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This is the second part of a two-part article on the Wyoming Criminal Code of 1982, which became effective July 1, 1983. The first part, published in the Fall Issue, dealt with background, general provisions, and crimes against persons. This part covers crimes against property, morals and family, public administration, public peace, and public policy; weapons and miscellaneous offenses; and sentencing.

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

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Prefatory Note: The 1984 Legislative Session

The 1984 session of the Wyoming Legislature amended a number of sections of the 1982 Criminal Code, including some sections involving crimes against persons which were critically discussed in the first part of this article.

One 1984 amendment corrects section 6-2-106(b), aggravated homicide by vehicle, by deleting the confusing and needless repetition of "while driving a vehicle," thus clarifying the legislative intent, and avoiding a possible construction that the victim must be a driver of another vehicle.2

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1. Enrolled Act No. 36, Forty-Seventh Legislature of the State of Wyoming, 1984 Budget Session. These amendments affected crimes against persons and other sections of the 1982 Criminal Code. The amendments affecting crimes against property and subsequent sections of the Criminal Code are discussed where relevant in this second part of this article.

2. See discussion at 19 LAND & WATER L. REV. 124 (1984). In connection with the question of whether it is necessary under WYO. STAT. § 6-2-106(b) (Supp. 1983) that the intoxication of the driver should cause the death of the victim, see Armijo v. State, No. 83-86, decided by the Wyoming Supreme Court on March 21, 1984. While Armijo does not provide the definitive answer, it is at least instructive, and arguably leans to the view that it is enough that the driving of an intoxicated person which causes the death of another is sufficient without the state being required to prove that the intoxication caused the death.
A second important amendment is to section 6-2-502, on aggravated assault and battery.\(^3\) The previous version had punished as felony one who “[c]auses bodily injury to a woman whom [sic] he knows is pregnant,” without specifying any required mental state on the part of the accused. The amended section provides: “Intentionally, knowingly or recklessly causes bodily injury to a woman whom [sic] he knows is pregnant.” Thereby the statute is improved, although not in grammar, by removing the possibility that it might be construed so as to impose strict criminal liability.

A third significant 1984 amendment clarifies and broadens section 6-2-503, on child abuse.\(^4\) The revised section provides that child abuse may be committed by an adult or by any person at least six years older than the victim, thereby making older children, such as babysitters and even siblings, subject to punishment for child abuse. Further, the amendment clarifies the meaning of the physical injury and mental injury that may be inflicted.\(^5\)

**C. Chapter 3: Offenses Against Property**

1. Arson and Related Offenses

   a. Arson

   The 1982 Criminal Code, as amended in 1983 before its effective date, has revised Wyoming’s arson law, but not so thoroughly as might at first appear. There remain four degrees of arson, as in the prior statutes, but the elements and punishments have been rearranged and modified. One change applicable to all four degrees of arson is the expansion of the traditional element of starting a fire to “starts a fire or causes an explosion.”\(^6\)

   Under the prior Wyoming statutes, first degree arson was committed when a person willfully and maliciously set fire to any dwelling house or other structure “that is parcel thereof,” or to any standing timber, whether the property of the defendant or another. Punishment ranged

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4. See discussion at 19 LAND & WATER L. REV. 133 (1984), where the section was described as “almost a model of bad drafting.”

   Other sections dealing with crimes against persons which were amended in 1984 are: (1) Section 6-2-204, interference with custody of a minor. The section was broadened to include failure to return a minor to the custodian as well as taking a child from the custodian. (2) Sections 6-2-304 and 6-2-305 which dealt with sexual assault by sexual contact which does not inflict serious bodily injury. Under § 6-2-304(a)(ii) it is now a third degree sexual assault for an adult to inflict sexual contact upon a child under twelve without causing serious bodily injury. (It is second degree sexual assault under § 6-2-305(b) if serious bodily injury is caused.) Section 6-2-305 now is broadened and clarified through expansion of the circumstances under which sexual contact may occur, and through making clear that the section only applies to instances where serious bodily injury is not caused. (3) Section 6-2-402 on blackmail is clarified, perhaps unnecessarily, by use of the term “bodily injury” rather than “personal injury” or “injures another person.” This change, in the interests of consistency, adopts language used in other Criminal Code sections.

5. The amended section uses “physical injury” as defined in WYO. STAT. § 14-3-202(a)(ii) (B) (1977), and “mental injury” as defined in WYO. STAT. § 14-3-202(a)(ii) (A) (1977).

6. The expanded “causes an explosion” language was drawn from MODEL PENAL CODE § 220.1 (P.O.D. 1962).
from two to twenty years’ imprisonment. Second degree arson covered willful and malicious burning of any other building or structure, whether the property of the defendant or another, and was punishable with one to ten years’ imprisonment. Third degree arson was willful and malicious burning of any other property of another person, whether real or personal, having a value of $25 or more, and was punishable by imprisonment from one to three years. Fourth degree arson was attempt to commit arson in any of the other degrees, and was punishable by imprisonment from one to two years, and a fine of $1,000. An additional section made it a felony willfully and with intent to injure or defraud an insurer to burn or attempt to burn any property; the punishment was one to five years’ imprisonment.

Under the 1982 Wyoming Criminal Code, first-degree arson, section 6-3-101, is committed when a person “maliciously starts a fire or causes an explosion with intent to destroy or damage an occupied structure.” “Occupied structure” is defined to mean a structure or vehicle where persons live, carry on business, assemble, have overnight accommodations, or can reasonably be expected to be present. As under the prior law, the occupied structure is not limited to those which are the property of others; the section covers burning one’s own occupied structure. The former provision which included standing timber within the property which might be the subject of first-degree arson, has not been retained. The punishment for first-degree arson is imprisonment for not more than twenty years, and a fine of up to $20,000 or, “if the fire was started to cause collection of insurance for the loss,” a fine in an amount not to exceed twice the face amount of the insurance. The fine based upon the amount of insurance is an innovation in Wyoming.

Second-degree arson, section 6-3-102, is what was formerly section 6-7-105, setting a fire “with intent to injure or defraud the insurer.” The new section requires that a person start a fire or cause an explosion “with intent to destroy or damage any property to cause collection of insurance

12. The word “maliciously” in first-degree arson is probably unnecessary. While traditionally arson has required that a fire be “willfully and maliciously” started, the term “maliciously” has meant something less than intentionally. See R. Perkins & R. Boyce, Criminal Law 866-61 (3d ed. 1982), where a malicious state of mind is said to be one wherein there is an absence of justification, excuse or mitigation, and either an intent to cause a particular harm or the “wanton and wilful doing of an act with awareness of a plain and strong likelihood that such harm may result.” Id. at 860. But where, as in first degree arson, the act of starting the fire must be done “with intent to destroy or damage an occupied structure,” it is clear that only an intent to cause the harm will suffice, and a knowing or reckless state of mind is not enough.
for the loss." Second-degree arson is a felony, with the maximum punishment increased from five to ten years' imprisonment, and with a new provision for a fine "of not more than two (2) times the face amount of the insurance." While there is no specific exclusion from second-degree arson of those fires set to collect insurance on occupied structures, it may be inferred from the inclusion of the twice-the-face-amount-of-the-insurance provision in the sanctions for first-degree arson that the Legislature intended that fires set for any reason with intent to destroy or damage an occupied structure are to be prosecuted as first-degree arson.

It is unclear whether second-degree arson is principally an arson statute, whose purpose is to punish the endangering of persons or property by setting fires, or if it is principally a statute directed against defrauding insurance companies. If it is a fraud statute, then it should be placed with the statutes punishing fraud, and should either be a part of a general fraud statute, or if applicable only to insurance fraud should be broadened to include other types of fraud against insurers. On the other hand, if it is an arson statute it should not extend to any burning of whatever kind of property, but only to those burnings or explosions which pose a danger to persons or other property. Thus under the new Code it is second-degree arson for a person to burn an insured painting in his fireplace or trash burner, if done with intent to cause the collection of insurance; but this does not endanger others, and is more properly a fraud rather than an arson.

Third-degree arson, section 6-3-103, covers intentionally starting a fire or causing an explosion and "intentionally, recklessly or with criminal negligence" either placing another "in danger of bodily injury" or destroying or damaging property of another of the value of $200 or more. Maximum punishment is five years' imprisonment and a $5,000 fine. The section should be read to exclude intentionally destroying or damaging occupied structures, which should be punished as first-degree arson. Also, if the act is an attempt to kill or cause bodily injury to another, it can be prosecuted as attempted murder or aggravated assault.

The language in third-degree arson, "[p]laces another in danger of bodily injury," does not specify how danger is to be proved or measured. Every fire may pose some dangers to persons who seek to extinguish it, or are within close proximity to it. The nature of fire is that it is dangerous. Granting that this language originates in section 220.1(2)(a) of the Model Penal Code, and that the widely varying potential factual settings under

15. Compare Model Penal Code § 220.1(1) (b), which provides that in connection with destroying or damaging property to collect insurance, "[i]t shall be an affirmative defense to prosecution under this paragraph that the actor's conduct did not recklessly endanger any building or occupied structure or place any other person in danger of death or bodily injury."


17. See the discussion on this subject in Model Penal Code and Commentaries, Comment to § 220.1, Arson and Related Offenses 9, 25-28 (1960).


