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The Wyoming Criminal Code of 1982 took effect July 1, 1983. In a two-part article, the author discusses the background and the salient features of the new code. The first part, printed here, deals with background, general provisions, and crimes against the person. The second part, to be published in the Spring issue, will deal with crimes against property, morals and family, public administration, and public peace, and with sentencing.

GOODBYE 3-CARD MONTE: THE WYOMING CRIMINAL CODE OF 1982

*Theodore E. Lauer**

Any person found dealing, playing or opening the game commonly known as "3-card monte" on any railroad or passenger train in this state shall be adjudged guilty of a misdemeanor, and when convicted shall be punished by a fine not to exceed one hundred dollars (\$100.00), and imprisonment not less than ten (10) days nor more than ninety (90) days, in the county jail.¹

I. THE LOSS OF THE FAMILIAR

Wyoming's 3-card monte statute, enacted by the Council and House of Representatives of the Territory of Wyoming, was approved December 13, 1873.² Passed, as O. W. Holmes, Jr. would write some seven years later, in

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Disclosure statement: The author must assume some of the responsibility for any shortcomings in the 1982 Wyoming Criminal Code, since he participated in interim legislative hearings in 1981 and 1982, and spoke before legislative committees in both houses of the Wyoming Legislature in the 1982 and 1983 legislative sessions, all dealing with the Criminal Code. Shortcomings may therefore be attributed in some degree either to the author's failure to perceive them when the Code was being considered, or to his inability to persuade the legislative committees to adopt a different course when shortcomings were perceived.

1. WYO. STAT. § 6-9-105 (1977). In this article, citations to the former criminal statutes will be given as (1977), while those to the new Criminal Code will be given as (Supp. 1983).
2. 1876 WYO. COMP. LAWS ch. 58, pt. II, § 2.

response to the "felt necessities of the time,"³ the statute would endure for nearly 110 years, until July 1, 1983. By the time of its demise with the taking effect of the Wyoming Criminal Code of 1982, passenger train service had vanished in Wyoming, and few living men recalled what 3-card monte had been about.⁴ It is not known how many prosecutions ever took place under the statute, but it is abundantly clear that the Wyoming Supreme Court was never called upon to construe it.⁵

3-card monte was not the only victim of the new Wyoming Criminal Code. Many other statutes possessing a peculiarly "Wyoming" flavor were also repealed: failure to remove headwear at public assemblies;⁶ dueling;⁷ producing a false heir;⁸ riot and rout;⁹ hazing;¹⁰ murder by duel;¹¹ poisoning water supply;¹² unlawful use of lodge emblems and misrepresentations as to secret societies;¹³ and advertising drug or nostrum for procuring abortion or miscarriage.¹⁴ All of these and more have been swept into oblivion by the new Criminal Code.

The obsolescence of 3-card monte and other colorful criminal statutes was in part responsible for the impulse which culminated in the Wyoming Criminal Code of 1982. Other forces played a larger role. Beginning in the early years of the twentieth century, scholars such as Dean Roscoe Pound of Harvard Law School began to call urgent attention to the decay of American criminal law, and reform through modern substantive criminal legislation was seen as a partial solution.¹⁵ Much of the scholarly impetus came from a desire to incorporate social science principles into the criminal justice system.¹⁶

In 1931 the American Law Institute (A.L.I.) proposed that a model code of criminal law be drafted. Nothing was done, however, until the

3. O. W. HOLMES, *THE COMMON LAW* I (1881).

4. Inquiry in summer 1983 among learned men and judges disclosed either that no one knew what 3-card monte was, or that they were reluctant to say. Looking elsewhere for a clue, it appears that while § 189 of the Canadian Code (Tremear, 1983) even at this date forbids the playing of 3-card monte, the statutory definition is of little assistance:

(2) In this section "three-card monte" means the game commonly known as three-card monte and includes any other game that is similar to it, whether or not the game is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing.

Dictionaries provide guidance to the extent of informing that "monte" is Spanish for mountain, or scrub, or the cards remaining after a deal. While some dictionaries call 3-card monte a Mexican card game, others call it "a Mexican three-card trick." See, e.g., *CHAMBERS TWENTIETH CENTURY DICTIONARY* 852 (New ed. 1973).

5. WYO. STAT. § 6-9-105 (1977), contains no annotations of judicial decisions; SHEPARD'S WYOMING CITATOR is silent; and 3-card monte appears nowhere in *Words and Phrases*, 8 WYOMING DIGEST (1956 & Supp. 1983).

6. WYO. STAT. § 6-6-203 (1977).

7. WYO. STAT. §§ 6-6-301, 6-6-302 (1977).

8. WYO. STAT. § 6-8-402 (1977). This section, denuded of its identity, probably has been subsumed within § 6-3-407 of the new Criminal Code.

9. WYO. STAT. §§ 6-6-101, 6-6-102 (1977). What was formerly rout can now be prosecuted as conspiracy. WYO. STAT. § 6-1-303 (Supp. 1983).

10. WYO. STAT. §§ 6-4-608, 6-4-609 (1977).

11. WYO. STAT. § 6-4-105 (1977).

12. WYO. STAT. § 6-4-603 (1977).

13. WYO. STAT. §§ 6-3-121, 6-3-122 (1977).

14. WYO. STAT. § 6-5-302 (1977).

15. See, e.g., R. POUND, *CRIMINAL JUSTICE IN AMERICA* (1924), especially at 204-212.

16. See, e.g., Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453 (1928).

Rockefeller Foundation granted funds to the A.L.I. for this purpose in 1952.¹⁷ For the next ten years, work proceeded on the model code in a determined fashion, aided by a large contingent of noted lawyers, judges and academics, and in 1962 the Proposed Official Draft of the Model Penal Code was published.¹⁸

The Model Penal Code (M.P.C.) had an immediate and far-reaching effect. Prior to 1952, only one American state had substantially revised its criminal statutes in the twentieth century. Between 1952 when the American Law Institute's intense work began to stimulate individual state criminal law reform efforts, and 1981, thirty-four states revised their criminal codes. Seven others had revision under way, and in six more revision had been proposed but defeated. Only in Nevada and Rhode Island had no action taken place.¹⁹

II. THE CONCEPT OF A CRIMINAL CODE

The concept is still relatively new to the common law world that all the law relating to substantive crimes should be set forth in a comprehensive code which includes not only the elements of crimes, but also definitions, basic principles of liability such as mental state, defenses and other excusing conditions, and disposition of offenders. While we have long had collections of criminal statutes that have been called criminal codes, these "codes" have largely been jumbled heaps of disparate statutes drawn from common law crimes. Since statehood every American state has been compiling and recompiling its criminal statutes, but the resulting collections have drawn heavily upon the uncodified and sometimes unwritten common law for context and substance. The unifying thread of consistency is absent.

The Model Penal Code exemplifies the notion of a comprehensive criminal code. It is a cohesive body of consistent principles which permits solution of most problems of substantive criminal law through application of the principles which appear in the code. The terms used are defined carefully, and the substantive provisions do not contradict or duplicate one another.

The promulgation of a true criminal code represents a significant departure from the past. The process of drafting the code involves a thorough examination of the underlying principles of criminal responsibility. The adoption of a comprehensive code causes a significant shift of power from the judiciary to the legislature, since much less occasion for interpretation or for fashioning new law will be left to the courts. Judicial opposition is not uncommon.

A great deal of time and money can be expended in the preparation of a new criminal code. Sometimes the task will prove thankless and the effort

17. Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952). See also P. LOW, J. JEFFRIES, & R. BONNIE, *CRIMINAL LAW: CASES AND MATERIALS* Appendix A, A-1 to A-5 (1982).

18. P. Low, *et al.*, *supra* note 17, at A-1, A-2.

19. *Id.* at A-2 to A-4.

wasted, as where the proposed code is heavily amended by the legislature so as to destroy its internal consistency, or where the legislature rejects the code in its entirety.

It has been suggested, at least half seriously, that a state like Wyoming cannot easily afford the years of work and hundreds of thousands of dollars of expense which are required to create a new code, and that the easiest and most economical approach would be to adopt in totality the modern criminal code of another jurisdiction. After all, if nearly three dozen American states have revised their criminal codes in thoroughgoing fashion in the past twenty years, then surely it would be an easy task to find one of these codes which is suited to Wyoming's conditions. And while no code will be completely free from flaws, the chances are good that the quality of product borrowed from another state would be equal to any code which Wyoming is likely to produce.

This would not be a course without precedent in the American past. Many Western states began their histories with statutes directly copied from the laws of older and more eastern states. But today native pride must be reckoned with. Wyoming now has a substantial history of its own, and has its unique outlook based upon the conditions within the state and the beliefs and sentiments of its own people. The laws of no other state, it can be said with assurance, are adequate to the challenge that faces us. Therefore, we must have our own criminal code, a Wyoming criminal code.

III. CRIMINAL CODIFICATION IN WYOMING

Wyoming achieved statehood in 1890. The first session of the Wyoming Legislature reenacted a number of Wyoming Territorial criminal statutes and also adopted a large number of criminal statutes taken directly from the Indiana Statutes.²⁰ During the ensuing decades, many additional sections were enacted in piecemeal fashion. No substantial efforts toward revision or recodification occurred until the 1970s, when federal Law Enforcement Assistance Administration funding enabled the Wyoming Attorney General to prepare a draft of a proposed new criminal code. This draft was submitted in 1977 to the Joint Judiciary Interim Committee of the Wyoming Legislature, but was not favorably received. Instead, the legislative committee determined to prepare its own revision.

