. ANN. § 14-6-402(a) (LexisNexis 2001).

granted or imposed by statute or common law, except as otherwise provided by law.”¹²² The term “minor” is also well defined. Three separate statutes define minor as “an individual who is under the age of majority.”¹²³

A conclusion that can be drawn from these various definitions is that a sixteen or seventeen-year-old may require special protection within our laws in some circumstances and not in others. Most circumstances involving immoral or indecent acts also involve sex. However, consent involving sixteen- or seventeen-year-olds is treated differently under the sexual assault statutes than under the indecent liberties statute. Consequently, this is where Wyoming’s sexual assault statutes and indecent liberties statute are inconsistent with one another.

A comparison of Wyoming’s sexual exploitation of children statute, Wyoming’s third degree sexual assault statute, and the statute prohibiting soliciting to engage in illicit sexual relations most aptly illustrates the statutory inconsistencies pertaining to age. Wyoming’s statute prohibiting sexual exploitation of children states in part, “[a] person is guilty of sexual exploitation of a child if, for any purpose he knowingly: . . . (ii) causes, induces, entices or coerces a child to engage in, or be used for, any explicit sexual conduct.”¹²⁴ Third degree sexual assault

122. WYO. STAT. ANN. § 14-1-101(a) (LexisNexis 2001).

123. WYO. STAT. ANN. § 14-3-402(a)(xi) (LexisNexis 2001) (definitions section of the Child Protection Act); WYO. STAT. ANN. § 14-6-201(a)(xv) (LexisNexis 2001) (definitions section of the Juvenile Justice Act); WYO. STAT. ANN. § 14-6-402(a)(xiii) (LexisNexis 2001) (definitions section of the Children in Need of Supervision Act).

124. WYO. STAT. ANN. § 6-4-303(b) (LexisNexis 2001). More explicitly, Wyoming’s sexual exploitation of a child statute states in relevant part:

(b) A person is guilty of sexual exploitation of a child if, for any purpose he knowingly:

(i) Causes, induces, entices, coerces or permits a child to engage in, or be used for, the making of child pornography;

(ii) causes, induces, entices or coerces a child to engage in, or be used for, any explicit sexual conduct;

(iii) Manufactures, generates, creates, receives, distributes, reproduces, delivers or possesses with the intent to deliver, including through digital or electronic means, whether or not by computer, any child pornography;

(iv) Possesses child pornography, except that this paragraph shall not apply to:

(A) Peace officers, court personnel or district attorneys engaged in the lawful performance of their official duties;

(B) Physicians, psychologists, therapists or social workers, provided such persons are duly licensed in Wyoming and the persons possess such materials in the course of a bona fide treatment or evaluation program at the treatment or evaluation site; or

makes sexual intrusion a crime when the victim is under sixteen years of age and the actor is at least four years older than the victim.¹²⁵ Conversely, Wyoming's statute that prohibits soliciting to engage in illicit sexual relations is consistent with Wyoming's third degree sexual assault statute. Like third degree sexual assault, the solicitation statute reflects the legislative intent to make a distinction surrounding sexual behavior at age sixteen.¹²⁶ The statute states in part, "anyone who solicits, procures or knowingly encourages anyone under the age of sixteen (16) years to engage in illicit sexual penetration or sexual intrusion" is guilty of a felony.¹²⁷

Proposed Changes to Wyoming's Indecent Liberties Statute

1. Vagueness

Because of the broad and general language found in Wyoming's indecent liberties statute, courts are plagued by endless interpretive challenges.¹²⁸ To correct this problem the Wyoming Legislature could amend the current indecent liberties statute providing language that more precisely explains the proscribed conduct.¹²⁹ The Wyoming Supreme Court has acknowledged the benefits that would flow from more specific statutory language, stating, "[a]lthough legislation must of necessity often use words of a general nature and need not be unduly precise, the questions

(C) Counsel for a person charged under this section.

Id.