20. Model Penal Code § 220.1(2) (P.O.D. 1962) states: "purposely starts a fire or causes an explosion, whether on his own property or another's and thereby recklessly: (a) places another person in danger of death or bodily injury." This subsection also makes criminal the act of endangering a building or occupied structure of another, and does not require damage or destruction.
which fires may be started make difficult any precise definition, it remains questionable whether too great discretion will not be left with the jury in prosecutions under this section. It should also be noted that the section applies to destruction or damage of property "which has a value of two hundred dollars ($200.00) or more." Thus it is the value of the property, and not the amount of injury to the property which controls.

Fourth-degree arson, section 6-3-104, is similar to third-degree arson, except that it does not include endangering persons, and applies to destruction or damage to property with a value of less than $200. Fourth degree arson is a misdemeanor, with maximum punishment of imprisonment for one year and fine of $750.

b. Related Offenses

Three sections dealing with fire, but not denominated arson, are brought forward into the 1982 Criminal Code from prior law without significant change other than an increase in the maximum punishment which may be imposed.

Negligently burning woods, prairie or grounds, section 6-3-105, is taken from a statute first enacted in 1890. The statute punishes a person who, with criminal negligence and without the owner's consent, sets fire to the woods, prairie or grounds of another, or allows a fire to pass "from the owner's woods, prairie or grounds to the injury or destruction of any property of another." The crime is a petty misdemeanor, with the usual six month, §750 fine maximum punishment.

Section 6-3-105 is not free from problems. First, it may duplicate in part section 6-3-103 on third-degree arson, which carries a felony penalty. While third-degree arson does not specify woods, prairie or grounds, but applies generally to fires no matter where they may occur, its coverage embraces some acts which also fall within 6-3-105. Second, the provision punishing a person who allows a fire to pass from "the owner's woods, prairie or grounds" is unclear. This act must be done without "permission of the owner and acting with criminal negligence." If "owner" is used in the same sense in both instances, the scope of the statute is sharply reduced, since if the fire starts on the land of A, who with criminal negligence permits it to escape to the land of B, only if A acts without his own permission will he be criminally liable. Further, it is not clear whether a person who with criminal negligence allows a fire to pass from the property of one person to that of another need be responsible for the starting of the fire before he will be guilty under this section. An alternate reading is that a person is responsible for fires which occur on his land, no matter how they may have originated, and must use some degree of care (so that his acts

22. Compare WYO. STAT. § 6-3-201 (Supp. 1983), dealing with property destruction and defacement. Conceivably, destroying another's property by burning could fall within this section. However, when the damage or destruction of property is due to burning or explosion, the penalty may be greater than when it is inflicted by other means.
23. 1890 WYO. Sess. Laws ch. 73, § 36. Immediately prior to the enactment of the 1982 Criminal Code, the provision was found in WYO. STAT. § 6-7-105 (1977), which provided maximum punishment of 30 days and $100.
cannot be characterized as criminal negligence) to prevent the escape of the fire to the lands of others.

Failure to extinguish or contain a fire, section 6-3-106, occurs when a person “lights a fire in any woods or on any prairie and leaves the vicinity of the fire without extinguishing it or containing it so it does not spread and is not likely to spread.” The punishment is only by fine, with maximum of $750. The statute could have been more comprehensively drawn if the language “in any woods or on any prairie” had been deleted. This would create a statute which punished the act of lighting a fire anywhere and then abandoning it. While the Legislature may have intended to limit the application of this section to rural surroundings, one problem is that even the rural world of Wyoming is not divided neatly into the two categories of woods and prairie. If the place where the fire is set cannot be described as woods or prairie, then no matter how dangerous it may be to abandon the fire, there cannot be a conviction under this section.

Throwing a burning substance from a vehicle, section 6-3-107, may duplicate the littering statute; the penalty is the same, imprisonment for not more than six months, and a fine of not more than $750. If there is to be a statute imposing criminal penalties for discarding burning substances, then it should not be limited to persons who are in vehicles. A person who has alighted from a vehicle, as well as one who is walking or even sitting down, and drops or throws a burning substance, may be equally dangerous.

c. Arson Reporting Immunity Act

Sections 6-3-108 through 6-3-110 reenact what was formerly titled the “Arson Reporting Immunity Act,” first enacted in 1981. These sections, predominantly civil rather than criminal in nature, provide for an insurance company to release information relating to a fire loss to a state or federal agency concerned with prosecuting arson or controlling fires. The statute specifies the agencies to which information must be released when requested, and the kind of information which must be released. An agency which has been furnished information may reciprocate by furnishing information to the insurance company. Immunity from civil and criminal liability “incident to the release of the information” is accorded insurance companies and agencies. A provision requiring that the information so received shall be held “in confidence,” except “where authorized by the source of the information,” by the statutes themselves, or by “a court of competent jurisdiction” may impair the efficacy of the statute.

24. The section is taken from WYO. STAT. § 6-7-107 (1977), first enacted as 1907 Wyo. Sess. Laws ch. 22, § 1. Section 6-7-107 provided for imprisonment of from ten to thirty days, and a fine of from $10 to $100. This is one of the relatively rare sections of the Criminal Code in which the penalty was reduced from the prior law.

25. Littering is found in Wyo. STAT. § 6-3-204 (Supp. 1983).


27. Wyo. STAT. §§ 6-3-108(a) (i), 6-3-109(a) (Supp. 1983).


29. Wyo. STAT. § 6-3-110 (Supp. 1983). One difficulty here is that it may be unclear as to who “the source of information” may be. Another is determining what procedures and standards are to be used by the “court of competent jurisdiction” in authorizing the release of information. Further, it is not clear that the information can be presented to a grand jury or used as the basis for criminal charges unless release is authorized. Finally, there are no sanctions for violation of the statute which ordains the information be held in confidence.
These sections are not well drafted, and if they are to be of significant value in bringing about a reporting and exchange of information between insurers and governmental agencies concerned with arson, they must be clarified and expanded. There are no adequate provisions for coordination. An insurer "which has reason to believe a fire loss was caused by other than accident" must notify an agency thereof; but the insurer has its choice of which agency, ranging from the local fire department to the FBI, is to be given the report.\textsuperscript{30} And once an agency has received information, it has full discretion whether or not to share the information with other agencies.\textsuperscript{31} If Wyoming is serious about reporting information of this nature, then the statute must be made fully functional. Additionally, the artificial restriction to information concerning only fire losses should be removed, and the statutes should be made applicable to insurance of all kinds.

\textit{2. Property Destruction and Defacement}

Article 2 of Chapter 3 of the 1982 Criminal Code contains four loosely-related sections dealing with property: property destruction and defacement;\textsuperscript{32} altering landmarks;\textsuperscript{33} cruelty to animals;\textsuperscript{34} and littering.\textsuperscript{35} These sections are largely unchanged from prior law.

Property destruction and defacement, section 6-3-201, punishes a person who "knowingly defaces, injures or destroys property of another without the owner's consent." This section, derived without substantial change from former section 6-10-105,\textsuperscript{36} is intended to replace a number of prior statutes dealing with a wide assortment of property damage or destruction, ranging from cemeteries\textsuperscript{37} to highway signs.\textsuperscript{38} The new section 6-3-201 has taken the place of time-honored statutes such as the one which imposed a fine not to exceed $5,000 and imprisonment up to one year on anyone "who shall willfully and intentionally break down, pull down, or otherwise destroy or injure, in whole or in part, any public jail, or other place of lawful confinement."\textsuperscript{39} Under the new section 6-3-201 penalties for property destruction and defacement are graded according to the cost of restoring damaged property, or the value of property destroyed. If this repair cost or value is less than $500, the punishment may be six months' imprisonment and a $750 fine; if $500 or more but less than $1,000, punishment may be a year's imprisonment and $1,000 fine; and if $1,000 or more, the crime is a felony and maximum punishment is five years' imprisonment and $5,000 fine.\textsuperscript{40} There is a provision for aggregating the amount of injuries resulting from "a single continuing course of conduct," so that the

\textsuperscript{30} Wyo. Stat. § 6-3-109(b) (Supp. 1983).
\textsuperscript{31} Wyo. Stat. § 6-3-109(c) (Supp. 1983).
\textsuperscript{32} Wyo. Stat. § 6-3-201 (Supp. 1983).
\textsuperscript{33} Wyo. Stat. § 6-3-202 (Supp. 1983).
\textsuperscript{34} Wyo. Stat. § 6-3-203 (Supp. 1983).
\textsuperscript{35} Wyo. Stat. § 6-3-204 (Supp. 1983).
\textsuperscript{36} Originally enacted as 1973 Wyo. Sess. Laws ch. 191, § 1. The only change is in the punishment for destruction or damage of under $500, where the maximum fine has been raised from $100 to $750.
\textsuperscript{39} Wyo. Stat. § 6-8-708 (1977), first enacted as 1876 Wyo. Comp. Laws ch. 35, § 152.
\textsuperscript{40} Wyo. Stat. § 6-3-201(c) (Supp. 1983).
damage from a number of connected acts may be added together to make the crime more serious, and the defendant subject to greater penalties. A

Altering landmarks, section 6-3-202, is derived without substantial change from a statute first enacted in 1890. The section is limited to acts of knowingly altering or destroying landmarks, monuments and bearing-trees which evidence the corners or boundaries of tracts of land. Maximum penalty is six months' imprisonment and a $750 fine. The conduct included within this section is almost certainly already covered by the general statute on property destruction and defacement, making this section superfluous. This section could stand alone if a new subsection were added, by which an aggravated violation would be created for instances where the landmark was altered or destroyed with intent to defraud.