From 1979 until 1981 a Criminal Code Subcommittee of the Joint Judiciary Interim Committee worked upon a draft of a code, during which time public hearings and subcommittee meetings were held and input from lawyers, judges, legislators, and the general public was solicited. Although the subcommittee recognized that its draft of a proposed Wyoming criminal code was in rough and unfinished form, it introduced the proposal in the 1982 session of the Wyoming Legislature.²¹ The 1982 session was a

20. The history of Wyoming's codification effort is drawn from a September 17, 1981 communication from Representative Cynthia M. Lummis, chairman of the Criminal Code Subcommittee of the Joint Judiciary Interim Committee, Wyoming Legislature, to Wyoming judges, lawyers, and law enforcement personnel, and from the author's personal observations.

21. Senate File No. 63, 1982 Wyoming Legislature.

short budget session, limited by the Wyoming Constitution and laws to twenty legislative days.²² In spite of predictions that the proposed code would simply vanish from sight in the short legislative session, the Legislature enacted the code with an effective date of July 1, 1983.²³ Governor Herschler did not sign the act, but instead permitted it to become law without his signature.²⁴

In 1982, following the legislative session, the Criminal Code Subcommittee worked assiduously to prepare remedial amendments to the 1982 Wyoming Criminal Code. A large number of amendments were introduced in the 1983 legislative session under the sponsorship of the Joint Judiciary Interim Committee.²⁵ Many of the corrective amendments were adopted, some were rejected, and a number of other amendments were made, some of a maverick nature, during the 1983 legislative session.

What has been enacted is denominated the Wyoming Criminal Code of 1982. It is not truly a code, inasmuch as it lacks the internal cohesion and unitary jurisprudential approach which a code must have. Whether it is an improvement upon prior law remains to be seen, but will depend in significant measure upon the willingness of the Legislature to amend and revise the code as shortcomings and inconsistencies appear.

The Criminal Code of 1982 is unique to Wyoming. It was forged from the minds and labors of Wyoming citizens, legislators, judges, lawyers, and law enforcement personnel. While it contains innovation, it also rests solidly upon the bedrock of the past. At the same time, it bears telling evidence of its origins, and of the manner in which the legislative process works.

The influence of the Model Penal Code is clearly present. Although early drafts borrowed more heavily from the Model Penal Code, in the final version prior Wyoming statutory language and conceptualism often won out. But whole sections from the Model Penal Code remain, together with words and phrases of Model Penal Code origin sprinkled throughout the Wyoming Code. The M.P.C. influence is hardly surprising; it has been the single greatest influence in American substantive criminal legislation in the past half-century.

Wyoming's Criminal Code has also borrowed whole articles, but more often sections or subsections of the Code, from the statutes of other states. Thus the five statutory sections dealing with computer crimes²⁶ were taken from Florida,²⁷ as it was believed that existing Wyoming statutes provided inadequate protection for this new area of property rights. New gambling statutes²⁸ were drawn from Colorado,²⁹ whose statutes had in turn been based upon the Model Anti-Gambling Act.³⁰ Indiana influenced the sections

22. WYO. CONST. art. 3, § 6; WYO. STAT. § 28-1-102(b) (1977).

23. 1982 WYO. SESS. LAWS ch. 75, § 6.

24. 1982 WYO. SESS. LAWS ch. 75.

25. Senate File No. 30, 1983 Wyoming Legislature.

26. WYO. STAT. §§ 6-3-501 to -503 (Supp. 1983).

27. FLA. STAT. ANN. ch. 85 (1964 & Supp. 1983).

28. WYO. STAT. §§ 6-7-101 to -103 (Supp. 1983).

29. COLO. REV. STAT. §§ 18-10-102, 18-10-103 (1973 & Supp. 1982).

30. MODEL ANTI-GAMBLING ACT (1952).

on prostitution.³¹ Statutes of other states influenced single sections of the Wyoming code: breach of the peace³² is derived from a Kansas statute,³³ and the burglar tool statute³⁴ came from Colorado.³⁵ Additionally, while based largely upon preexisting Wyoming law, Chapter 5, Offenses Against Public Administration,³⁶ was influenced by terminology used in the Colorado statutes.³⁷ Overall, however, the criminal statutes of other states did not have a major influence upon the 1982 Wyoming Criminal Code.

The main influence upon the 1982 Code came from prior Wyoming statutes. Many have been retained without significant change, others have been modified in small ways, and still others have been reworded or consolidated into single sections. The impetus for retention of the old came from several disparate sources, which combined to limit sharply the amount of true change that was incorporated into the new Code. A first source was the rationale which underlies the oft-expressed sentiment: "If it ain't broke, don't fix it." Persons of this conviction insisted that there should not be a wholly new code merely for the sake of novelty; they insisted that each provision that was to be changed had to be shown to be lacking in some specific aspect. A second powerful voice came from judges and lawyers who insisted that it was poor policy to discard a hundred years of experience with and understanding of the existing law, and to cast away the many judicial precedents which aided comprehension of that law. A wholly new code would mean that Wyoming would have to start again from scratch. Arguably these persons possessed some selfish interest in not desiring to learn a whole new body of statutory law; and while their fund of priceless precedents was in reality far smaller than they claimed, their conservative approach did serve to limit the number of changes that could practicably be made. A third source was the unyielding fact that the task of preparing an entirely new code simply was beyond the resources available. The Wyoming Legislature does not have available an enormous staff of legislative aides to research and draft legislation; and the personal energies of the legislators who served selflessly on the interim committees were only finite. The result was that in some areas where interest was not intense, the Legislature made little change, but for the most part simply reenacted the existing statutes. The effort required to undertake an exhaustive and painstaking examination of these statutes was not present. The result is that some old statutes which are obsolescent, if not obsolete, have been retained.

One effect of a lack of reexamination of old statutes has been that within the 1982 Criminal Code are several statutes which are of a civil rather than criminal nature. These include arson reporting immunity;³⁸ release of information by banks in check fraud cases;³⁹ nuisances;⁴⁰

31. Ind. Code §§ 35-45-4-2 to -4 (1974); WYO. STAT. §§ 6-4-101 to -103 (Supp. 1983).

32. WYO. STAT. § 6-6-102 (Supp. 1983).

33. KAN. STAT. ANN. § 21-4101 (1981).

34. WYO. STAT. § 6-3-304 (Supp. 1983).

35. COLO. REV. STAT. § 18-4-205 (1973).

36. WYO. STAT. §§ 6-5-101 to -307 (Supp. 1983).

37. Notes to Working Draft 3, Criminal Code of 1982, 5.1 (Sept. 1981).

38. WYO. STAT. §§ 6-3-108 to -110 (Supp. 1983).

39. WYO. STAT. §§ 6-3-705, 6-3-706 (Supp. 1983).

40. WYO. STAT. §§ 6-6-201 to -209 (Supp. 1983).

firearms regulation;⁴¹ and regulation of sale of rifles and shotguns.⁴² These statutes would be more appropriately placed elsewhere.

IV. THE WYOMING CRIMINAL CODE OF 1982

Preliminary observations behind, it is our next task to consider the individual substantive provisions of the Code itself. The Criminal Code of 1982 is divided into ten chapters, containing thirty-five articles made up of one hundred eighty-nine sections. There is something to be said as to every one of these sections, but a commentary upon those dimensions would prove beyond the scope of even a series of law review articles. Therefore the observations will be limited to those sections which in the author's opinion are the most significant. The ten chapters of the Code will be addressed in the order in which they appear in the Code itself.

A. Chapter 1: General Principles

1. Applicability of Provisions

Section 6-1-101(a) gives the code a name: it "may be cited as the Wyoming Criminal Code of 1982." The two succeeding subsections provide that prosecutions for crime shall be governed by the law in effect when the crime was committed, but that in prosecutions pending upon the effective date of the Code, defendants should have the benefit of any reduced penalty effected by the Code.⁴³ Aside from initial flurries over the proper choice of a court to process what was a felony when committed but is now to be punished as misdemeanor, and over efforts by defendants to defer trials or sentencing until after July 1, 1983, when it was in their interest to do so, this section should cause no particular problems.

2. Common-law Crimes

The 1982 Criminal Code makes plain that only those acts which the legislature has specifically proscribed are to be crimes in Wyoming; section 6-1-102 provides in part: "Common-law crimes are abolished. No conduct constitutes a crime unless it is described as a crime in this act or in another statute of the state." Thus the Legislature has definitively settled the question of whether prosecutors can charge, and courts can recognize, old common-law crimes, whether or not they have been previously enforced, or can devise new common-law crimes. They cannot.

While abolishing common-law crimes, the legislature has recognized that many of Wyoming's statutory crimes are merely a codification of the common law, and that the common law must be relied upon to provide definition and meaning to the statutory language. Accordingly, section 6-1-102 further provides that the courts may use case law (common law) "as an interpretive aid and in the construction of this act."

41. WYO. STAT. §§ 6-8-201 to -204 (Supp. 1983).

42. WYO. STAT. §§ 6-8-301 to -303 (Supp. 1983).

43. WYO. STAT. § 6-1-101(b), (c) (Supp. 1983).

3. *Civil Recovery for Criminal Act*

Section 6-1-103 reenacts a provision which has been present in Wyoming criminal statutes since 1890:⁴⁴ the criminal code does not prevent persons injured by criminal acts from recovering damages, but the only evidence of a conviction which may be used as evidence in a civil damage action is a conviction "obtained by confession in open court."