125. WYO. STAT. ANN. § 6-2-304(a)(i) (LexisNexis 2001). Third degree sexual assault states: "An actor commits sexual assault in the third degree if, under circumstances not constituting sexual assault in the first or second degree: (i) The actor is at least four (4) years older than the victim and inflicts sexual intrusion on a victim under the age of sixteen (16) years." *Id.*

126. The soliciting to engage in illicit sexual relations statute states:

Except under circumstance [sic] constituting sexual assault in the first, second or third degree as defined by W.S. 6-2-302 through 6-2-304, anyone who solicits, procures or knowingly encourages anyone under the age of sixteen (16) years to engage in illicit sexual penetration or sexual intrusion as defined in W.S. 6-2-301 [definitions section for sexual assault] is guilty of a felony, and upon conviction shall be imprisoned for a term not more than five (5) years.

WYO. STAT. ANN. § 14-3-104 (LexisNexis 2001).

Compare WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001) (third degree sexual assault) with WYO. STAT. ANN. § 14-3-104 (LexisNexis 2001) (soliciting to engage in illicit sexual relations).

127. WYO. STAT. ANN. § 14-3-104 (LexisNexis 2001).

128. *See supra* notes 23-41 and accompanying text.

129. *See generally* Brand, *supra* note 92, at 206 (discussing the vagueness of the statute).

of vagueness in the area in which we are here concerned could be reduced by more specificity in the language of the enactment."¹³⁰

The Wyoming Legislature could amend the current statute by creating several individual statutes that address the variety of acts that currently fit within the definition of "immoral or indecent liberties." For example, Wyoming already has a statute proscribing solicitation of minors for sexual purposes by use of electronic media (e.g., computers).¹³¹ As another example, the Legislature could create a statute that proscribes enticing a minor into a vehicle for sexual purposes.¹³² However, one potential problem with this approach is that more specific language will create a greater likelihood that behavior now proscribed by the current indecent liberties statute would be inadvertently legalized.¹³³

Another approach would be to codify the factors expressed by the Wyoming Supreme Court in *Pierson v. State*.¹³⁴ The section could begin, "factors to consider include but are not limited to." This would provide some additional guidance without restricting the application of the statute. Codification of the factors expressed in *Pierson* would allow juries to better consider the totality of the circumstances related to the

130. *Sorenson v. State*, 604 P.2d 1031, 1033 n.1 (Wyo. 1979); Brand, *supra* note 92, at 205.

131. WYO. STAT. ANN. § 6-4-303 (LexisNexis 2001). Wyoming's sexual exploitation of children statute proscribes causing, inducing, etc. a child to engage in or be used for child pornography or explicit sexual conduct such as simulated sex, masturbation, lascivious exhibition of the genitals, etc. *Id.* The statute also proscribes the creation, reproduction or transmission of child pornography. *Id.*

132. See ALA. CODE § 13A-6-69 (2001); Alabama's enticing child to enter vehicle, house, etc., for immoral purposes statute that states in relevant part:

It shall be unlawful for any person with lascivious intent to entice, allure persuade or invite, or attempt to entice, allure, persuade or invite, any child under 16 years of age to enter any vehicle, room, house, office or other place for the purpose of proposing to such child the performance of an act of sexual intercourse or an act which constitutes the offense of sodomy or for the purpose of proposing the fondling or feeling of the sexual or genital parts of such child or the breast of such child, or for the purpose of committing an aggravated assault on such child, or for the purpose of proposing that such child fondle or feel the sexual or genital parts of such person.

Id.

133. This assumption is based on the common-sense notion that as statutory language becomes more specific, it would be more difficult for legislators to anticipate all contingencies.

134. *Pierson v. State*, 956 P.2d 1119, 1125-26 (Wyo. 1998). The factors identified are "the victim's relative maturity; experience; whether the minor is emancipated; the extent of parental involvement in the minor's decisions; and evidence of the defendant's manipulation or coercion of the minor." *Id.*

defendant's conduct and thus better determine whether that conduct was immoral or indecent.¹³⁵

2. Age

Because sixteen and seventeen-year-old victims are treated differently under the sexual assault statutes than under the indecent liberties statutes, and because the age differentials required for a violation of third degree sexual assault are not found in the indecent liberties statute, potential unjust consequences exist for consensual sex acts involving sixteen or seventeen-year-olds. The various statutes criminalizing sexual conduct related to age of the victim should be reconciled.¹³⁶ Several approaches can be considered to reconcile the discrepancies in the statutes.