Section 6-3-203 of the 1982 Criminal Code, dealing with cruelty to animals, has been enacted for a salutary purpose, and incorporates provisions drawn from earlier statutes. The penalty is a misdemeanor, with maximum imprisonment for six months and maximum fine of $750. The language of the statute is very broad, and will leave a great deal of latitude in interpretation to prosecutors, judges and juries. While some acts will clearly fall within the statute, such as starving domestic animals, others are not so evident. Thus section 6-3-203(a) makes a person guilty of cruelty to animals "if, without lawful authority, he knowingly: . . . (ii) Unnecessarily . . . kills an animal." When is killing an animal unnecessary? What is meant by "lawful authority"? In one sense, ownership may grant lawful authority, so that the owner of an animal may kill it even when it is not necessary that he do so. Therefore is it only an animal which is the property of another that may not be killed unnecessarily?

Littering, section 6-3-204, is new, being derived from several statutory sections previously located under Title 35, Public Health and Safety. Littering is committed when a person "places, throws, scatters or deposits garbage, debris, refuse or waste material, objects or substances, including

41. WYO. STAT. § 6-3-201(e) (Supp. 1983).
42. 1890 WYO. SESS. LAWS ch. 73, § 69, most recently codified in WYO. STAT. § 6-10-111 (1977). Formerly, the maximum punishment was six months' imprisonment and a fine of $100.
43. WYO. STAT. § 6-3-202(b) (Supp. 1983).
44. Certainly landmarks are "property" within WYO. STAT. § 6-3-201(a) (Supp. 1983); and no matter how small the value of a landmark destroyed or damaged, a penalty of up to six months' imprisonment and a fine of $750 could be imposed under § 6-3-201(b)—which is the same maximum penalty that could be imposed under the landmark statute, § 6-3-202(b).
45. If there is sufficient concern over landmarks as a special species of property to warrant a statute directed to injury to landmarks, then perhaps the section could be improved by being broadened to cover destruction or damage to other kinds of identifying markers, such as those showing the location of buried cables and pipelines. Moreover, a strong argument can be made that to punish destruction of signs, landmarks and other symbols based on the value of the marker fails to deal with the real injury which removal of such a sign or landmark may cause or make likely. Thus destruction of a highway stop sign may amount to a loss of a few dollars incurred in replacing the sign; but if the absence of the sign causes a driver to enter a main traveled road without stopping, with ensuing danger or perhaps personal injury or death, then a much more severe punishment for endangering may be appropriate.
abandoned or junked vehicles, upon the property of another." The crime is a misdemeanor, with maximum punishment of six months' imprisonment and $750 fine, and with an added provision permitting the sentencing court to impose up to forty hours of labor in cleaning litter from roads, parks and other public places. One noteworthy feature of the littering statute holds operators of motor vehicles responsible for matter thrown from the vehicle while it is being operated on the public roads. While this provision may solve the difficult problem of proving which occupant of a vehicle threw the trash from the window, it will also make the driver of a school bus criminally liable for things the passengers do, which may be wholly beyond the driver's control. One remarkable omission, particularly in windy Wyoming, is the failure to prescribe punishment for persons who throw litter onto their own lands and permit it to be blown or washed onto the lands of others.

3. Burglary and Criminal Intrusion

a. Burglary

Burglary is characterized as a preparatory crime, since it must be committed to facilitate the commission of a further crime. At common law, burglary was the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony. Legislatures have gradually but inexorably broadened the elements of burglary to include structures of many kinds, entry in the daytime as well as the nighttime, and entry without breaking.

In Wyoming, as early as 1876 burglary had been expanded from the common law definition to include both forcible breaking and entering and entry without force through an open door or window, as well as an entry into an inner room by one lawfully within a building. Included structures had been enlarged from dwellings to include a number of enumerated structures ranging from malt houses to saloons to water craft to railroad cars, "or any other close enclosure." The common law limitation of burglary to nighttime activity had been deleted.

By 1957, the burglary statute had evolved to the place that force was no longer required, but it was enough that the entry was made "without the consent of the person in lawful possession and with intent to steal or

48. WYOMING STAT. § 6-3-204(c) (Supp. 1983). Subsection (b) places a limitation upon the littering statute: "This section does not apply to discharges which are regulated, controlled or limited by air, land or water quality laws or regulations." Whether the assumption underlying subsection (b), that the responsible state agency will assiduously enforce all laws and regulations throughout the state, so that local law enforcement officials need not be concerned with violations, is validly founded, remains to be seen.

49. WYOMING STAT. § 6-3-204(b) (Supp. 1983).

50. WYOMING STAT. § 6-3-204(a) (Supp. 1983). Does a provision of this kind, imposing strict criminal liability for acts which may be those of another, pass constitutional muster? Even provisions which merely create inferences of this nature, which the trier of fact may or may not draw, have caused controversy. Cf. County Court v. Allen, 442 U.S. 140 (1979).


52. See, e.g., MODEL PENAL CODE § 221.1 (P.O.D. 1962).

53. 1876 WYOMING COMP. LAWS ch. 35, § 38. The punishment for burglary was imprisonment from one to ten years.

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commit a felony.” Included structures had also changed with the times to  
cover, as well as buildings and dwellings, an “enclosed portion of any  
automobile, vehicle, or aircraft,” or a “locked enclosed cargo portion of a  
truck or trailer.”

The 1982 Wyoming Criminal Code expands slightly upon the pre-
existing law by broadening the act to “without authority, enters or remains  
in,” and by expanding the category of structures to include “a building, oc-
cupied structure or vehicle, or separately secured or occupied portion  
thereof.” “Occupied structure” is defined to include any structure or  
vehicle where “any person lives or carries on business or other calling”, or  
where people assemble; or which “is used for overnight accommodation  
of persons”, or in which “a person may reasonably be expected to be  
present.” The new Code defines “vehicle” to mean “any device by which  
persons or property may be moved, carried or transported over land, water  
or air.” Thus there may be burglary of hot air balloons, snowmobiles,  
elevators and escalators, pipelines, and perhaps even telephone cables.  
Whatever it is that the ingenious thief might wish to steal from or to com-
mit a felony by entering, he will probably discover that the Legislature has  
declared the act to be burglary.

The maximum imprisonment for burglary has been reduced from four-
ten to ten years, with additional provision for a fine of up to $14,000. The  
fine is a relic of an earlier version of the 1982 Criminal Code, which had  
reduced the ten year maximum period of imprisonment and affixed a  
fine of $14,000 in the apparent belief that a fine equal to $1,000 for every  
year of the maximum imprisonment was fitting and appropriate.

54. 1957 WYO. SESS. LAWS ch. 185, § 1, later codified as WYO. STAT. § 6-7-201 (1977). The  
statute declared burglary to be a felony, with punishment of up to fourteen years.
55. Id. By 1957 aggravitated burglary had also been added to the statute. See infra text accom-
panying note 67 for discussion of aggravated burglary.
56. WYO. STAT. § 6-3-301 (Supp. 1983).
57. WYO. STAT. § 6-1-104(a) (v) (A) (Supp. 1983). This definition would include a fruit  
vendor’s roadside stand.
58. WYO. STAT. § 6-1-104(a) (v) (B) (Supp. 1983). This definition would include a chataqua  
tent. Would it include a stadium? No definition of “structure” is found in the 1982 Code.  
It could conceivably be construed to mean anything which has been constructed, but  
seems more likely to be limited to buildings and the like.
59. WYO. STAT. § 6-1-104(a) (v) (C) (Supp. 1983). This definition would include a pup tent, but  
probably not a sleeping bag since it would be stretching matters to describe it as a  
“structure.”
60. WYO. STAT. § 6-1-104(a) (v) (D) (Supp. 1983). This definition would cover a tree house or a  
baby carriage.
61. WYO. STAT. § 6-1-104(a) (xi) (Supp. 1983).
62. The limitation that the intent must be “to commit larceny or a felony therein” might  
make burglary of a telephone cable difficult, and burglary of microwave transmission  
imp-ossible. (Emphasis added).
63. Even stealing coins from a fountain might be burglary if someone could reasonably be ex-
pected to be present in the fountain.
64. As noted, under WYO. STAT. § 6-7-201 (1977), punishment for burglary was not more  
than fourteen years. The original version of the 1982 Code retained the fourteen year  
maximum, but added a fine of up to $14,000. 1982 WYO. SESS. LAWS ch. 75, § 3, §  
6-3-301(b). The 1983 amendment reduced the maximum punishment to ten years, but re-
tained the $14,000 fine. WYO. STAT. § 6-3-301(b) (Supp. 1983).
65. Many, but not all other sections of the 1982 Criminal code are consistent with this app-
roach: see, e.g., WYO. STAT. § 6-3-101 (20 years, $20,000); § 6-4-401 (6 years, $5,000); §  
6-5-203(c) (ii) (3 years, $3000) (Supp. 1983). And the original version of aggravated bat-
tery in 1982 WYO. SESS. LAWS ch. 75, § 3, § 6-3-301(b), provided maximum punishment of  
50 years and a fine of $50,000.
It is noteworthy that burglary is limited to instances where there is "intent to commit larceny or a felony therein." Thus when a person breaks into a building so he can gain access to an enclosed yard or the roof of an adjoining building from which he can steal property, or to enable him to hide so that he can emerge suddenly to assault or rob another, it is not burglary. 66

The revision of the burglary statute has created an uncertainty through elimination of the earlier provision that "entry into a place during the time when it is open to the general public is with consent." 67 Thus under the prior law it was not burglary to enter a store, during business hours, with the intent to shoplift. The present language "without authority" raises the question whether a person who so enters a store does so without authority, since it could be argued that the only authorized entry would be for lawful business purposes.

b. Aggravated Burglary

A person is guilty of aggravated burglary under the 1982 Code if, "in the course of committing the crime of burglary," he "[i]s or becomes armed with or uses a deadly weapon or a simulated deadly weapon," or attempts to inflict bodily injury or knowingly or recklessly inflicts bodily injury. 68 "In the course of committing the crime" includes both the period during which an attempt is made, and that in which the actor is "in flight after the attempt or commission." 69

Aggravated burglary was formerly punishable by imprisonment from five to fifty years, and this was retained in the original version of the 1982 Criminal Code, which added a fine of up to $50,000, or both fine and imprisonment. The 1983 amendment reduced the maximum imprisonment to twenty-five years, but retained the $50,000 fine. It may be wondered whether a fine would ever be an adequate alternative to imprisonment for aggravated burglary. Further, under the statute as now worded, if imprisonment is to be imposed, there is a minimum of five years; yet a court could, consistently with the language of the section, impose a fine of $10 without any imprisonment.