Efforts were made, particularly in the 1983 legislative session, to broaden this provision to permit injured persons a wider use of evidence of criminal conviction in civil actions for damages, but consensus failed and the section remains in its original form.

Whatever may be the history of section 6-1-103 and the original rationale for its enactment, it is plainly antiquated and inconsistent with modern legal development. Wyoming Rule of Evidence 803(22) specifically provides that evidence of a final judgment of conviction, after a trial or a plea of guilty, of a crime punishable by death or imprisonment for more than one year, is not excluded by the hearsay rule, and may be admitted "to prove any fact essential to sustain the judgment." While admittedly the rule only removes the hearsay objection, and does not directly conflict with section 6-1-103, the rule plainly shows that the modern trend is toward freer introduction of evidence of criminal convictions in civil cases.⁴⁵

In an era in which the rights of criminal victims are being increasingly recognized, there is no good reason to prohibit the use of a criminal conviction to aid the victim of the crime to recover damages for loss caused by the crime. Concern over the use of convictions for minor crimes may be allayed by permitting admission only of convictions of serious crime. Some of this concern is misplaced, however, in light of the provision that a guilty plea may be admitted in a subsequent civil damage action; it is the motor vehicle misdemeanor which generates a high proportion of civil damage claims to which a defendant is most likely to plead guilty without reflection upon the civil consequences. Under section 6-1-103 such guilty pleas are admissible.

The section, if applied literally, is also overbroad, since it prohibits the use of criminal convictions in damage actions for normal impeachment purposes, unless the conviction was upon a plea of guilty. This prohibition extends to any witness and to any crime, including those not connected with the damage claim.

4. *Definitions*

One attribute of a code is that it employs carefully defined terms in a consistent manner. Previous Wyoming criminal statutes used a variety of terms in disorganized fashion, using different words to express the same meaning, and sometimes the same words to express different meanings. The Criminal Code of 1982 contains more definitions than earlier collections of Wyoming criminal statutes, but the problem of terminology is far from solved. As set forth throughout this article, there has been a failure in many cases to employ carefully defined terms in a consistent manner.

44. 1890 WYO. SESS. LAWS ch. 73, § 9.

45. See C. McCORMICK, EVIDENCE § 318 (2d ed. 1972).

Within the Code, definitions are found in three principal locations: in section 6-1-104, which is the general definition section; at the beginning of some individual articles, as with sexual assault;⁴⁶ and within sections relating to individual crimes, as with robbery⁴⁷ or defrauding an innkeeper.⁴⁸ Many definitions are taken directly from the Model Penal Code, while others show M.P.C. influence.

The process of defining words and terms is a difficult one, but since the art of legislation is essentially the expression of precise meaning, it is a necessary one. Definition which is too broad leaves to the judge or jury the power to determine the reach of the law; but definition which is too narrow may exclude reprehensible conduct from the application of criminal sanction. Wyoming Criminal Code definitions, following the lead of the Model Penal Code, tend toward overbreadth, perhaps on the theory that it is socially acceptable to criminalize a greater part of human conduct, and that the court or jury will balk at overextension which transcends communal norms.

Thus bodily injury, a term of importance in many crimes against persons, "means physical pain, illness or any impairment of physical condition."⁴⁹ The definition of deadly weapon is similarly broad, and embodies a teleological element: a deadly weapon is anything "which in the manner it is used or is intended to be used is reasonably capable of producing death or serious bodily injury."⁵⁰ Under this definition, if serious bodily injury has been caused, then what caused it is pretty plainly a deadly weapon.

5. *Parties to Crime*

The prior statutory provision on accessories before the fact⁵¹ has been retained essentially unchanged in section 6-1-201. The content of this section is unremarkable, providing that one who aids or abets in the commission of a felony, or who counsels, encourages, hires, commands or procures a felony to be committed, may be prosecuted as a principal and punished as a principal. The only unusual aspect is the retention of the anachronism that one can only be an accessory before the fact to a felony. At common law this did not create a hiatus as to misdemeanors, since "all persons concerned therein, if guilty at all, are principals."⁵² A 1929 Wyoming decision⁵³ adopted the common law rule, which will probably survive the enactment of the 1982 Criminal Code. Nevertheless, any confusion could have been obviated by a simple statutory change.

The provision on accessories after the fact has been placed in Chapter 5, under Offenses Against Public Administration, in section 6-5-202, upon the theory that an accessory after the fact is not truly a party to the crime. This provision is discussed at a later point in this article.

46. WYO. STAT. § 6-2-301 (Supp. 1983).

47. WYO. STAT. § 6-2-401(d) (Supp. 1983).

48. WYO. STAT. § 6-3-406(b) (Supp. 1983).

49. WYO. STAT. § 6-1-104(a) (i) (Supp. 1983).

50. WYO. STAT. § 6-1-104(a) (iv) (Supp. 1983).

51. WYO. STAT. § 6-1-114 (1977). See *Hawkes v. State*, 626 P.2d 1041 (Wyo. 1981).

52. 4 W. BLACKSTONE, COMMENTARIES *36.

53. *State v. Weekley*, 40 Wyo. 162, 275 P. 122 (1929).

6. *State of Mind: Culpability*

Traditional criminality is based upon possession by the accused of a culpable state of mind at the time he acted. Much confusion has been engendered by legislative failure to specify the state of mind required to convict of various crimes, or by the use of terminology of uncertain and undefined meaning such as wantonly, maliciously, negligently, purposely, willfully, intentionally, fraudulently, and unlawfully, in connection with the criminal act. Often it has not been made clear what, if any, state of mind must be present as to each of the elements of a particular crime. Wyoming's criminal statutes have been, historically, generally no better and no worse than those of other states, but some confusion has occurred.

One great contribution of the Model Penal Code has been the recognition that understanding of the criminal law is greatly enhanced if the required criminal states of mind are limited in number and carefully defined. Model Penal Code section 2.02 sets forth and defines four states of mind: purposely, knowingly, recklessly, and negligently. These terms are used consistently throughout the Model Penal Code, and others are avoided. Clear direction has thus been given to the lawyer or judge confronted with the problem of ascertaining the mental elements of a particular criminal offense.

When the Wyoming Criminal Code was drafted, some attempt was made to employ the Model Penal Code terminology. This was not thoroughly successful in the face of the expressed desire to retain the historical elements of many crimes. A degree of success was achieved when definitions of "recklessly"⁶⁴ and "criminal negligence"⁶⁵ were included in the Code, and when the statutory language was in several places modified to employ these terms instead of vague possible synonyms.

The Model Penal Code term "knowingly" was used in a number of sections of the new Code, but no definition was provided. It remains to be seen whether the Wyoming courts will apply the Model Penal Code definition to the term. Although the M.P.C. definition is not an uncommon or improbable one, neither is it the only possible definition which might be used.

The 1982 Criminal Code employs a variety of other undefined terminology to express the required state of mind, including: "believes,"⁶⁶ "reasonably believing,"⁶⁷ and "has reasonable cause to believe";⁶⁸ "intentionally,"⁶⁹ "knowingly or intentionally,"⁶⁰ "intentionally and knowingly,"⁶¹ "intentionally, knowingly or recklessly,"⁶² and "intentionally or in reckless disregard of the consequences";⁶³ "involuntarily"⁶⁴ and

54. WYO. STAT. § 6-1-104(a) (ix) (Supp. 1983).

55. WYO. STAT. § 6-1-104(a) (iii) (Supp. 1983).

56. WYO. STAT. § 6-3-403(a) (Supp. 1983).

57. WYO. STAT. § 6-3-605(b) (Supp. 1983).

58. WYO. STAT. § 6-3-403(a) (Supp. 1983).

59. WYO. STAT. § 6-2-401(c) (i) (Supp. 1983).

60. WYO. STAT. § 6-4-101 (Supp. 1983).

61. WYO. STAT. § 6-2-504 (Supp. 1983).

62. WYO. STAT. § 6-2-502(a) (i) (Supp. 1983).

63. WYO. STAT. § 6-2-503 (Supp. 1983).

64. WYO. STAT. § 6-2-105(a) (ii) (Supp. 1983).

“voluntarily”;⁶⁵ “knowing,”⁶⁶ “knowingly,”⁶⁷ “knows,”⁶⁸ “knows or reasonably should know,”⁶⁹ and “with knowledge or probable cause to believe”;⁷⁰ “maliciously”;⁷¹ “negligently”;⁷² “premeditated malice”;⁷³ “purposely”;⁷⁴ and “willfully.”⁷⁵

One other problem is that in upwards of fifty sections of the new Criminal Code there is no mental state specified for one or more elements of the offense. While some of these elements are meant to embody strict criminal liability, so that mental state is not a relevant factor, it is doubtful whether all of these sections were intended to impose strict liability. When the issue arises, as it is certain to do, the courts will be required to determine whether any mental state must be shown, and if so, what it is.

7. Defenses

While the 1982 Criminal Code provides expressly that common-law crimes are abolished, it declares with equal force that “Common-law defenses are retained unless otherwise provided by this act.”⁷⁶ This provision has no predecessor in the Wyoming statutes. Although it is not difficult to understand the effect of a provision abolishing common-law crimes, the retention of common-law defenses poses serious problems of interpretation.

The first is the meaning of “common-law.” Is the proper reference to the common law of England, or to the common law of the United States, or to the common law of Wyoming? If the reference is to the common law of England, then it must be determined what is to be the applicable date at which the common law is to be ascertained. Care must be taken in that case to avoid a date so early that ancient defenses, long discarded, cannot be asserted. Benefit of clergy comes to mind. It is likely that the proper construction will be to consider as falling within the common law only those defenses which the Wyoming Supreme Court recognized prior to July 1, 1983, the effective date of the Criminal Code.