First, the age of consent could be changed to eighteen under Wyoming's third degree sexual assault statute. However, this has been attempted through the introduction of bills in both 1997 and 2001 without success.¹³⁷ Although this approach would resolve the age disparity between the third degree sexual assault statute and the indecent liberties statute, it would not alleviate arguably unjust felony penalties where two people very close in age engage in some type of consensual sexual activity, when at least one of the parties is slightly under eighteen. In *McArtor v. State*, Justice Cardine in dissent noted "consensual sexual intercourse between a boy eighteen years of age and a girl one day shy of being eighteen years of age is immoral, immodest, and indecent and that the boy is guilty of a felony which may result in imprisonment for ten years."¹³⁸ One author noted, "[c]onceivably, two seventeen-year-olds who engaged in heavy petting after the prom could both be charged with, and convicted for, taking 'indecent liberties with a minor.'"¹³⁹

This brings to the forefront a second approach. To alleviate the criminality of people who are close in age engaging in consensual sexual activity, drafting age differentials into the statutes becomes necessary. In considering what is the appropriate age to apply these differentials, con-

135. *Id.*

136. See WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001) (third degree sexual assault); WYO. STAT. ANN. § 6-4-303 (LexisNexis 2001) (sexual exploitation of children); WYO. STAT. ANN. § 14-3-104 (LexisNexis 2001) (soliciting to engage in illicit sexual relations); and WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001) (indecent liberties).

137. See Brand, *supra* note 92, at 208; see also H.R. 0102, 56th Leg., Gen. Sess. (Wyo. 2001).

138. *McArtor v. State*, 699 P.2d 288, 296-97 (Wyo. 1985) (Cardine, J., dissenting); see also *supra* notes 1-2 and accompanying text.

139. Brand, *supra* note 92, at 206.

sideration must also be given to the immodest, immoral or indecent nature of the activity. No child should impose immodest, immoral or indecent acts upon another child, no matter how close they may be in age. Even if the child "consented" to the act by the other child, we still might conclude that societal intervention is justified because the consenting child may not have the capacity to give informed consent.

The appropriate age differential for the Legislature to impose would probably be four years. By decriminalizing consensual sexual behavior involving a sixteen- or seventeen-year-old "victim" and an actor less than four years older, the consistency of the four-year age differential found in the second degree and third degree sexual assault statutes would be maintained.¹⁴⁰ Accordingly, the four-year differential is also what is recommended by the Model Penal Code.¹⁴¹ In addition, imposing the age differential when the victim is sixteen or seventeen maintains the integrity of the sixteen-year-old age of consent found in the sexual assault statutes while still providing some protection when the age of the perpetrator and victim are very disparate.

A third approach would be to change the age of majority. In drafting Louisiana's indecent behavior with juveniles statute, the Louisiana Legislature settled on a compromise age of seventeen for their age of majority and age of consent to sexual behavior.¹⁴² This coincides with Louisiana's age of majority.¹⁴³ If Wyoming were to take such an approach, it would close the gap between the age of majority and age of consent. The seventeen-year age of majority could also be applied to all

140. See WYO. STAT. ANN. §§ 6-2-303 to 304 (LexisNexis 2001).

141. Brand states:

The Model Penal Code commentators consider it "harsh and unreasonable" to punish a person for engaging in sexual activity with a willing partner "Whom society regards as a fit associate in a common educational or social endeavor." [Model Penal Code § 213.3 cmt.2, 386]. The drafters of the MPC chose the four year age differential to reflect the "prevailing pattern of secondary education."

Brand, *supra* note 92, at 208-09 n.186.

142. LA. REV. STAT. ANN. § 14:81(A) (West 2001). Louisiana's indecent behavior with juveniles statute states in relevant part:

Indecent behavior with juveniles is the commission of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person. Lack of knowledge of the child's age is not a defense.

Id.; see also LA. REV. STAT. ANN. § 14:80, cmt. (West 2001).