The new concept of "in the course of committing the crime of burglary" is drawn from the Model Penal Code, 70 and broadens the scope of aggravated burglary to a very significant degree. Thus a would-be burglar who is armed with a gun, which he leaves in his auto outside the building he intends to burgle, would be guilty of aggravated burglary if the act of driving to the scene is found to be substantial enough to constitute an attempt. Also the burglar who in his efforts to escape becomes armed, or attempts to inflict, or knowingly or recklessly inflicts bodily injury, is guilty of aggravated burglary. Presumably "flight after the attempt or commission" is limited to immediate and continuous flight, which ceases when a place of refuge is reached. The phrase "[i]s or becomes armed with or uses a deadly

67. WYO. STAT. § 6-7-201(c) (1977).
68. WYO. STAT. § 6-3-301(c) (Supp. 1983).
69. WYO. STAT. § 6-3-301(d) (Supp. 1983).
70. MODEL PENAL CODE § 221.2(2) (P.O.D. 1962).
weapon or simulated deadly weapon” could present problems of construction; if not narrowly construed, a burglar who steals a firearm will without more be guilty of aggravated burglary. The burglar who steals a toy gun will be similarly guilty, unless “is or becomes armed with” is held to mean something more than mere possession.

c. Criminal Entry

Section 6-3-302 of the new Criminal Code is entitled “criminal entry,” and makes it a misdemeanor for anyone, without authority, knowingly to enter a building or occupied structure, a vehicle, or a separately secured or occupied portion thereof. It is an affirmative defense that entry was made by mistake or in an emergency, that the structure was abandoned, that it was open to the public, or that the accused reasonably believed that the owner or person in charge would have authorized the entry. The section reenacts what formerly was called criminal trespass.\footnote{\text{71}}

A question arises under section 6-3-302 as to whether requiring the defendant to prove the so-called “affirmative defenses” is a proper allocation of the burden of proof. Particularly troublesome is the issue of whether the structure was open to the public. Thus if the structure was in fact open to the public, need not the prosecution first establish that for some reason defendant was not included within the general license to enter?\footnote{\text{72}} Or in other words, the prosecution must present evidence to prove that the entry was without authority. But if defendant then proved authority, this would be refutation of an element of the state’s case, and not the establishment of an affirmative defense.

d. Criminal Trespass

Criminal trespass, section 6-3-303 of the new Code,\footnote{\text{73}} includes both entry upon and remaining upon premises of another after a person knows he has no authority to do so, or after being notified not to trespass, or to depart. Provisions for notification are more explicit than under the former statute. Notice can be given by personal communication from the owner or occupant, his agent, or a peace officer, or by signs reasonably likely to come to the attention of intruders.\footnote{\text{74}} The crime is a misdemeanor.\footnote{\text{75}}

It is interesting to contrast criminal trespass, as defined in section 6-3-303, with criminal entry, as defined in section 6-3-302. In particular, criminal entry appears to be a more modern and more definitive statute, expressly providing, by way of defenses, those conditions under which a person may make an unauthorized entry into a building or vehicle. Criminal trespass, on the other hand, sets forth no conditions under which unauthorized entry onto lands may not be criminal. Thus, if the statute is read literally, and so as not to imply any defenses, a person entering posted land to preserve life or property in an emergency would nonetheless be guilty of criminal trespass. And since the Legislature expressly provided

\footnotesize{
\begin{itemize}
  \item \text{71. WYO. STAT. § 6-10-103 (1977).}
  \item \text{72. Otherwise, the prosecution could make its case simply by proving that the defendant was in a building open to the public.}
  \item \text{73. This section is derived from WYO. STAT. § 6-10-102 (1977).}
  \item \text{74. WYO. STAT. § 6-3-303(a) (i), (ii) (Supp. 1983).}
  \item \text{75. WYO. STAT. § 6-3-303(b) (Supp. 1983).}
\end{itemize}
}
defenses in the preceding section, but none for criminal trespass, an argument can be made that none were intended. But this would be a foolish construction. The Legislature could, however, have furnished clearer evidence of its intention by combining criminal entry and criminal trespass into a single section, with the same defenses applicable to both, as the Model Penal Code has done.

e. Burglar's Tools

If burglary is a preparatory offense, then possession of burglar tools must be a pre-preparatory offense, in that it penalizes possession of tools and instruments with intent to use them in breaking into a structure. Wyoming has had a burglary tool statute since territorial days, and a revised burglary tool statute appears in section 6-3-304 of the 1982 Criminal Code. While the crime has consistently been a felony, maximum punishment has varied over the years, from two years in 1876 to ten years in 1957, to three years and a fine of $3,000 in the new Code.

The 1982 Code proscribes possession of "an explosive, tool, instrument or other article" designed for criminal and forcible entry into buildings or occupied structures, with intent so to use the article. The element of possession arguably broadens the scope of the prior statute, which extended only to persons "who shall be found having upon him or her" tools with intent feloniously to break and enter. Thus one may possess items which are in his house or vehicle or elsewhere, while "having upon him" would require possession on his person. In another particular, the new Code provision governing burglary tools is narrower than prior law. Earlier Wyoming law provided that if a person had upon him certain described tools, "or other instrument or tool," with intent to commit burglary, he was guilty of

76. Moreover, this conclusion is probably not supportable in light of Wyo. Stat. § 6-1-102(b) (Supp. 1983), which retains common law defenses.
78. This burglary is entry of a building or occupied structure for the purpose of committing some other crime. If the intent to commit the other crime is absent, then the entry is not the felony of burglary, but the misdemeanor of criminal entry. Since the burglary and the other intended crime are part of a single transaction, it has been argued that to punish for both the burglary and the other crime is duplicative; thus Model Penal Code § 221.1(3) (P.O.D. 1962), provides that unless the other crime is a serious felony (of the first or second degree), a person cannot be convicted of both the burglary and the other intended offense.
79. 1876 Wyo. Comp. Laws ch. 35, § 126. This section provided that any person "found having upon him or her any pick lock, crow key, bit or other instrument or tool, with intent feloniously to break and enter," shall "be deemed a vagrant, and punished by confinement in the penitentiary for a term not exceeding two years." A "crow key" was probably a crowbar; but there may have been some uncertainty over the term, since by 1910, in Wyo. Comp. Stat. § 5822, the device was denominated a "crow key."
80. 1876 Wyo. Comp. Laws ch. 35, § 126.
82. Wyo. Stat. § 6-3-304(b) (Supp. 1983).
83. Wyo. Stat. § 6-7-202 (1977). This section was broader than the present 6-3-304, inasmuch as it also punished any person who "shall be found" in any building containing valuable property, "with intent to steal any goods and chattels." This provision, which is found as early as 1876 Wyo. Comp. Laws ch. 35, § 126, was far broader than burglary, since it did not require a breaking or entering with intent to steal or commit a felony, or even an entry with that intent, but if read literally embraced the case of the person whose intent to steal was only formed after entry.
84. Concededly there are no Wyoming judicial decisions construing either term, so the author's application of common legal meaning must await definitive judicial construction.
the offense, without any requirement of proof that he intended to use the instrument or tool in consummating the breaking and entering. The new section, on the other hand, requires that the "explosive, tool, instrument or other article" be possessed "with intent to use the article" in the commission of a burglary. While satisfying a jury with circumstantial evidence of this intent may pose no great difficulty to the prosecution, nonetheless the new section does possess an entirely different thrust from the old.

f. Breaking Coin Machines

Section 6-3-305 of the 1982 Code makes it a misdemeanor to break, open or enter a coin machine with intent to commit larceny. "Coin machine" is defined to mean a device designed to receive a coin, bill or token, and which in return provides property or service. While the former statute expressly included parking meters within the protected class of devices, it is arguable that the new definition of coin machine, which requires that property or service be provided by the machine, does not include parking meters, which provide neither, but are simple regulatory devices.

g. Forcible Entry or Detainer

The new Code's provision on forcible entry or detainer, section 6-3-306, is the survival of an archaic statute first enacted in 1381, and mentioned in Blackstone. The crime is committed when a person "violently takes or keeps possession of land without authority of law." In view of the dangerous nature of "violently" taking or keeping possession of land, it comes as something of a surprise that the punishment is only by fine, and then not to exceed $750. For plainly if a person seizes land by violence, or threats of violence, he will have committed one or more crimes of a far more serious nature, such as assault, robbery or blackmail. While the origins of the statute lie in the desire to avoid breaches of the peace, and to compel persons to avoid self-help and rely upon civil litigation in determining the right to possession of real property, it is not clear why the Legislature believed that the statute has any present-day utility.