A second problem is whether new common-law defenses may be recognized, or existing ones enlarged. If read literally, retention of common-law defenses means only that those defenses already recognized can be asserted in the future, and that the power to create any new defenses rests solely with the Legislature. But it is by no means certain that the Wyoming Supreme Court will find itself so limited.

65. WYO. STAT. § 6-2-201(c) (Supp. 1983).

66. WYO. STAT. § 6-3-303(a) (Supp. 1983).

67. WYO. STAT. § 6-1-201 (Supp. 1983).

68. WYO. STAT. § 6-3-408 (Supp. 1983).

69. WYO. STAT. § 6-2-302(a) (iii) (Supp. 1983).

70. WYO. STAT. § 6-6-102 (Supp. 1983).

71. WYO. STAT. § 6-2-104 (Supp. 1983).

72. WYO. STAT. § 6-2-310(a) (Supp. 1983).

73. WYO. STAT. § 6-2-101 (Supp. 1983).

74. *Id.*

75. WYO. STAT. § 6-3-404(a) (Supp. 1983).

76. WYO. STAT. § 6-1-102(b) (Supp. 1983).

Clearly the Legislature could have listed statutorily all of the available defenses. The Model Penal Code has done so.⁷⁷ While it might be argued that the Legislature did not list defenses because it wished to leave room for growth in the law through the process of judicial decision, with the courts free to adopt new defenses as the need might arise, a more likely explanation is that the Legislature did not feel itself able, within constraints of time and manpower, to set out criminal defenses in a definitive fashion.

Several provisions of the Criminal Code do relate to defenses, or to matters whose existence negates the commission of a crime. Often it is not entirely clear whether a specific provision is a defense, in the sense that it is a fact which the defendant must prove, but if proved negatives the offense. Some of the Code provisions which can be characterized as defenses include: being under the influence of alcohol or drugs;⁷⁸ renunciation of attempt,⁷⁹ or persuasion to abandon the crime after solicitation,⁸⁰ or withdrawal from and thwarting of conspiracy;⁸¹ voluntary release of kidnapping victim unharmed;⁸² reasonable belief in sexual assault prosecutions that child was over sixteen years of age;⁸³ defense of person, property or abode, or of another, to charge of threatening to use drawn deadly weapon,⁸⁴ or pointing firearm;⁸⁵ affirmative defenses to criminal entry;⁸⁶ limitations upon obscenity statute;⁸⁷ reasonable belief in bigamy prosecution that person is free to remarry;⁸⁸ action of public servant within scope of authority as defense to requiring bidder or contractor to deal with particular supplier;⁸⁹ being a relative of a fugitive, in accessory after the fact prosecution;⁹⁰ and being authorized to take a controlled substance, intoxicating liquor, or deadly weapon into a jail or other penal institution.⁹¹ It is not always clear from the statutory language whether the additional fact must be proved by the accused, or disproved by the prosecution.

In one statute, a common law defense is not fully retained: the marital exemption to sexual assault. The relevant language of section 6-2-307 is: "The fact that the actor and victim are married to each other is not by itself a defense. . . ." Whether the circumscription placed upon the defense by this language means that the defense has been abolished, or that it has been abolished only to the extent stated, is uncertain; but if section 6-1-102(b) is read in conjunction with section 6-2-307, it seems clear that the marital exemption remains, except to the extent limited by section 6-2-307.

77. MODEL PENAL CODE § 2.04; §§ 2.08 through 2.13; §§ 3.01 through 3.10; §§ 4.01 through 4.10 (P.O.D. 1962). Other specific affirmative defenses are spelled out in individual sections on substantive crimes.

78. WYO. STAT. § 6-1-202 (Supp. 1983).

79. WYO. STAT. § 6-1-301(b) (Supp. 1983).

80. WYO. STAT. § 6-1-302(b) (Supp. 1983).

81. WYO. STAT. § 6-1-303(b) (Supp. 1983).

82. WYO. STAT. § 6-2-201(c) (Supp. 1983).

83. WYO. STAT. § 6-2-308(a) (Supp. 1983).

84. WYO. STAT. § 6-2-502 (Supp. 1983).

85. WYO. STAT. § 6-2-504 (Supp. 1983).

86. WYO. STAT. § 6-3-302 (Supp. 1983).

87. WYO. STAT. § 6-4-302 (Supp. 1983).

88. WYO. STAT. § 6-4-401(b) (Supp. 1983).

89. WYO. STAT. § 6-5-105(c) (Supp. 1983).

90. WYO. STAT. § 6-5-202 (Supp. 1983).

91. WYO. STAT. §§ 6-5-208, 6-5-209 (Supp. 1983).

There are also statutory defenses to crimes which are found outside the Criminal Code, the most notable being the defense of mental illness or deficiency, found in section 7-11-304.

One other defense found within the Criminal Code has been retained from prior statutory law, although in a reworded form. Section 6-1-202 provides that self-induced intoxication is not a defense to crime, except that it may be offered to negate a specific intent which is an element of the crime. This is a restatement of former section 6-1-116, which provided that drunkenness was not an excuse for crime, except "where a crime rests in intention." Section 6-1-202(b) of the new Code defines self-induced intoxication.

8. *Inchoate Offenses*

In 1981 the Wyoming Legislature enacted criminal statutes on attempt, solicitation, and conspiracy.⁹² Prior to 1981 there was a statute covering conspiracy to commit a felony,⁹³ but no general attempt statute and no general solicitation statute. The new attempt, solicitation, and conspiracy crimes were denominated "inchoate offenses," meaning that they were committed in the course of preparing to commit some other crime. The new statutes were strongly influenced by the language of the Model Penal Code,⁹⁴ although some features were drawn from the statutes of other states.⁹⁵ In particular, the penalty section for the three crimes followed the Model Penal Code,⁹⁶ making each of them punishable as severely as the most serious offense that was the object of the particular attempt, solicitation, or conspiracy, with the single limitation that an attempt, solicitation, or conspiracy to commit murder in the first degree could only be punishable by life imprisonment if the murder were not actually committed. This is in keeping with the Model Penal Code philosophy that it is dangerousness to society which is to be punished, and not necessarily the results achieved by the criminal act.

The 1982 Criminal Code reenacts the new attempt, solicitation, and conspiracy statutes, together with the penalty section, as sections 6-1-301 through 6-1-304. Some relatively minor changes were effected. Brief mention should be made of the salient features of these offenses.

The attempt statute, section 6-1-301, adopts the test that an attempt is committed when a substantial step toward commission of the crime has been taken. The step taken must be "strongly corroborative of the firmness" of the intent to commit the crime, and it is not required that close proximity to success be achieved. Section 6-1-301(a)(ii) removes the defense of impossibility; that the attempted crime could not in reality have been committed is of no relevance if, under the circumstances as the defendant believed them to be, it would have been possible to commit the crime. Thus if an attempt is made to pick an empty pocket, or the professor attempts to steal what is in reality his own umbrella, the crime has been committed.

92. 1981 WYO. SESS. LAWS ch. 11, § 1.

93. WYO. STAT. § 6-1-117 (1977).

94. MODEL PENAL CODE §§ 5.01, 5.02, 5.03 (P.O.D. 1962).

95. See, e.g., COLO. REV. STAT. § 18-2-301 (1973); MO. REV. STAT. § 564.011 (1979); MONT. CODE ANN. §§ 45-3-101 to -103 (1983).

96. MODEL PENAL CODE § 5.05 (P.O.D. 1962).

The attempt statute has a singular defense: that after taking the substantial step with intent to commit the crime, the actor may escape criminal liability if, before actually committing the crime, he voluntarily and completely renounces his criminal intention and thereby avoids committing the crime.⁹⁷ The renunciation permits the person to wipe the slate clean. There may be difficulty in applying this defense. While little difficulty would be experienced in the case where the actor takes his gun and sets out resolutely for the intended victim's house twenty miles away, but changes his mind at the halfway point and goes back, it is plainly a much harder case where the actor reaches intended victim's house, fires one shot through the window which misses, and then renounces his criminal intention and fires no more shots. The one Wyoming Supreme Court decision dealing with the defense makes it reasonably clear that the defense is not likely to be judicially favored.⁹⁸

The solicitation statute, section 6-1-302, is limited to felonies. This limitation probably stemmed from the fact that there can only be an accessory before the fact to a felony, and not to a misdemeanor, and it was felt that solicitation should have a similar treatment. A person may be convicted of solicitation only if the solicited crime is neither attempted nor committed. It is a defense if the actor, after soliciting another, persuades the other not to commit the crime or in some other way prevents the commission of the crime solicited.

The conspiracy statute, section 6-1-303, is fairly straightforward. Agreement is required, as is an overt act. It is a defense if, after entering into the conspiracy, the actor withdraws and thwarts the conspiracy's success in a manner which evidences his voluntary and complete renunciation of criminal intention. The statute does not provide guidance for conspiracy cases in which all of defendant's coconspirators are incompetent or are acquitted; this is left to common law.

B. Chapter 2: Offenses Against the Person

1. Homicide

a. Murder in the First Degree

Section 6-2-101 of the Wyoming Criminal Code of 1982 defines and provides for the punishment of murder in the first degree. The new Code section is substantially similar to the prior Wyoming statute, except in two respects. The prior section, section 6-4-101, listed as the crimes which can form the predicate for Wyoming's approximation of felony murder: "rape, sexual assault, arson, robbery or burglary." New section 6-2-101 has deleted rape as redundant (sexual assault is the new name for rape and sundry other acts) and has added three new predicate crimes, so that the list now reads: "any sexual assault, arson, robbery, burglary, escape, resisting arrest or kidnapping."