143. LA. REV. STAT. ANN. 2§ 14:80, cmt. (West 001).

the statutes that now define "child" differently, creating more uniformity for terms within the Wyoming statutes. However, two problems exist with this approach. This compromise age of majority fails to address the injustices arising when the victim and the perpetrator are close to the same age.¹⁴⁴ Furthermore, the compromise ignores the proposition that a person of age sixteen is presumed under Wyoming's current third degree sexual assault statute to have the capacity to consent to sexual activity.¹⁴⁵ Changing the age of consent to seventeen would arbitrarily presume that sixteen-year-olds would no longer have the capacity to consent.

Fourth, the Legislature could more specifically identify acts that are currently encompassed within the indecent liberties statute and reclassify them. In other words, some offenses currently within the umbrella of indecent liberties as felonies could be reclassified as misdemeanors.¹⁴⁶ For example, consensual sexual contact between a minor victim of sixteen or seventeen and a person less than two years older than the minor victim could be classified as a misdemeanor.¹⁴⁷ If this approach were combined with the age differentials, people within the four-year differential might be guilty of a misdemeanor, whereas actors falling outside the four-year age differential would be guilty of felonies.

Finally, the Legislature could simply decriminalize all sexual behaviors that currently would be considered immoral or indecent acts committed against a sixteen- or seventeen-year-old.¹⁴⁸ By restructuring Wyoming's indecent liberties statute to become "immoral or indecent acts with a person under sixteen" the consent issue is resolved.¹⁴⁹ How-

144. Louisiana addressed this problem by requiring a two-year age differential. LA. REV. STAT. ANN. § 14:81(A) (West 2001).

145. See WYO. STAT. ANN. § 6-2-304(a)(i) (LexisNexis 2001).

146. See VA. CODE ANN. § 18.2-370.1 (Michie 2001) (creating a misdemeanor category for indecent liberties by children); see also ALASKA STAT. §§ 11.41.434, 11.41.436, 11.41.438, 11.41.440 (LexisNexis 2001) (creating four degrees of sexual abuse of a minor).

147. The term "sexual contact" is not currently defined in the context of Wyoming's indecent liberties statute. However, the definition of "sexual contact" found in Wyoming's sexual assault statutes could be used which defines the term as "touching, with the intention of sexual arousal, gratification or abuse, of the victim's intimate parts by the actor, or the actor's intimate parts by the victim or of the clothing covering the immediate area of the victim's or actor's intimate parts." WYO. STAT. ANN. § 6-2-301(a)(vi) (LexisNexis 2001).

148. Several states have no provision for indecent acts on a person over sixteen; see N.C. GEN. STAT. § 14-202.1 (2001) (indecent liberties with children); see also GA. CODE ANN. § 16-6-4 (2001) (child molestation). Others have made it a misdemeanor; see ALASKA STAT. § 11.41.440 (LexisNexis 2001).

149. If the Legislature did take such a step, Wyoming's sexual-exploitation-of-children statute would also have to be modified. See WYO. STAT. ANN. § 6-4-303 (Lex-

ever, restructuring the statute in the manner described raises another issue.

Decriminalizing consensual behavior involving a sixteen or seventeen-year-old also raises the issue of morality. Parents still have legal responsibility for their sixteen- and seventeen-year-old children until they reach the age of majority. With many laws there comes a point where some behavior generally considered morally inappropriate should not be dealt with through legislation.¹⁵⁰ Decriminalizing consensual sexual activity involving sixteen or seventeen-year-olds would require that the moral implications of sexual activity involving sixteen and seventeen-year-olds be addressed through resources such as the family, schools, and churches, not through criminal sanctions.

Some states have completely decriminalized sexual activity involving a sixteen- or seventeen-year-old.¹⁵¹ The two statutes that most closely approximate Wyoming's indecent liberties statute are those found in North Carolina and Georgia.¹⁵² North Carolina's indecent liberties statute applies only to victims under age sixteen.¹⁵³ Likewise, Georgia's child molestation statute provides:

A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the

isNexis 2001). The sexual-exploitation statute can still provide protection from exploitation of sixteen and seventeen-year-olds for pornographic means, but the section that makes it a crime when a person "causes, induces, entices or coerces a child to engage in, or be used for, any explicit sexual conduct" should then be qualified by allowing consent of the sixteen or seventeen-year-old minor to be a defense to that subsection only. WYO. STAT. ANN. § 6-4-303(b)(ii) (LexisNexis 2001). Otherwise the age of consent found in third degree sexual assault is nullified.