85. WYO. STAT. § 6-7-202 (1977).
86. The old law appears to have been designed to deal with persons apprehended at the scene of the burglary or attempted burglary, taken with tools "upon" them. The new law, on the other hand, is designed to apply to possession of tools well prior to any act of burglary. It is not clear whether under the old law a particularized intent to break into a specific building was necessary, or whether under the new law a general non-particularized intent to use the tools for burglary is enough, although this distinction is suggested by the language used.
87. This section is derived from § 6-2-113 (1977). The maximum penalty is six months' imprisonment and a fine of $750.
88. WYO. STAT. § 6-1-104(a) (ii) (Supp. 1983).
89. 4 W. BLACKSTONE COMMENTARIES *148, citing the statute of 5 Richard II, st. 1, ch. 8 (Forcible Entry, 1381).
90. As originally enacted in Wyoming, the maximum penalty was a fine of $100. 1890 WYO. SESS. LAWS ch. 73, § 73. This fine remained the maximum until the adoption of the 1982 Code. See, e.g., WYO. STAT. § 6-10-113 (1977), from which the new section was drawn. The Code as enacted in 1982 retained the former language "with menace, force and arms," 1982 WYO. SESS. LAWS ch. 75, § 3, § 6-3-306; but in 1983 the legislature deleted this language. WYO. STAT. § 6-3-306 (Supp. 1983). The effect of the deletion could be that the section now applies only to actual use of violence, and no longer includes threats. Since the Wyoming Supreme Court was never called upon to interpret this statute during the first ninety-two years of its existence, it is not likely that we will soon learn what, if any, effect the 1983 amendment has had.
4. Larceny and Related Offenses

a. Larceny

The 1982 Wyoming Criminal Code enlarged the larceny statute, section 6-3-402, to include not only larceny as traditionally defined, but also larceny by bailee and embezzlement. The Legislature stopped short of creating a unitary statute dealing with theft of all kinds of property and services, however, and instead reenacted statutes on shoplifting and theft of services.

Some of the classical Wyoming statutory language describing larceny has been retained, but in a new definitional context: "A person who steals, takes and carries, leads or drives away property of another with intent to deprive the owner or lawful possessor is guilty of larceny." Likewise, a bailee, public servant or other person entrusted with property is guilty of larceny if he, "with intent to steal or deprive the owner of the property, converts the property to his own or another's use."

The concept that the stealing or taking must be "with intent to deprive the owner or lawful possessor" is new, and depends upon the definition of "deprive" found in section 6-3-401(a):

(ii) "Deprive" means:

(A) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or with intent to restore only upon payment of reward or other compensation; or

(B) To dispose of the property so as to make it unlikely that the owner will recover it.

This definition is derived from the Model Penal Code, but is not without potential difficulties. Thus one meaning of "deprive" is to withhold property "for so extended a period as to appropriate a major portion of its economic value." But "major portion" plainly means more than half. Therefore, if a person appropriates the property of another with intent to use it for a lengthy time, but not so long as to render it worth less than half of its value at the time of taking, there is no intent to deprive.

The Criminal Code as enacted in 1982 contained a provision punishing as misdemeanor a temporary stealing or taking of property. This section was repealed in 1983, however, with the consequence that the only criminal penalty now imposed in Wyoming for the temporary taking of property

91. WYO. STAT. §§ 6-7-301 and 6-7-302 (1977).
92. WYO. STAT. § 6-7-303 (1977).
93. WYO. STAT. §§ 6-7-307, 6-7-308, and 6-7-310 to -315 (1977).
94. WYO. STAT. § 6-3-404 (Supp. 1983).
95. WYO. STAT. § 6-3-408 (Supp. 1983).
96. WYO. STAT. § 6-3-402(a) (Supp. 1983).
97. As amended by 1984 WYO. SESS. LAWS ch. 44, § 2.
98. WYO. STAT. § 6-3-402(b) (Supp. 1983). The significance of the difference in terminology between subsections (a) and (b) is not entirely clear. See infra note 109.
100. This conclusion follows from the affinity between "major" and "majority."
101. 1982 WYO. SESS. LAWS ch. 76, § 3.
appears to relate to the unauthorized use of motor vehicles. This statutory coverage is consistent with the Model Penal Code, the commentary to which explains that punishment for temporary taking of personal property other than motor vehicles "goes beyond prevailing moral notions and cannot be justified as necessitated by the dangerousness of the behavior."  

The provision relating to larceny specifies an "intent to deprive the owner or lawful possessor," thereby raising an issue as to one who takes property from a lessee. Is a taking from a lessee, followed by a disposition that will make it unlikely that the lessee will recover the property during the term of the lease, a criminal act? Conceivably a taking from the lessee will not affect the interest of the owner, unless a lessee is considered to be an owner. But under these circumstances, is the punishment to be determined by the value of the property, or by the value of the lessee's interest in the property? And can a lessor who takes the property from the lessee ever be guilty of larceny of the leased property?

Although Wyoming's larceny provisions are borrowed in part from the Model Penal Code, Wyoming has not enacted a provision similar to that of the Model Penal Code dealing with theft of lost property. That section recognizes that one may come into possession of lost or mislaid property of another, and subsequently decide to appropriate it to one's own use.

102. WYO. STAT. § 31-11-102 (Supp. 1983), providing for imprisonment of up to one year for unauthorized use of an automobile, which is defined in § 31-11-101(a)(i) as "all vehicles of whatever description propelled by any power other than muscular, except vehicles running on rails." The origin of this "joy riding" statute is found in WYO. STAT. § 1057 (1887), which forbade unauthorized temporary taking of "any horse, mare, gelding, foal or filly, ass or mule, or any buggy or other vehicle or personal property from the stable, lot, house, premises or pasture of another, or from a hitching post or rack or any other place." It is noteworthy that joy riding on a horse is no longer a crime.

103. MODEL PENAL CODE AND COMMENTARIES, Comment to § 223.9, Unauthorized Use of Automobiles and Other Vehicles 271-72 (1980). The Comment gives the somewhat far-fetched example of making a criminal of a girl who "wore her roommate's dressing to a party without the roommate's consent." If this is a sufficient reason for not making temporary taking a crime, then would it not be a sufficient reason for repealing the crime of larceny that the same girl in preparing for the party, took some of her roommate's deodorant and hair spray without consent? Plainly there are other examples which constitute far more serious societal problems. For example, the employee who takes money "temporarily" from his employer, intending to return it in full after using it to win at the racetrack or gambling table creates a serious problem; and to provide no criminal sanctions at all if the employee is successful in his endeavor and replaces the money can only encourage conduct of this nature. The COMMENT TO MODEL PENAL CODE § 223.2, Theft by Unlawful Taking or Disposition 175 (1980), considers as larceny the case where the employee loses the money at the racetrack, but fails to consider the case where the employee is successful (or at least breaks even) and returns the money originally taken. Employers rightfully will complain about this unauthorized use of their funds even in cases where a true "sure thing" is involved. While decisions can be found holding that this conduct constitutes embezzlement, see, e.g., W. LAFAVE & A. SCOTT, CRIMINAL LAW 653-54 (1972); R. PERKINS & R. BOYCE, CRIMINAL LAW 365 (3d ed. 1982), what of the case where the employee who takes the money is not a bailee or one entrusted with it, and therefore cannot be an embezzler?

104. WYO. STAT. § 6-3-204(a) (Supp. 1983).

105. The answer will depend, not unsurprisingly, upon the facts and circumstances of the taking. Most thieves are indifferent to whether they are stealing property from the owner or from a lessee, and consequently in most cases the full value of the property will be the proper measure. In the exceptional case, only the lessee's interest in the property will be affected by the taking; the lessor's interest will not be disturbed, and the proper measure will be the value of the lessee's interest.

thereby depriving the owner. If larceny requires the intent to deprive at the
time when the property is first taken, then only by a tortured construction
can the finder, who later decides to appropriate the property, be guilty of
larceny. The same considerations apply when the owner has delivered
property to another by mistake. The answer given by the Wyoming
statutes seems to be that the finder or person to whom the goods have been
mistakenly delivered can be found guilty of larceny by a bailee, under sec-
tion 6-3-402(b). “Bailee” is defined as “a person other than the owner of
property who rightfully possesses property.” Certainly a finder or a per-
son to whom goods are mistakenly delivered can be said to be in rightful
possession of the property; and the subsequent conversion of the goods to
his own use will constitute larceny by a bailee, which does not require a
trespassory taking or a larcenous intent at the time of acquiring
possession.

Larceny is a felony or a misdemeanor, depending on the value of the
property taken. The dividing line as set in the 1876 Wyoming Compiled
Laws was $25. Larceny of property valued at $25 or more was grand
larceny, a felony, punishable by penitentiary imprisonment for up to ten
years. Larceny of property of a value of less than $25 was petit larceny, a
misdemeanor, punishable by a fine of from $5 to $100 or by imprisonment
from one month to six months, or by both in the case of a second offense.
In 1890, the petit larceny statute was amended to provide that a second
petit larceny offense should be punished the same as for grand larceny.
The dividing line was raised to $100 in 1971.