A further deletion from the prior statute is the language "or whoever purposely and with premeditated malice kills any peace officer, corrections employee or fireman acting in the line of duty." Inasmuch as the statute

97. WYO. STAT. § 6-1-301(b) (Supp. 1983).

98. *Haight v. State*, 654 P.2d 1232 (Wyo. 1982).

already provided that "[w]hoever purposely and with premeditated malice . . . kills any human being is guilty of murder in the first degree," the reference to police officers, corrections employees and firemen was felt to be surplusage.

The Wyoming first degree murder statute, as it now appears in section 6-2-101 of the new Code, includes three kinds of killings:

- (1) purposely and with premeditated malice;
- (2) in the perpetration of, or attempt to perpetrate, any sexual assault, arson, robbery, burglary, escape, resisting arrest or kidnapping; and
- (3) by administering poison or causing the same to be done.

As to killing purposely and with premeditated malice, little needs to be said. This is the classical and traditional Wyoming statutory first degree murder language, and its meaning is fairly well settled.

The second category, which once might have been described as felony murder, with a limited number of specified predicate felonies, can no longer be described by that term, since some of the predicate acts are not felonies, but misdemeanors. Sexual assault in the fourth degree is a misdemeanor,⁹⁹ as is arson in the fourth degree,¹⁰⁰ and resisting arrest as well.¹⁰¹ Two things have caused this result: new crimes which are not felonies have been added to the list, and older crimes which were felonies when put on the list have been redefined so that they may be misdemeanors. It is not at all beyond question that an unintended killing in the perpetration of a misdemeanor ought to be treated as first degree murder and draw a life sentence.

The third category, administering poison, is antiquated, but was probably included originally on the ground that the administration of poison which results in death will almost invariably involve purposeful and premeditated acts, and therefore the prosecution should not be required to prove the elements of purpose and premeditation. But if purpose and premeditation do exist in poisoning cases, then there is no good reason not to require killings by poison to be treated under the category of killings committed purposely and with premeditated malice; from proof of the administration of poison the finder of fact will readily infer the necessary purpose and malice.

b. Death Penalty

When a defendant has been convicted of murder in the first degree, a separate sentencing hearing must be held to determine whether he shall be sentenced to death or to life imprisonment. Section 6-2-102 reenacts, substantially unchanged, the prior Wyoming statutory provisions.¹⁰² These

99. WYO. STAT. § 6-2-306 (Supp. 1983).

100. WYO. STAT. § 6-3-104 (Supp. 1983).

101. WYO. STAT. § 6-5-204(a) (Supp. 1983).

102. WYO. STAT. § 6-4-102 (1977). One change in new section 6-2-102(h) (viii) appears to have been an inadvertence. The former subsection listed as an aggravating circumstance,

provisions govern the sentencing hearing and the determination of aggravating and mitigating circumstances relating to the killing and to the defendant's personal history and characteristics. They are modeled upon the Florida statute upheld by the United States Supreme Court in the 1976 decision in *Proffitt v. Florida*.¹⁰³

Section 6-2-103 reenacts the prior statute providing for mandatory review by the Wyoming Supreme Court of sentences of death.¹⁰⁴

c. *Second Degree Murder*

Section 6-2-104 reenacts the prior second degree murder statute without change.¹⁰⁵ The second degree murder statute, including the punishment which may be imposed, has remained unchanged since it was adopted by the Wyoming Legislature in 1890.¹⁰⁶

d. *Manslaughter*

Section 6-2-105 of the new Code reenacts with two changes the former manslaughter statute, section 6-4-107. Voluntary manslaughter remains as before: unlawful killing of a human being without malice, voluntarily, upon a sudden heat of passion. The elements of voluntary manslaughter, which are those of murder reduced by provocation, have remained the same since 1890.¹⁰⁷

Two changes have been made, however, in the involuntary manslaughter section of the statute. One is merely formal, excluding from the manslaughter statute those unlawful act killings which are included in section 6-2-106, homicide by vehicle. The other change is substantive. Former section 6-4-107 provided that a killing was manslaughter if done "involuntarily, but . . . by any culpable neglect or criminal carelessness." New section 6-2-105(a)(ii) provides in its place: "involuntarily, but . . . recklessly." The change in language apparently has not wrought a change in meaning. In construing the prior section, the Wyoming Supreme Court has declared that "culpable neglect" and "criminal carelessness" mean the same thing, and that they require more than negligence.¹⁰⁸ There must be an act which amounts to recklessness.¹⁰⁹ "Recklessly" is now defined by the new Code to mean "done with a conscious disregard of a substantial and unjustifiable risk that the person's conduct will result in the harm he is accused of causing."¹¹⁰ Thus the new language should not result in any change in meaning.

"The murder of a judicial officer, former judicial officer, county attorney, or former county attorney, during or because of the exercise of his official duty." Because Wyoming now has district attorneys as well as county and prosecuting attorneys, the subsection was enlarged to include district attorneys. But in so doing, the Legislature inadvertently omitted present county and prosecuting attorneys from the list. The subsection now reads in relevant part: "district attorney, former district attorney or former county and prosecuting attorney."

103. 428 U.S. 242 (1976).

104. WYO. STAT. § 6-4-103 (1977).

105. WYO. STAT. § 6-4-104 (1977).

106. 1890 WYO. SESS. LAWS ch. 73, § 16.

107. 1890 WYO. SESS. LAWS ch. 73, § 17.

108. *See, e.g., State v. Catellier*, 63 Wyo. 123, 179 P.2d 203 (1947).

109. *See, e.g., Thomas v. State*, 562 P.2d 1287 (Wyo. 1977).

110. WYO. STAT. § 6-1-104(a) (ix) (Supp. 1983).

e. Homicide by Vehicle

The vehicular homicide statute has been a source of difficulty for Wyoming prosecutors, and has led to a series of Wyoming Supreme Court decisions delineating between manslaughter on the one hand, and vehicular homicide on the other.¹¹¹ The vehicular homicide statute in the new Criminal Code, section 6-2-106, represents the Legislature's latest effort to create a viable and meaningful vehicular homicide statute under which sanctions may be imposed upon drivers who cause death by criminally negligent vehicle operation, and upon those who cause death while driving under the influence of intoxicants. Unfortunately, section 6-2-106 is seriously flawed.

Subsection (a) creates the crime of homicide by vehicle, where the death results from criminal negligence. Criminal negligence is defined in section 6-1-104(a)(iii) to mean: "a great or excessive deviation from that standard of care which a reasonable, prudent person would exercise under the same or similar circumstances to avoid a substantial and unjustifiable risk of harm."

The language of subsection (a) of section 6-2-106 is somewhat convoluted. In all likelihood it will ultimately be held to mean that a person whose criminally negligent operation of a vehicle causes the death of another person is guilty of homicide by vehicle. This in spite of the fact that the language unfortunately seems to say something else, since it does not connect the cause of the death to the criminally negligent operation of the vehicle. Literally read, this section would impose guilt for homicide by vehicle upon a person who is driving prudently, but whose negligence causes the death of a child passenger who chokes on a hard candy.

It is noteworthy, if troubling, that section 6-2-106(a) applies not merely to drivers of motor vehicles, but to the operators of all vehicles. Vehicles are defined in section 6-1-104(a)(xi) to mean "any device by which persons or property may be moved, carried or transported over land, water or air." Thus vehicle can mean anything from a pipeline to an escalator or elevator.

Section 6-2-106(b) creates the offense of aggravated vehicular homicide, applying to persons operating motor vehicles under the influence of intoxicants whose intoxication causes the death of another person. The original version of the statute, section 31-5-1117,¹¹² provided that if anyone driving a vehicle while under the influence caused the death of another person, he would be guilty of aggravated vehicular homicide. This original section was attacked on the ground that since it did not require a causal connection between the intoxication and the death, it was unconstitutional on due process grounds. Fearing the success of this attack, the Legislature added to the version in the new Code the language: "and the violation [driving under the influence] is the proximate cause of the death."

Whether proof of a causal connection between the intoxication and the death is a constitutional requirement is not at all clear. At least one state

111. See, e.g., *Lopez v. State*, 586 P.2d 157 (Wyo. 1978); *Bartlett v. State*, 569 P.2d 1235 (Wyo. 1977); *Thomas v. State*, 562 P.2d 1287 (Wyo. 1977); *State v. Cantrell*, 64 Wyo. 132, 186 P.2d 539 (1947); *State v. McComb*, 33 Wyo. 346, 239 P. 526 (1925).

112. WYO. STAT. § 31-5-1117 (Supp. 1982), *repealed* by the Wyoming Criminal Code of 1982.

court has held that it is not.¹¹³ On principle, there seems no good reason why a state could not provide that if a motorist drives while drunk and kills someone, he can be subjected to enhanced punishment even if the prosecution does not prove that the intoxication caused the death.

In its determination to make aggravated vehicular homicide safe from constitutional assault, the Legislature overreacted by putting in too many words. Section 6-2-106(b) imposes guilt on a person "if, while driving a motor vehicle in violation of W.S.31-5-233 [driving under the influence], he unlawfully causes the death of another person while driving a motor vehicle and the violation is the proximate cause of the death." There is one too many "while driving a motor vehicle"; the only sensible reading of the subsection is that the victim must be another driver.

f. A Serious Omission?