150. These controversies typically surround many victimless crimes like gambling, prostitution, and sexual behavior among consenting adults.

151. Phipps, *supra* note 97, at 47 n.196.

152. *Id.*

153. N.C. GEN. STAT. § 14-202.1(a) (2001). North Carolina's taking indecent liberties with children statute states in part:

A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part of member of the body of any child of either sex under the age of 16 years.

Id.

presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.¹⁵⁴

Thus, neither the North Carolina statute nor the Georgia statute provides sanctions if the victim is sixteen or seventeen years old.

Taking into consideration the effects of these statutes, even states that have created misdemeanor categories for sexual activities involving children have minimized or decriminalized sexual activity involving a sixteen or seventeen-year-old. For example, Alaska's misdemeanor abuse of a minor in the fourth degree statute creates varying degrees of "sexual abuse of a minor" but requires that to violate the statute, when a victim is sixteen or seventeen, the actor must be at least three years older than the victim and in a position of authority in relation to the victim.¹⁵⁵ An actor who is not in a position of authority over the victim but is more than three years older than the sixteen or seventeen-year-old victim commits no crime under Alaska law.¹⁵⁶

Regardless of which approach, if any, is taken to reconcile the issues of age and sexual activity in the Wyoming statutes, the overarching concern is consent. The issue of consent was thrust into the mix when the Wyoming Supreme Court delivered its opinion in *Pierson v. State*.¹⁵⁷ The court held, "the jury must be allowed to consider the totality of the circumstances relating to the culpability of the defendant's conduct. This includes whether the conduct was consensual in those

154. GA. CODE ANN. § 16-6-4(a) (2001).

155. ALASKA STAT. § 11.41.440(a) (LexisNexis 2001). Alaska's misdemeanor abuse of a minor in the fourth degree statute states:

An offender commits the crime of sexual abuse of a minor in the fourth degree if

(1) being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

Id.; see also ALASKA STAT. § 11.41.338 (LexisNexis 2001) (Alaska's sexual abuse of a minor in the third degree, a felony).

156. See ALASKA STAT. § 11.41.440(a) (LexisNexis 2001); see also ALASKA STAT. § 11.41.438 (LexisNexis 2001).

157. *Pierson v. State*, 956 P.2d 1119 (Wyo. 1998) (involving a thirty-six-year-old adult who had consensual sexual intercourse with a sixteen-year-old girl).

cases where the minor was legally old enough to give an informed consent" under Wyoming's third degree sexual assault statute.¹⁵⁸

Since consent is a factor underlying Wyoming's third degree sexual assault statute, it cannot be ignored in the context of an indecent liberties charge.¹⁵⁹ The court in *Pierson* reasoned, "Looking at the statutes together, and the disparity in punishments, it logically follows that the [L]egislature intended criminal liability under Wyo. Stat. § 14-3-105 [indecent liberties] to entail conduct which is more culpable than the conduct which constitutes guilt under Wyo. Stat. § 6-2-304 [third degree sexual assault]."¹⁶⁰ The court then declared that when a victim is at least sixteen years old, consent becomes a factor in the defendant's culpability, stating, "[w]e therefore find no logical support for the state's contention that consensual sexual intercourse between an adult and a minor over the age of fifteen, without more, is sufficient to convict a defendant of taking indecent liberties with a minor."¹⁶¹ The court added that to hold otherwise would render Wyoming's third degree sexual assault statute not only superfluous, but misleading.¹⁶²

The "more" referred to above as applied to sixteen- or seventeen-year-old victims points to consent as a factor in determining whether the conduct in question constitutes an indecent or immoral act.¹⁶³ In *Pierson*, as in cases that preceded *Pierson*, the court pointed to the common sense of society to define the term "indecent liberties."¹⁶⁴ To refine the common sense of society definition of "indecent liberties," the court declared that when the jury considers the totality of the circumstances relating to the culpability of the defendant's conduct it must consider several factors.¹⁶⁵ The factors include whether the conduct was "consensual in those cases where the minor was legally old enough to give an informed consent" under third degree sexual assault.¹⁶⁶ The court reasoned that consent "must also be considered in light of the facts relevant to the victim's ability, in fact, to give an informed consent and the defendant's actions

158. *Id.* at 1125; see also WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001) (third degree sexual assault).