The 1982 Criminal Code as originally enacted raised the dividing line
still further, to $200, and added a provision for a fine of not more than
$10,000. Larceny of property with a value of less than $200 was a misde-
meanor, with maximum punishment of imprisonment for six months and a
fine of $750. The provision punishing as felony a second conviction for
larceny of under $200 was retained.

In 1983 the Legislature restructured the punishment for larceny, as for
other property crimes, by raising the division between felony and misde-

107. W. LAFAYE & A. SCOTT, CRIMINAL LAW 628-30 (1972); R. PERKINS & R. BOYCE,
CRIMINAL LAW 308-13 (3d. ed. 1982).
108. WYOMING STATUTE, § 6-3-401(a) (i) (Supp. 1983).
109. The subsection on larceny by bailee, § 6-3-402(b), contains element-descriptive language
different from that in the subsection on larceny, § 6-3-402(a). Subsection (a) provides:
“steals, takes and carries, leads or drives away . . . with intent to deprive the owner or
lawful possessor.” Subsection (b), on the other hand, provides “with intent to steal or
deprive the owner of the property, converts the property.” Thus, while subsection (a)
larceny is stealing (whatever that means) with intent to deprive, subsection (b) larceny is
conversion with intent to steal, or conversion with intent to deprive. The subtleties of this
difference escape this author, and may have escaped the Legislature.
110. 1876 WYOMING COMPILATION LAWS ch. 35, §§ 42-44.
111. 1876 WYOMING COMPILATION LAWS ch. 35, §§ 42-43. In addition, larceny was a felony, regardless of
the value of the property taken, if the taking was from the person of another or “from the
sleeping apartment of another in the night time.”
112. 1876 WYOMING COMPILATION LAWS ch. 35, § 44.
113. 1890 WYOMING SESSIONAL LAWS ch. 73, § 40.
114. 1971 WYOMING SESSIONAL LAWS ch. 123, § 1.
115. 1982 WYOMING SESSIONAL LAWS ch. 75, § 3, § 6-3-402(c) (i).
116. 1982 WYOMING SESSIONAL LAWS ch. 75, § 3, § 6-3-402(c) (ii).
117. 1982 WYOMING SESSIONAL LAWS ch. 75, § 3, § 6-3-402(c) (i) (B).
meanor to $2000, and providing further that larceny of property of a value of $200 and less than $2000 would be subject to maximum punishment of one year’s imprisonment and a fine of $2000. Larceny under $200 retained maximum punishment of six months and a fine of $750. The 1983 amendment also deleted the provision making all second larceny convictions felonies. While continued monetary inflation may have been partly responsible for restructuring the punishment, the principal reason was threatened overcrowding of the penitentiary by persons convicted as felons for property crimes involving moderate values.

The 1983 amendment came under sharp criticism. The division between felony and misdemeanor had been located far higher in Wyoming than in any other state. The change had placed many items of substantial value, including many motor vehicles and most firearms, into the misdemeanor category. Population pressures in local jails, problems of extraditing misdemeanants, and fear of making Wyoming a haven for thieves were cited. The result was that the Legislature in the 1984 session again revised the dividing point between felony and misdemeanor as to larceny and other property crimes, lowering it to $500. In addition, a new section 6-3-410 was adopted, permitting aggregation of property amounts in crimes “committed pursuant to a common scheme or the same transaction, whether the property is taken from the same person or from different persons.”

The 1984 session of the Legislature also resulted in some tinkering with the larceny statute, adding a new provision that stealing “any horse, mule, sheep, cattle, buffalo or swine” of the value of $200 or more is livestock rustling, a felony punishable by a maximum of ten years’ imprisonment and $10,000 fine. If the value of the stolen animal is less than $200, the customary misdemeanor sanctions apply.

b. Receiving Stolen Property

Section 6-3-403 of the Wyoming Criminal Code provides for the punishment of a “person who buys, receives, conceals or disposes of property which he knows, believes or has reasonable cause to believe was obtained in violation of law.” If the value of the property is $500 or more, the crime is a felony punishable by imprisonment for not more than ten years, and a fine of not more than $10,000; otherwise the crime is a misdemeanor.

The section includes more than simply receiving stolen property, and represents a significant enlargement of earlier Wyoming law. The prior

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119. A survey of the larceny statutes of other states set forth in a letter from Michael J. Hruby, Assistant District Attorney of Natrona County, to Dan Pauli, Legislative Service Office, dated December 5, 1983, showed that the highest dividing line between felony and misdemeanor was $1,000 in Connecticut, and that all other states set the division at $500 or less.
123. Id. The maximum punishment is six months’ imprisonment and a fine of $750.
statute, section 6-7-304, punished a person who bought, received, or concealed property knowing it to have been stolen, embezzled, or obtained by false pretenses. The principal expanded changes are in the required mental element of the crime; the manner of original wrongful taking of the property; and the element of what is done with the property.

The requisite mental element is "knows, believes or has reasonable cause to believe." These terms are not defined, and it is unclear just what the difference between "knows" and "believes" may be. The radical change, however, comes in the addition of "has reasonable cause to believe." With this addition, the statute punishes for negligence, i.e., an unreasonable belief, making a person criminally responsible not only for what he knew, but also for what a jury determines that a reasonable man in his position should have known. Felony punishment of up to ten years' imprisonment for simple negligence relating to goods one buys or disposes of is excessive and unprecedented. Even the initial thief who has stolen the property must be shown to have entertained an intent to deprive the owner thereof, thereby implying knowledge and not mere negligence.

Even the Model Penal Code, which is notorious for expanding criminal liability, has not gone so far. It provides in section 223.6(1) that a "person is guilty of theft if he purposely receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen." It does not impose criminal sanctions for what the person should reasonably have known.

A second significant change is from property "stolen, embezzled or obtained by false pretense," found in the prior statute, to property "obtained in violation of law." The original version of what is now section 6-3-403 used the term "obtained in violation of this act," but the section was amended to its present form in 1983. The 1982 Criminal Code provides little guidance as to what is meant by "obtained in violation of law." Does this mean violation of criminal law? Or violation of any law, including civil law? What if the property was acquired not by larceny or other criminal taking from the owner, but rather in violation of some governmental regulation which bears a minor criminal penalty? Does its subsequent transfer expose the transferee to criminal liability under this section? Furthermore, until now it has not been a crime simply to buy a controlled substance such as marijuana. But under this statute, since one buying mari-

125. The prior statute is WYO. STAT. § 6-7-304 (1977), which was relatively unchanged since its original enactment in 1890 WYO. SESS. LAWS ch. 73, § 41, except that the dividing line between felony and misdemeanor was at first $25 and later increased to $100.
126. WYO. STAT. § 6-3-403(a) (Supp. 1983).
127. The prior statute required that the defendant deal with the property "knowing the same to have been stolen," etc. There may have been a fear that "knowing" required actual knowledge which had to be proved by the prosecution, thereby creating an unnecessarily great burden. This is a doubtful construction. See Curran v. State, 12 Wyo. 553, 76 P. 577 (1904). "Believing" is a more subjective state of affairs, and one may arguably believe something which is not true; the use of this term may place an easier burden upon the prosecution. But if this is the explanation, then there was no reason to retain both "knowing" and "believing"; the latter alone would suffice.
129. The original version of the statute was 1982 WYO. SESS. LAWS ch. 75, § 3, § 6-3-404, and the statutory elements were amended to their present form in 1983 WYO. SESS. LAWS ch. 171, § 1, § 6-3-403.
A third significant change comes through addition of "disposes of" to "buys, receives, conceals." A person who disposes of property which he knows, believes, or has reasonable cause to believe was obtained in violation of law is now guilty under this section. The statute gives no guidance as to what "disposes of" may encompass. Taking an extreme case, a parent who pours down the drain (or drinks) beer purchased by his underage child, or throws away the child's stash of marijuana, is guilty under this section. A less extreme scenario would involve the person who purchases property in good faith, without reason to believe that it has been stolen. He then discovers that it was indeed stolen. At this point, what does the section require him to do? By necessary implication, the statute would not be violated if he returned the property to the owner, or turned it over to law enforcement authorities. But can he constitutionally be required to divulge that he has the property? Or if he does not divulge, but instead disposes of it, will he be guilty under this section? Finally, the addition of "disposes of" may subject a thief to double punishment, both under the larceny statute for the initial taking, and also under this section for disposing of the property. Certainly he is not protected under the general principles of double jeopardy, since each crime has an element which the other does not.

Subsection (b) of section 6-3-403 provides that a person "may be indicted under this section in the county where he received or possessed the property notwithstanding the wrongful taking occurred in another county." The limitation to prosecution by indictment, to the exclusion of prosecution by information, is probably a legislative oversight.

c. Shoplifting and Altering Price Tags

Section 6-3-404 deals with both shoplifting and altering price tags upon merchandise. Subsection (a), which embodies the prior shoplifting provision of section 6-7-401, deals with a form of attempted larceny through concealing or taking possession of merchandise in a retail or wholesale store without the owner's consent and with intent to convert it without paying for it. Since there are ample provisions covering larceny and attempts, this section is probably unnecessary, except as a palliative to storekeepers.