The new Criminal Code contains no provision relating to the killing of an unborn child. Former section 6-4-507 provided imprisonment for up to fourteen years for killing an unborn child by a willful assault and battery upon a woman known to be pregnant. New section 6-2-502(a)(iv) makes the causing of bodily injury to a woman known to be pregnant aggravated assault, but contains no reference to assault upon the unborn child. Conceding the reluctance of legislators to confront an issue so closely related to the abortion/right to life controversy, nevertheless there is an important social value in protection of the unborn child of a wanted pregnancy.

2. Kidnapping and Related Offenses

a. Kidnapping

The former Wyoming kidnapping statute, section 6-4-201, penalized only kidnapping which was undertaken for ransom, reward or robbery. A companion statute, section 6-4-202, punished child stealing. The new Criminal Code in section 6-2-201 substantially broadens the offense of kidnapping by expanding the underlying purposes which will make a removal or confinement of a person kidnapping. Removal or confinement with intent to hold for ransom or reward, or to use as a shield or hostage, or to facilitate the commission of a felony, or to inflict bodily injury or terrorize, now constitutes kidnapping. The penalty provision has been retained, whereby if the victim is released substantially unharmed prior to the trial the maximum punishment is twenty years' imprisonment, but if not released unharmed the maximum punishment is imprisonment for not less than twenty years, or for life.

Apparently, the Legislature intended to incorporate the former child stealing statute into the new kidnapping statute. To this end, the new statute provides that a removal or confinement of a child under fourteen is unlawful if without the consent of a parent, guardian or other responsible custodian. However, to constitute kidnapping the unlawful confinement or removal must be for the purposes set forth above, including holding for ransom, as a hostage, to facilitate commission of a felony, or to inflict bodily injury. The simplest case of child stealing is one where the child is taken not for these purposes, but to have as a child and to raise. A taking for the pur-

113. *Baker v. State*, 377 So.2d 17 (Fla. 1979).

pose of keeping as one's own child will not constitute kidnapping under the new section 6-2-201.

b. Felonious Restraint

Section 6-2-202 of the new Criminal Code adopts the language of Model Penal Code section 212.2, to create the crime of felonious restraint. This section had no counterpart in prior Wyoming law. It denominates as felonious restraint any knowing unlawful restraint which exposes another to risk of serious bodily injury, or any knowing holding of another in involuntary servitude. Thus it is intended to deal with aggravated restraints of liberty which are considered less serious than kidnapping. Unfortunately, the vagueness of the terminology will impair the usefulness of this section. As exposure to risk of serious bodily injury is an element of the crime, the failure to state how substantial the risk must be poses an obstacle to application of the statute. If any quantum of risk will suffice, then the statute is indistinguishable from false imprisonment, since persons at all times are exposed to *some* risk of serious bodily injury, and any false imprisonment or other restraint will invariably increase the amount of that risk somewhat. Also the failure of the section to define involuntary servitude poses a problem, since forcible slavery at one end of the spectrum shades gradually into subtleties of economic constraint under which virtually all of us must exist.

c. False Imprisonment

Section 6-2-203 of the 1982 Criminal Code is derived from Model Penal Code section 212.3. While the language differs from the prior Wyoming statute on false imprisonment, there seems to be little change in meaning.¹¹⁴ The new section forbids the knowing and unlawful restraint of another "so as to interfere substantially with his liberty." The central issue will be a matter of degree, which the finder of fact must decide. The Wyoming language, "knowingly and unlawfully restrains," differs from that of the Model Penal Code, "knowingly restrains another unlawfully." The difference, which may have resulted from mere legislative tinkering with word order, may be significant. Under M.P.C. there must be knowledge both of the restraint and of the fact that the restraint is unlawful; while under the Wyoming section there must be knowledge of the restraint, and the restraint must be unlawful, but there need not be knowledge by the accused that the restraint is unlawful.

d. Interference with Custody

Prior Wyoming statutes, sections 6-4-203 through 6-4-205, dealt with cases where one parent, who had no right to custody of the child, took physical custody in violation of court order or express agreement. Taking the child with intent to cause a change in physical custody was a misdemeanor,¹¹⁵ but taking and knowingly and intentionally concealing and harboring the child was a felony with a two year maximum sentence.¹¹⁶ Any third person who agreed for compensation to assist in taking or concealing a child was guilty of felony and could be imprisoned for ten years.¹¹⁷

114. WYO. STAT. § 6-4-606 (1977).

115. WYO. STAT. § 6-4-203 (1977).

116. WYO. STAT. § 6-4-204 (1977).

117. WYO. STAT. § 6-4-205 (1977).

Section 6-2-204 of the 1982 Criminal Code replaces the former sections with a single section drawn from Model Penal Code section 212.4. Under the new section, any person is guilty of interference with custody by taking or enticing a child from lawful custody of another, without privilege to do so. It is a defense that the action was necessary to avert an immediate threat to the child's welfare, or that the child taken was fourteen years of age or older and was taken without intent to commit a criminal offense and at the instigation of the child. Punishment is a felony if the person who takes the child is not "a parent or person in equivalent relation to the child," or if the child is concealed from the lawful custodian. If the person who takes the child is a parent or equivalent person, and there is no concealment, the offense is a misdemeanor.

3. *Sexual Assault*

The Wyoming Legislature enacted a modern sexual assault statute in 1977.¹¹⁸ By "modern" statute is meant one which includes assaults upon both males and females; which includes both traditional heterosexual rape and other forms of sexual acts including sexual contact; which decriminalizes consensual sexual acts between adults; which enlarges upon the kinds of coercive sexual acts considered criminal; which eliminates the necessity for corroboration of the testimony of alleged victims; which makes reasonable mistake of age a defense to sexual acts with certain minors; which provides for medical examination of alleged victims of sexual assault; which forbids public release of the names of alleged victims and of accused persons prior to the filing of an indictment or information; and which limits the reception at trial of evidence of the victim's prior sexual conduct or reputation.

The 1982 Wyoming Criminal Code reenacts the 1977 sexual assault statutes, with several significant changes:

(a) The definition of sexual intrusion has been expanded to include the former definitions of both sexual intrusion and sexual penetration.¹¹⁹ Inasmuch as the terms sexual intrusion and sexual penetration always appeared together, and the consequences of both acts under similar circumstances were the same, the new definition is merely a simplification and does not effect any substantive change.

(b) Sexual assault in the third degree and sexual assault in the fourth degree have been transposed.¹²⁰ Sexual contact not resulting in serious bodily injury was formerly third degree sexual assault,¹²¹ punishable by imprisonment for not more than five years;¹²² while sexual intrusion upon a child under sixteen (but over twelve) and at least four years younger than the actor was fourth degree sexual assault,¹²³ a misdemeanor.¹²⁴ Sexual contact is now fourth degree, and a misdemeanor,¹²⁵ while sexual intrusion

118. 1977 WYO. SESS. LAWS ch. 70, § 1.

119. WYO. STAT. § 6-2-301(vii) (Supp. 1983).

120. WYO. STAT. §§ 6-2-304, 6-2-305 (Supp. 1983).

121. WYO. STAT. § 6-4-304 (1977).

122. WYO. STAT. § 6-4-306 (1977).

123. WYO. STAT. § 6-4-305 (1977).

124. WYO. STAT. § 6-4-306 (1977).

125. WYO. STAT. § 6-2-304 (Supp. 1983).

upon a child under sixteen has become third degree and a felony.¹²⁶ The flip-flop evidently resulted from second thoughts by the Legislature as to the relative seriousness of the two offenses. But there is a no reason why, for purposes of classical penological balance or otherwise, there must be a misdemeanor sexual assault in addition to the felonies. If both sexual intrusion upon a child under sixteen and sexual contact not involving serious bodily injury are felt to be of sufficient gravity, then they should both be felonies.

(c) The marital exception to sexual assault has been modified substantially. Formerly section 6-4-307 provided:

A person does not violate any provision of this act if the actor and the victim are legally married, unless a decree of judicial separation or restraining order has been granted.

New section 6-2-307 provides:

The fact that the actor and the victim are married to each other is not by itself a defense to a violation of W.S. 6-2-302(a)(i), (ii) or (iii) or 6-2-303(a)(i), (ii), (iii) or (vi).

The effect of the revision is not altogether clear. Instead of total abolition of the marital defense, the Legislature has narrowed it, but has invited the courts to determine the remaining scope of the defense. The language "not *by itself* a defense" gives rise to the likelihood that marriage plus some other fact is a defense. Thus, under the statute, if the actor and the victim are married to each other but not living together, so that the marriage is a mere naked legal relationship without domesticity and conjugality to clothe it, the actor has no defense based upon marriage. But if the actor and the victim are married and cohabitating, maintaining a domestic establishment together, the statutory language leaves open the possibility that these facts, taken together, may constitute a defense. It is by no means certain just what interpretation the courts will place upon this language.¹²⁷

(d) Section 6-2-309, dealing with medical examination of alleged victims, has been enlarged by two subsections. New subsection (e) provides that if a minor's parents cannot be located, the minor may consent to the examination, and subsection (f) now provides that a medical examination is not mandatory if a report of sexual assault is received more than ten days after the alleged incident. In addition, subsection (a) has been amended to make explicit that the alleged victim may refuse a medical examination.