159. See WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001) (third degree sexual assault); WYO. STAT. ANN. § 14-3-105 (LexisNexis 2001) (indecent liberties).

160. *Pierson*, 956 P.2d at 1125.

161. *Id.*

162. *Id.*

163. Brand, *supra* note 92, at 202-03.

164. *Pierson*, 956 P.2d at 1125-26 (quoting *Sorenson v. State*, 604 P.2d 1031, 1034 (Wyo. 1979)).

165. *Id.*

166. *Id.*; see also WYO. STAT. ANN. § 6-2-304 (LexisNexis 2001) (third degree sexual assault).

to secure the consent of the minor.”¹⁶⁷ The court instructed that, “such circumstances include, but are not limited to, the victim’s relative maturity; experience; whether the minor is emancipated; the extent of parental involvement in the minor’s decisions; and evidence of the defendant’s manipulation or coercion of the minor.”¹⁶⁸

In light of the *Pierson* decision, a defendant charged with indecent liberties must establish three elements to prove consent of the victim.¹⁶⁹ First, the defendant must demonstrate that the minor had capacity to give consent to the sexual contact. Second, the defendant must show that the minor did consent. Third, the defendant must prove “that the conduct between the defendant and the minor was not ‘indecent’ or ‘immoral’ as defined by their society’s standard.”¹⁷⁰ The most certain way to tackle the longstanding inconsistency between Wyoming’s third degree sexual assault statute and Wyoming’s indecent liberties statute is for the Legislature to codify the three elements described in *Pierson* within Wyoming’s indecent liberties statute.¹⁷¹

3. Should Wyoming’s Indecent Liberties Statute Be Moved to Title VI with Wyoming’s Sexual Assault Statutes?

When considering reforming Wyoming’s indecent liberties statute, the Legislature might consider the merits of moving the indecent liberties statute, or repealing it and incorporating unlawful sexual behavior with children into Title 6 with the other sex offenses.

Other states have incorporated sexual acts with children into their sexual assault statutes. Moving the indecent liberties statute into Title 6 would create a cohesive body of law involving proscribed sexual behavior or sexual assault.¹⁷² Moving sex acts with children to Title 6

167. *Pierson*, 956 P.2d at 1125-26.

168. *Id.* at 1126.

169. Brand, *supra* note 92, at 206.

170. *Id.* at 206-207.

171. *Id.* at 207.

172. Wyoming’s solicitation statute, which precedes the indecent liberties statute, also relates to the protection of children. WYO. STAT. ANN. § 14-3-104 (LexisNexis 2001). Wyoming’s soliciting to engage in illicit sexual relations statute states:

Except under circumstances constituting sexual assault in the first, second or third degree as defined by W.S. 6-2-302 through 6-2-304, anyone who solicits, procures or knowingly encourages anyone under the age of sixteen (16) years to engage in illicit sexual penetration or sexual intrusion as defined in W.S. 6-2-301 [definitions section for sexual assault] is guilty of a felony, and upon conviction shall be imprisoned for a term not more than five (5) years.

could be coupled with more specific language, thereby reducing vagueness challenges. For example, Montana previously had a “lewd and lascivious acts upon children” statute which used the general terminology “lewd and lascivious” in much the same way Wyoming uses “immoral or indecent liberties” language.¹⁷³ However, that statute has been repealed and the behaviors previously labeled “lewd or lascivious” are now encompassed in Montana’s sexual abuse of children statute and sexual assault statutes.¹⁷⁴ Montana’s sexual abuse of children statute contains more specific language identifying the proscribed behaviors than its predecessor.¹⁷⁵