Subsection (b) is new, and covers the practice of altering, defacing, changing or removing price tags with intent to obtain the property for less than the marked price. The wording of the section is unfortunate, however, since the penalty provisions appear to depend upon the person actually paying something for the merchandise. A person who alters the price tag but who does not pay for the goods may be prosecuted for attempt, and a strong inference arises that he intended to pay the altered price, thereby supplying a basis for imposing punishment. But severe problems of proof may be presented where the person has removed the price tag, but never tenders payment; in most cases it will be difficult if not impossible to determine how much less than the marked price he intended to pay.
The penalty provisions for shoplifting and for altering or removing price tags follow those for other property crimes. If the value of the property concealed or possessed, or the price differential in the case of a tag altered or removed, is $500 or more, the crime is a felony, with maximum punishment of ten years' imprisonment and a fine of $10,000; if less than $500, it is a misdemeanor, with maxima of imprisonment for six months and a fine of $750.\textsuperscript{130} It should be further noted that the new section 6-3-410 on aggregation of values applies to crimes under section 6-3-404.\textsuperscript{131}

Section 6-3-405 permits detention and interrogation in a reasonable manner and for a reasonable time when there is reasonable cause to believe a person is violating section 6-3-404. The section follows prior law,\textsuperscript{132} and allows the detention and interrogation to be made by a "peace officer, merchant or merchant’s employee."\textsuperscript{133}

d. Defrauding an Innkeeper

Section 6-3-406 on defrauding an innkeeper remains substantially unchanged from the statute originally enacted in 1969,\textsuperscript{134} except that the division between felony and misdemeanor has been raised from $25 in the prior statute to $500 under the new section as amended in 1984.\textsuperscript{135} The statute punishes any person "who, with intent to defraud, procures food, drink or accommodations at a public establishment without paying in accordance with his agreement with the public establishment."

A "public establishment" is one selling "prepared food or beverages, or leasing or renting overnight sleeping accommodations to the public generally."\textsuperscript{136} "Agreement with a public establishment" means agreement on the price of food, beverages or accommodations where the price is set forth on a menu or schedule of rates shown to or made available to the patron. However, the need for a menu or schedule of rates is obviated by a further provision that "Acceptance of food, beverages, service or accommodations for which a reasonable charge is made is an agreement with a public establishment."\textsuperscript{137}

130. Wyo. Stat. §§ 6-3-404(a) (i) and (ii), and 6-3-404(b) (i) and (ii), as amended in 1984 Wyo. Sess. Laws ch. 44, § 2.

131. A comparison between the treatment afforded shoppers who alter price tags and merchants who do the same thing, is instructive. Under § 6-3-404(b) the shopper who switches or alters a price tag may be imprisoned in any case, and may be convicted of a felony if the differential is sufficient, or if the total can be aggregated under § 6-3-410. But the merchant who mislabels his merchandise, however fraudulently, is subject under § 6-3-610 to only a fine of up to $750, no matter how egregious his alteration, or how much ill-gotten gain he has secured from his practice. No aggregation is possible. One is led to believe that what the Legislature considers serious crime in the case of consumers is only "business as usual" if committed by a merchant.


135. 1984 Wyo. Sess. Laws ch. 44, § 2, § 6-3-406 (a) (i) and (ii), The original version of the 1982 Criminal Code placed the felony/misdemeanor division at $200, 1982 Wyo. Sess. Laws ch. 75, § 3, § 6-3-408; this figure was raised with other property crimes in 1983 to $2000, 1983 Wyo. Sess. Laws ch. 171, § 1, § 6-3-406, but lowered in 1984. The 1983 amendment also deleted a provision which made it a misdemeanor for a person to leave "a public establishment without paying for food, drink or accommodations received."

136. Wyo. Stat. § 6-3-406(b) (ii) (Supp. 1983). The last sentence of this subsection, listing examples of public establishments, is inartfully drawn.

The first impression is that this section is intended to apply to persons who obtain food or lodging without intending to pay for it; the classical pattern is the person who absconds without tendering payment. The language, however, particularly "without paying in accordance with his agreement," may be more broadly applied to other situations. Is the person who knowingly gives an insufficient funds check to a public establishment guilty of violation of this section as well as the section on check fraud? What of the person who sees the sign "No Checks" but goes ahead and orders and devours his meal and then, having no cash, tenders a check?

e. Obtaining Property by False Pretenses

The section on false pretenses, section 6-3-407, manages to simplify the language of its predecessor, but also leaves to the common law or to judicial interpretation much of its meaning. The section provides simply that "A person who knowingly obtains property from another person by false pretenses with intent to defraud the person" is guilty of a felony or misdemeanor, depending upon the value of the property so obtained.

The crime of false pretenses was created to close the hiatus in larceny law caused by the requirement that the taking of the property be of a trespassory nature. If a person parted with the title to property voluntarily, even if induced to do so by a false representation, there could be no larceny. But under the false pretenses statute, first enacted in England in 1757, a false representation, made with intent to cheat and defraud, which induced the owner to part with the property was sufficient. The Wyoming false pretenses statute immediately predating the 1982 Criminal Code was worded nearly identically with the old English statute of 1757, and the new Code has not made any significant change.

Given the simple wording of section 6-3-407 of the 1982 Code, it would have been easy enough to have included false pretenses within the general larceny statute: "A person who steals, takes and carries away, leads or drives away, or obtains by false pretenses, property of another with intent to deprive the owner or lawful possessor is guilty of larceny." But to have created a truly unified larceny statute (which could also have included shoplifting, defrauding an innkeeper, and theft of services) was an act for which the Wyoming Legislature was not yet ready. Even the Model Penal Code has retained an expanded section on false pretenses, entitled "Theft by Deception."

139. The felony/misdemeanor division, as with other property crimes, is now §500.
140. See discussion in W. LAFAYE & A. SCOTT, CRIMINAL LAW 655 (1972); R. PERKINS & R. BOYCE, CRIMINAL LAW 363-64 (3d. ed. 1982).
141. The original English enactment is 30 Geo. II, ch. 24, § 1 (1757). It began, "[a]ll persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons..." WYO. STAT. § 6-3-106 (1977), which remained the law until July 1, 1983, began, "[i]f any person or persons shall knowingly and designedly, by false pretence or pretenses, obtain from any other person or persons any choses in action, money, goods, wares, chattels, effects, or other valuable thing whatever, with intent to cheat or defraud any such person or persons..." The demise of the former statute is almost to be regretted.
142. Compare WYO. STAT. § 6-3-402(a) (Supp. 1983).
143. § 223.3 (P.O.D. 1962).
f. Theft of Services

Section 6-3-408 on theft of services is new to Wyoming, taken from the Model Penal Code.\textsuperscript{144} The original provision in the 1982 Code covered a "person who, with intent to defraud or by threat, obtains services which he knows are available only for compensation, without paying for the service." A 1984 amendment deleted the words "or by threat,"\textsuperscript{145} probably because the act of taking services by threat falls within the purview of robbery\textsuperscript{146} or blackmail.\textsuperscript{147} Certainly taking services or property by threat is more serious than taking by a misrepresentation. The "threat" language originated in the Model Penal Code, where it may have been appropriate, since Model Penal Code robbery requires a threat of serious bodily injury,\textsuperscript{148} leaving less serious threats to be covered in sections on theft of services\textsuperscript{149} or theft by extortion.\textsuperscript{150}

The division between felony and misdemeanor, and the punishment which may be imposed, in theft of services is the same as for other property crimes.

g. Fraudulently Obtaining Telecommunication Services

Section 6-3-409 reenacts former section 37-12-123, which was enacted in 1961.\textsuperscript{151} The section covers fraudulent acts of charging telecommunications services to a telephone number or credit card without authority, or to a false number or credit card, as well as other common acts designed to defraud the telephone company or other telecommunications service. The statutory language is cumbersome, and fails to define telecommunications service, which now may have a much broader meaning than in 1961, with the development of cable television services and even more recently computer data bases accessible by telephone, More serious, the crime is only a misdemeanor, no matter what the value of the services fraudulently obtained. And new section 6-3-410\textsuperscript{152} on aggregating values for property crimes does not apply to fraudulently obtaining telecommunications services.

Section 6-3-409, then, is a statute which covers in a specialized manner acts which are already covered by general statutory sections, and is therefore duplicative and unnecessary. Some of the provisions may overlap the later-enacted sections on computer crimes.\textsuperscript{153} Worse yet, in cases of serious telecommunications fraud, involving perhaps tens of thousands of dollars, the punishment is limited to misdemeanor. The section should be repealed.

\textsuperscript{144} § 223.7 (P.O.D. 1962). The Model Penal Code section is broader than the Wyoming statute, however, in that it also embraces acts of defrauding an innkeeper.
\textsuperscript{145} 1984 Wyo. Sess. Laws ch. 44, § 2, § 6-3-408.
\textsuperscript{146} Wyo. Stat. § 6-2-401 (Supp. 1983).
\textsuperscript{147} Wyo. Stat. § 6-2-402 (Supp. 1983).
\textsuperscript{148} § 222.1 (P.O.D. 1962).
\textsuperscript{149} § 223.7 (P.O.D. 1962).
\textsuperscript{150} § 223.4 (P.O.D. 1962).
\textsuperscript{151} 1961 Wyo. Sess. Laws ch. 126, § 1.
h. Aggregating Values in Property Crimes

Section 6-3-410, enacted in 1984, provides that the amount of property involved in crimes of larceny, receiving stolen property, shoplifting and altering price tags, defrauding an innkeeper, false pretenses, and theft of services, may be aggregated in determining the value of the property, where the crime is "committed pursuant to a common scheme or the same transaction, whether the property is taken from the same person or different persons."154 While "common scheme or the same transaction" will have to be judicially defined, the section promises to be a useful tool to prosecutors where an offender commits a series of minor property crimes, none of which taken alone rises to felony stature.