(e) Section 6-2-310, regulating the release of names of alleged victims and accused actors, has been enlarged, and misdemeanor penal sanctions have been authorized against persons who improperly release information. An anomaly appears from the language used, which first provides that names and information shall not "be released or *negligently* allowed to be released," and then provides punishment for *willful* violation of the section. New authority is granted in subsection (b) to restrict disclosure of the

¹²⁶ WYO. STAT. § 6-2-305 (Supp. 1983).

¹²⁷ *Quaere*: What is the effect of WYO. STAT. § 6-1-102(b) (Supp. 1983)?

identity of a minor alleged victim even after filing of an indictment or information.

(f) Former section 6-4-314 on attempted sexual assault in the first or second degree, which imposed a maximum five year sentence, has been repealed. Attempted sexual assaults can be punished under the general attempt statute, section 6-1-301, and persons convicted may receive punishment equal to that provided for the completed offense.¹²⁸

4. *Robbery and Blackmail*

a. *Robbery*

Previous Wyoming robbery statutes were fairly straightforward expressions of the common law. Robbery was a forcible and felonious taking "from the person of another any article of value, by violence or by putting in fear."¹²⁹ If a firearm or other deadly weapon was used or exhibited, the crime was aggravated robbery.¹³⁰

Section 6-2-401 of the new Code embodies both robbery and aggravated robbery, and has both broadened and narrowed the common law definition. The broadening may spill over into the area of extortion,¹³¹ but the narrowing may have unintended consequences which eliminate from the new crime of robbery many occurrences that formerly fell within the statute, and which common sentiment would hold should still be regarded as robbery. Further, the narrowing may restrict the applicability of aggravated robbery.

Section 6-2-401 broadens the common law in two respects. First robbery may now occur if, in the course of larceny, which now includes embezzlement and larceny by bailee,¹³² bodily injury is inflicted or immediate bodily injury is threatened. Thus if in fleeing from a larceny the thief injures another, or threatens injury, he commits robbery. If he uses or displays a weapon in the process, he commits aggravated robbery. Plainly none of these acts constituted robbery at common law, since common law robbery required a taking from the person.¹³³ Acts of a similar kind during an attempt to commit larceny would likewise constitute robbery under the new law. Second, it is now robbery if threats are brought to bear upon a person apart from the location of the property which is the subject of the larcenous intent.

But the section also narrows the common law by excluding from the definition of robbery those not uncommon strong-arm takings of property from the person which neither threaten nor inflict bodily injury. Thus under the new law, if a woman with a purse containing \$1500.00 in cash were walking down the street and a purse-snatcher engaged her in a tug-of-war for the purse and was ultimately successful without inflicting injury or threatening bodily injury, the resulting crime would only be larceny.

128. WYO. STAT. § 6-1-304 (Supp. 1983).

129. WYO. STAT. § 6-4-401 (1977).

130. WYO. STAT. § 6-4-402 (1977).

131. WYO. STAT. § 6-4-401 (1977).

132. WYO. STAT. § 6-3-402(b), (d) (Supp. 1983).

133. R. PERKINS & R. BOYCE, CRIMINAL LAW 343 (3d ed. 1982).

Moreover, in the example given, it would only be misdemeanor larceny, inasmuch as the amount involved is under \$2000.00.¹³⁴ Furthermore, if the thief exhibited a deadly weapon this would still not be robbery, much less aggravated robbery, unless bodily injury were inflicted or threatened. It is to be urged that the section be amended to bring strong-arm larceny back within the fold of robbery.

A further change relates to the language "threatens another with or intentionally puts him in fear of immediate bodily injury." This is Model Penal Code language, taken from section 222.1(1)(b). Under common law robbery, threats alone are of no effect unless they actually put the victim in fear;¹³⁵ the new statute makes ineffectual threats or even unheeded threats sufficient to form the basis for robbery. Perhaps this is a simple matter of taking the would-be robber at his word; but it does reflect a shift from result-oriented fear in the victim to the subjective intent-oriented purpose of the would-be robber.

Under the common law, exemplified by Wyoming's prior statutes, robbery related to taking "any article of value,"¹³⁶ which appeared limited to tangible things. Under the new Code's definition of property, which is the subject of larceny, there is included "anything of value whether tangible or intangible, real or personal, public or private." If this definition is given full effect, services can now become the subject of robbery. This may evidence an inconsistency in the Code, since on the one hand any robbery is a felony, no matter the value of the property taken, while under the statute dealing with theft of services, the taking of services by threat may be either a misdemeanor or a felony, depending upon whether the services appropriated are worth \$2000.00 or more.¹³⁷

b. *Blackmail*

Blackmail is another crime which has been "modernized" by the 1982 Wyoming Criminal Code, although not without considerable enlargement of its elements and the accompanying possibility of accomplishing some unintended and unexpected results. Wyoming's earlier blackmail statutes originated with an act approved December 10, 1869, forbidding extortionate threats to accuse others of crime.¹³⁸ In 1890 a blackmail statute incorporating threats of injury to person or property as well as of accusation was enacted,¹³⁹ and this cataloging of threatened harms remained the law until the effective date of the 1982 Code.

The new blackmail statute is an attempt to simplify the former law, and in so doing it draws upon and mingles Model Penal Code provisions. M.P.C. section 223.4 deals with theft by extortion and includes threats which are more explicitly described than Wyoming's new section 6-2-402; but the Wyoming statute goes beyond threats to obtain property, and includes threats intended "to compel action or inaction by any person against his

134. WYO. STAT. § 6-3-402 (Supp. 1983).

135. R. PERKINS & R. BOYCE, *supra* note 133, at 348.

136. WYO. STAT. § 6-4-401 (1977). Aggravated robbery used the language "any property of value." *But cf.* § 6-1-101(a) (i) (1977).

137. WYO. STAT. § 6-3-408 (Supp. 1983).

138. 1876 WYO. COMP. LAWS ch. 35, tit. 5, § 41.

139. 1890 WYO. SESS. LAWS ch. 73, § 34.

will." This additional language may implicate Model Penal Code section 212.5, Criminal Coercion, but the additional language may go beyond and extend to such unintended things as false imprisonment by threat.

Three salient features of the Wyoming statute bear note. First, the Model Penal Code sections expressly provide that it is an affirmative defense to theft by extortion¹⁴⁰ or to criminal coercion¹⁴¹ that the property obtained or the action demanded was justified or honestly claimed. Wyoming section 6-2-402 is silent as to any possible justifications. Therefore under the Wyoming statute persons making honest claims may unwittingly commit blackmail. One example is the attorney in a divorce action who urges upon his adversary a custody arrangement favorable to the attorney's client, "so we don't have to go court and air your client's dirty linen"—meaning a propensity to sexual acts with young boys.¹⁴² A second is the householder who returns home to find his flower garden ravaged, and who is informed that the neighbor's teen-age boys were observed trampling the tulips. For him to suggest to the neighbor that if recompense is made "it won't be necessary to bring this to the attention of the police," is blackmail under the new Code. Unless the Legislature intends as the public policy of Wyoming that all disputes be fully litigated or that all petty complaints be made to the authorities rather than settled between the parties, it would be well to add a provision that claims reasonably made in a good faith effort to effect settlements of disputes are not blackmail.

A second feature of the Wyoming statute is that blackmail is invariably a felony, no matter how small the property or action or inaction that is sought. This should be contrasted with section 6-3-408, theft of services, where theft of services by threat is graded according to the value of the services appropriated. Further, it should be noted that false imprisonment by force is but a misdemeanor,¹⁴³ while the same imprisonment caused by threat (compelled inaction interfering substantially with liberty) can be blackmail and thereby a felony.

A third feature is the newly incorporated concept of aggravated blackmail, whereby if in the course of committing blackmail the accused injures another person the punishment is increased to a minimum of five years and maximum of twenty-five years imprisonment. This seems to have been some legislator's "good thing" gone amuck. Blackmail is a crime not involving violence; if intentional violence occurs, the some other crime is committed. But Wyoming's new aggravated blackmail provision imposes what appears to be a strict liability element, causing injury to another person, upon the corpus of the crime of blackmail. There is no indication in the statute as to the strength of the causal connection between those activities related to the blackmail and the personal injury. Conceivably the injury may be inflicted under circumstances which have only slight connection with the purpose of the blackmail, as where the blackmailer negligently collides with another vehicle while driving to mail his latest demand. And since blackmail is among the more protracted of crimes, any blackmailer will likely remain at risk for a long time.

140. MODEL PENAL CODE § 223.4 (P.O.D. 1962).

141. MODEL PENAL CODE § 212.5(l) (P.O.D. 1962).

142. *Compare* State v. Harrington, 128 Vt. 242, 260 A.2d 692 (1969).

143. WYO. STAT. § 6-2-203 (Supp. 1983).

5. Assault and Battery

a. Simple Assault; Battery

Wyoming has traditionally defined simple assault narrowly, restricting it to attempts to cause violent injury to another, with present ability to do so.¹⁴⁴ Likewise, the penalty has been low: the prior statute imposed as maximum punishment a \$50.00 fine.¹⁴⁵ Battery has been defined as a touching of another in "a rude, insolent or angry manner."¹⁴⁶

The 1982 Criminal Code retains the traditional content of these crimes. Section 6-2-501 provides that simple assault is committed when a person "having the present ability to do so . . . unlawfully attempts to cause bodily injury to another." Punishment is by fine alone, with a maximum of \$750.00. Battery has been extended to include both the rude, insolent or angry touching and "intentionally, knowingly or recklessly" causing bodily injury to another. Punishment for battery is a maximum six months' imprisonment and \$750.00 fine.