Colorado also currently incorporates sexual acts with children into its unlawful sexual behavior statutes.¹⁷⁶ For example, Colorado’s sexual assault statute contains a paragraph making it a crime to commit sexual penetration or sexual intrusion on a victim who is under fifteen years of age if the actor is at least four years older than the victim.¹⁷⁷ The statute also contains a paragraph that makes it a crime to commit the same act on a person who is at least fifteen but less than seventeen if the actor is at least 10 years older than the victim.¹⁷⁸ In addition, Colorado has an unlawful sexual contact statute that includes a paragraph that states, “[a]ny person who knowingly, with or without sexual contact, induces or coerces a child . . . to expose intimate parts or to engage in any sexual contact, intrusion, or penetration with another person, for the purpose of the actor’s own sexual gratification, commits unlawful sexual contact.”¹⁷⁹ Furthermore, Colorado has a statute prohibiting sexual assault on a child that states, “any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.”¹⁸⁰ Finally, Colorado has a statute entitled, “sexual assault on a child by one in a position of trust.”¹⁸¹ That

Id.

Both the indecent liberties statute and the soliciting to engage in illicit sexual relations statute are found under the title “children” and the chapter labeled “protection.” Therefore, Wyoming’s solicitation statute should also be incorporated into Title 6.

173. MONT. REV. CODE ANN. § 94-4106 (Smith 1969) (repealed 1973).

174. MONT. CODE ANN. § 45-5-625 (2001); MONT. CODE ANN. §§ 45-5-501 to 511 (2001).

175. MONT. CODE ANN. § 45-5-625 (2001).

176. COLO. REV. STAT. §§ 18-3-401 to 405.3 (2001).

177. COLO. REV. STAT. § 18-3-402(d) (2001).

178. COLO. REV. STAT. § 18-3-402(e) (2001).

179. COLO. REV. STAT. § 18-3-404(1.5) (2001). For the purposes of this subsection (1.5), the term “child” means any person under the age of eighteen years. *Id.*

180. COLO. REV. STAT. § 18-3-405 (2001).

181. COLO. REV. STAT. § 18-3-405.3 (2001).

statute applies where the victim is less than eighteen years of age and carries a more severe penalty if the victim is less than fifteen years of age.¹⁸² These Colorado statutes provide more specificity about what constitutes the proscribed behavior than Wyoming's indecent liberties statute. Like Montana, the Colorado statutes incorporate these statutes into a comprehensive body of laws with other statutes encompassing unlawful sexual behavior.

CONCLUSION

The longstanding controversy and high volume of indecent liberties cases coming before the Wyoming Supreme Court on appeal signify that the time is ripe for reform of the indecent liberties statute. Wyoming is in a unique position. The Wyoming indecent liberties statute combines very broad language, no specific intent requirement, and is not part of a cohesive body of law involving proscribed sexual behavior or sexual assault. The confusion and overlap would be best addressed if the Legislature would repeal Wyoming's indecent liberties statute and change the sexual assault statutes to proscribe specific acts against children as other states have done.¹⁸³ Wyoming should consider modeling a reformed framework of sexual assault statutes after Colorado's unlawful sexual behavior statutes.¹⁸⁴ Colorado follows the national trend to include laws proscribing sexual behavior with children under their sex crime statutes, not under child protection statutes.

Several issues must be considered in the formulation of any change to the indecent liberties statute. First, the Legislature should consider morality's place in deciding whether legislation is appropriate. Second, the Legislature should consider the proper age of consent and how to establish capacity to consent. The age of consent should be established within the statute. In addition, a four-year age differential requirement should be included when indecent liberties involve a sixteen or seventeen-year-old victim. Changing the age of majority is not appropriate because it would create other problems that have nothing to do with the indecent liberties statute. Finally, vagueness of the statutory language should be addressed.

Wyoming's indecent liberties statute should be repealed and replaced with more specific statutes designed to establish unlawful sexual

182. *Id.*

183. *See* COLO. REV. STAT. §§ 18-3-401 to 405.3 (2001); MONT. CODE ANN. § 45-5-625 (2001); ALASKA STAT. §§ 11.41.434, 11.41.436, 11.41.438, 11.41.440 (LexisNexis 2001).

184. COLO. REV. STAT. §§ 18-3-401 to 405.3 (2001).

behavior with children. The new statute or statutes should then be incorporated into Wyoming's sexual assault framework to create a cohesive, comprehensive body of law to address unlawful sexual behavior.

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