Thus in Wyoming, assault by putting another in fear of imminent touching or bodily injury remains non-criminal. Also, it may be questioned whether the Legislature has not chosen to treat simple assaults too lightly; persons with a propensity for inflicting violence may best be deterred by the threat of a jail sentence. The Model Penal Code makes imprisonment a possible penalty for simple assault,¹⁴⁷ expressly providing in its sentencing section that a fine alone shall be imposed by the court only when it is of the opinion that "the fine alone suffices for protection of the public."¹⁴⁸

The new battery provision, under which bodily injury attributable to recklessness will suffice for conviction, means that a person may be guilty of battery without intending to cause bodily injury or even to touch the victim, if the person consciously disregards a substantial and unjustifiable risk that bodily injury will result from his conduct.¹⁴⁹

b. Aggravated Assault and Battery

Aggravated assault and battery, section 6-2-502, is derived from several earlier Wyoming statutes, including aggravated assault and battery,¹⁵⁰ and mayhem.¹⁵¹ The section broadens the scope of what may constitute an aggravated assault, and also seeks to serve as a substitute for the former statute on killing an unborn child by assault and battery upon the mother.

Aggravated assault and battery may be committed in four ways:

(1) Causing serious bodily injury intentionally, knowingly or recklessly "under circumstances manifesting extreme indifference to the value of

144. WYO. STAT. § 6-4-501 (1977).

145. *Id.*

146. WYO. STAT. § 6-4-502 (1977).

147. MODEL PENAL CODE §§ 211.1(1); 6.08, 6.09 (P.O.D. 1962).

148. MODEL PENAL CODE § 7.02 (P.O.D. 1962).

149. See definition of "recklessly" in WYO. STAT. § 6-1-104(a) (ix) (Supp. 1983).

150. WYO. STAT. § 6-4-506 (1977).

151. WYO. STAT. § 6-4-601 (1977).

human life." The language is derived from Model Penal Code section 211.1(2)(a). The terms "intentionally" and "knowingly" are not defined in the Wyoming statutes, but presumably they should be given the same meaning as in the Model Penal Code.

(2) Attempting to cause, or intentionally or knowingly causing, bodily injury to another with a deadly weapon. This is again Model Penal Code language, from section 211.1(2)(b). Attempting to cause this injury is included within the Model Penal Code as well as in the Wyoming statute, but need not be included in either, inasmuch as attempts are punishable under both codes as seriously as are completed crimes.¹⁵² However, under the Model Penal Code, an assault of this kind is punished less severely than the infliction of bodily injury with extreme indifference to human life.¹⁵³ Under Wyoming section 6-2-502, all included acts are punishable similarly, with a maximum of ten years' imprisonment (but without provision for a fine, interestingly enough).

(3) Threatening to use a drawn deadly weapon unless "reasonably necessary in defense of [one's] person, property or abode or to prevent serious bodily injury to another." This provision, which describes neither an assault nor a battery, may be misconceived. Its Wyoming antecedents are a misdemeanor statute carrying a maximum penalty of six months' imprisonment and a \$100.00 fine,¹⁵⁴ and a felony statute dealing with a malicious assault with a deadly weapon.¹⁵⁵ Nothing in these statutes would appear to justify a new statute bearing punishment of a maximum of ten years in prison. Furthermore, the defense of self, property or others provision seems to narrow the prior law by permitting defense of another by a threat only when necessary to prevent serious bodily injury to that other. Plainly, it is well established, particularly with regard to members of one's own family, that one's right to defend others is equal to one's right to defend oneself.¹⁵⁶

(4) Causing bodily injury to a woman whom the person knows is pregnant. On its face, this subsection is objectionable, since it appears to impose strict criminal liability; there is no state of mind required of the defendant in the infliction of the bodily injury. Inasmuch as states of mind are carefully spelled out in the other subsections, the absence of any state of mind here gives strong reason to conclude that none was intended. But a construction of this kind would be an anomaly; a man whose operation of an automobile caused injury to his wife, known to him to be pregnant, would become a felon. Even inadvertent injury would impose a criminal liability, so long as the actor knew the woman to be pregnant. This subsection is said to be a substitute for prior section 6-4-507, which made felonious a killing of an unborn child by an assault upon a woman known to be pregnant. But while in most cases the death of the unborn child could not result without bodily injury or serious bodily injury to the mother, and therefore the purpose as stated would be served, the section may also result in considerable overkill

152. WYO. STAT. §§ 6-1-301, 6-1-304 (Supp. 1983); MODEL PENAL CODE §§ 5.01, 5.05 (P.O.D. 1962).

153. MODEL PENAL CODE § 211.1(2) (P.O.D. 1962).

154. WYO. STAT. § 6-11-102 (1977).

155. WYO. STAT. § 6-4-506 (1977).

156. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 54 (1972).

even if some intentional or knowing mental element were read into the provision. For "bodily injury" may include relatively mild injuries to the woman, which in no way endanger the child within her womb; bodily injury "means physical pain, illness or any impairment of physical condition."¹⁵⁷ This would seem to include momentary pain, as well as any bruising or discoloration. One can possess concern and empathy for pregnant women without insisting that anyone who causes them momentary pain or slight bruising should be made a felon, with potential punishment extending to ten years in prison. It is strongly urged that this subsection needs clarification.

c. Child Abuse

Section 6-2-503 reenacts with minor changes a child abuse statute first enacted in 1977.¹⁵⁸ The section, which is almost a model of bad drafting, imposes imprisonment for up to five years upon any adult who intentionally or recklessly causes a child under sixteen years to suffer physical injury or mental trauma, or to suffer assault and battery, "to a degree as to require medical, psychological or psychiatric treatment to heal or overcome the injuries or damages."¹⁵⁹ The section expressly excepts instances of violation of the aggravated assault and battery section, section 6-2-502, which may be more serious and bear a heavier potential penalty. Much of the section's language wears a heavy veil of vagueness. By the term "mental trauma" just what did the Legislature intend? Conceivably this term embraces common kinds of psychological abuse. But also it might include any act of a reckless or intentional nature that might have traumatic consequences upon the child's psyche. At an extreme, a reckless killing of a child's pet could have such consequences as would justify psychiatric treatment. Nor is it readily apparent why the offense may only be committed by adults; older children who are not yet adults but are serving as babysitters or even as companions are often known to inflict trauma upon their charges.

d. Reckless Endangering

The statute on reckless endangering, section 6-2-504, is new to Wyoming, and is drawn from Model Penal Code section 211.2. The section is intended to penalize as misdemeanors those acts which may fall short of intentional endangerment, but which involve a conscious risk that another will thereby be placed in danger of death or serious bodily injury. The Wyoming statute departs from the Model Penal Code formulation in that under section 6-2-504 the victim must actually be placed in danger, while M.P.C. section 211.2 specifies "conduct which places or may place another person in danger." The distinction may be seen to be of importance in a case in which the defendant drives at a high rate of speed, on the wrong side of the road, over the blind crest of a hill. Under the Model Penal Code, it is not necessary that there be approaching traffic which is actually endangered for reckless endangering to occur; that approaching traffic may be there is enough. But under the Wyoming statute, it is essential that oncoming traffic be present and actually be endangered.¹⁶⁰

157. WYO. STAT. § 6-1-104(a) (i) (Supp. 1983).

158. 1977 WYO. SESS. LAWS ch. 99, § 1.

159. At least the reading given in the text is one possible interpretation of the statute. Another interpretation would be to impose liability for any physical injury or mental trauma, intentionally or recklessly inflicted; as well as liability for any assault and battery necessitating medical, psychological or psychiatric treatment.

160. See Williams, *The Problem of Reckless Attempts*, 1983 CRIM. L. REV. 365.

The second subsection of section 6-2-504 provides that pointing a firearm, apparently whether loaded or unloaded, at or in the direction of another person is reckless endangering, unless the pointing is reasonably necessary in self defense, in defense of one's property, or in defense of another from serious bodily injury. It is curious that the defense of others is qualified by the threat of serious bodily injury, while defense of self is not; this distinction appears to be a limitation which regresses even beyond early law, since a man has historically been generally privileged to use the same force to protect others, including members of his family, as he can use to protect himself.¹⁶¹ The provision making it reckless endangering to point a firearm makes absolute what the Model Penal Code only presumes;¹⁶² evidently the Wyoming Legislature has chosen to avoid any potential problems with presumptions in criminal cases.¹⁶³

e. Terroristic Threats

Section 6-2-505, which prohibits terroristic threats, is new to Wyoming, and is taken almost verbatim from section 211.3 of the Model Penal Code. The M.P.C. provision, however, includes threats of violence both to terrorize individuals and to cause public inconvenience, whether through evacuation of buildings, places of assembly, transportation facilities or otherwise. The Wyoming statute does not include terroristic threats directed solely against individuals. It should be noted that the section deals both with threats which are intended to cause inconvenience and threats which are made in reckless disregard of the risk of causing inconvenience. Therefore no matter what the person making the threat may intend, he may be guilty if he is aware of "a substantial and unjustifiable risk" that inconvenience will result.¹⁶⁴

[Editor's note: The second half of Dean Lauer's article will appear in Volume XIX, No. 2.]

161. See W. LAFAVE & A. SCOTT, *supra* note 156; R. PERKINS & R. BOYCE, *supra* note 133, at 1144.

162. MODEL PENAL CODE § 211.2 (P.O.D. 1962), provides in part: "Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded."

163. See *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

164. WYO. STAT. § 6-1-104(a) (ix) (Supp. 1983).