5. Computer Crimes

Article 5 of Chapter 3 of the 1982 Wyoming Criminal Code, dealing with computer crimes, is new to Wyoming, and is said to be drawn from chapter 815 of the Florida statutes.155 The article begins in section 6-5-101 with a set of definitions ranging from reasonably understandable to somewhat abstruse. Thus "access" means "to approach, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system or computer network."156

There are three substantive sections. Section 6-3-502, crimes against intellectual property, punishes a person who knowingly and without authorization modifies or destroys data, programs or supporting documentation, or discloses or takes data, programs or supporting documentation which is a trade secret or confidential. The affected data, programs or supporting documentation must in each case be "residing or existing internal to a computer, computer system or computer network." Section 6-3-502(b) provides that violation is a felony, with a maximum punishment of three years' imprisonment and a fine of $3,000, unless the violation is "with the intention of devising or executing a scheme or artifice to defraud or obtain property," when the maximum becomes ten years' imprisonment and a fine of $10,000.

Section 6-3-503 embraces two distinct activities. Subsection (a) covers what is termed "a crime against computer equipment or supplies," and punishes one who "knowingly and without authorization modifies equipment or supplies used or intended to be used in a computer, computer system or computer network." The crime is a misdemeanor, except if committed "with the intention of devising or executing a scheme or artifice to defraud or to obtain property," it is a felony with maximum punishment of ten years' imprisonment and a fine of $10,000.

Subsection (b) of section 6-3-503 punishes a person who "knowingly and without authorization destroys, injures or damages a computer, computer system or computer network and thereby interrupts or impairs governmental operations or public communication, transportation, or sup-

plies of water, gas, or other public service." The crime is a felony, with maximum punishment of three years' imprisonment and a fine of $3,000.

Section 6-3-504 is denominated "crimes against computer users," and punishes a person who, again knowingly and without authorization, "[a]ccesses a computer, computer system or computer network," or 
"[d]enies computer system services to an authorized user of the computer system services" owned or operated "on behalf of, or in conjunction with another." The crime is again a felony, with a maximum punishment of three years' imprisonment and a fine of $3,000, unless committed to defraud or obtain property, in which case the maxima become ten years and $10,000.

While computers are new and to a significant extent mysterious, and because they function somewhat differently from other types of productive property, their owners may need some additional protections that do not exist under traditional criminal laws. Nonetheless, great caution must be exercised to make certain that the acts prohibited and the penalties imposed for those acts are appropriate. The mystery of the computer should not be a basis for making criminal certain acts where computers are concerned that would be innocuous where other instrumentalities or forms of property are involved. For this reason it is not altogether clear that other existing statutory provisions do not deal adequately with the subject-matter of this article. Thus sections dealing with larceny, fraud, and property destruction would in most instances cover the rather specialized kinds of acts described under "computer crimes."

The rapid development and distribution of new kinds of computers may serve to make even a recent statutory scheme obsolete. Thus the sections on computer crimes may be clearly appropriate for giant business computer installations; but we are now experiencing the explosive growth of the microcomputer for home and business use. It is not evident that the computer crime sections were written with home computers in mind. Thus while felony sanctions may be appropriate under section 6-3-502 for a person who intentionally modifies or obliterates computer data relating to the records of a large governmental agency, or for the design of a new turbine for a nuclear power station, it is not at all certain that one who destroys home computer data relating to Aunt Martha's chocolate fudge recipe or a computer game with a value of twenty dollars should be punished as a felon. In the same vein, under section 6-3-502(a)(iii) a person who copies or shares in an unauthorized manner copyrighted computer software, even a program with minimal cost, is guilty of a felony.

While section 6-3-502 may impose penalties which are grossly overblown, section 6-3-503 on crimes against computer equipment or sup-

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157. The language of the article is confusing in many places, and it is often difficult to comprehend its scope and intent. Thus under § 6-3-502(a), one who modifies, destroys or discloses or takes "data . . . residing or existing . . . external to a computer" is guilty of a felony under the statute. But what limitation is there to "data . . . external to a computer"? Is a telephone directory, which surely is a form of data external to a computer, within this category? Or must the data have something to do with a computer before it will be included within this section? Even so, if one destroys a home microcomputer instruction book, is he to be a felon?
plies may not provide penalties which are sufficiently stringent. Thus, unless done as part of a scheme to defraud or obtain property, modification of computer equipment or supplies is only a misdemeanor. Conceivably, modification of computer equipment or supplies which is not part of such a scheme may have consequences running into many thousands of dollars in damage. Misdemeanor punishment may be wholly inadequate.

Section 6-3-503(b) makes it a felony for a person knowingly and without authorization to injure or damage "a computer, computer system or computer network," and as a consequence to interrupt or impair governmental operations or public utilities. Under this section, to what does the term "knowingly" extend? Need the person know that he is acting without authorization, or that the consequence of the acts will be interruption or impairment of governmental operations or public utilities? Or is the interruption or impairment consequence to be a strict liability element of the offense, so that all that the accused need know is that he is injuring or damaging a computer?

The section on crimes against computer users, section 6-3-504, makes it a felony to "access a computer" knowingly and without authorization. "Access" is defined to include the predictable acts of communicating with a computer, and storing data in and retrieving data from a computer; but it also means "to approach" a computer. This is confusing. Is it now a felony in Wyoming to get near a computer without authorization? Further, the term "knowingly and without authorization" needs definition in this section as elsewhere in the article on computer crimes. Thus must the person know (a) that he is "accessing" a computer, and (b) that he is doing so without authority? Or is knowledge as to accessing all that is required, and the fact of lack of authority need not be known, but is a strict liability element?

The same section, 6-3-504(a)(ii), makes it a felony knowingly and without authorization to deny computer system services to an authorized user of the services "which, in whole or in part, are owned by, under contract to, or operated for, or on behalf of, or in conjunction with another." The meaning of this section is not at all clear. Just what acts are prohibited, and are they worthy of felony sanction? Under this section, it would seem that if A owned computer system services, and had contracted with Z to authorize Z to use the services, but then denied Z access, there would be no crime. But if the ownership of the computer system services were in A and B, A's act in denying Z would be a felony.

While computer owners and users are entitled to the protection of the criminal law, at the same time the Legislature has a plain duty to proceed slowly with new concepts, and to adopt sweeping new criminalizations and severe new sanctions only where clearly necessary and appropriate. Unfortunately, the computer crimes sections may be both unnecessary and inappropriate. But now that they are on the statute books, it is likely to be an insuperable task to remove them, or even to amend them into a sensible form.
6. Fraud

Article 6 of Chapter 3, Fraud, consists of an assortment of statutory sections largely drawn from prior Wyoming criminal statutes. The 1982 Criminal Code does not appear to have created any new crimes in this area. However, the prior law has been changed to some degree by the new Code.

a. Forgery

The key to the forgery statute is found in the definition of "writing" set forth in section 6-3-601: "printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, and other symbols of value, right, privilege or identification." This definition is drawn verbatim from section 224.1(1) of the Model Penal Code. It is extremely comprehensive, although it is not clear that it includes works of art, such as paintings or sculptures, unless these can be said to be a "method of recording information," or perhaps "symbols." But taking this definition from the Model Penal Code, without adopting the Model Penal Code graded framework of punishment for forgery, creates potential problems, as will be seen.

Section 6-3-602 contains the substantive provisions on forgery, providing that one "is guilty of forgery if, with intent to defraud," he alters a writing of another without authority, makes or completes a writing "so that it purports to be the act of another who did not authorize that act," or utters any writing which he knows to have been so altered, made or completed. Forgery is a felony punishable by a maximum of ten years' imprisonment and a fine of $10,000, except that it is a misdemeanor if the writing is a permit to transport animals issued by their owner, or a number placed on a mine car.

The prior forgery statute, section 6-2-101, listed at great length those items within its scope, which for the most part were writings relating to the payment of money or affecting the title to property. Plainly these were items of significance, and their forgery might well justify treating the act as a felony with the maximum punishment of fourteen years' imprisonment found in the prior statute.

But the present forgery statute embraces not only writings of considerable legal significance; it also includes an immense spectrum of items which are not so significant. Thus under the 1982 Code it is forgery, if done with intent to defraud, to alter the time on a parking lot ticket, as well as forgery to make an imitation of a rubber stamp imprint on one's hand to gain entrance to a Friday night teen-age dance. These items are writings

158. This section is largely new. Compare Wyo. Stat. § 6-1-101(a)(iii) (1977); "Writing includes printing."
159. (P.O.D. 1962).
161. This is a survival from Wyo. Stat. §§ 30-3-111 and 30-3-112 (1977), whose exact significance is unknown. Evidently the Legislature chose not to change the penalty, for reasons best known to it.
162. There were at least seventeen other forgery statutes replaced, including Wyo. Stat. §§ 6-2-102, 6-2-103, 6-2-105 and 6-2-110 (1977).
163. The statute contained some eighteen lines of description of items subject to being forged.
under the statutory definition. And as forgery, it is a felony punishable by a prison term of up to ten years.

The Model Penal Code deals with the broad definition of "writing" by tailoring the applicable punishment to the kind of item which is forged. Thus forgery of governmental and corporate instruments and securities bears punishment of imprisonment up to ten years;164 forgery of wills, deeds, contracts, commercial paper and other instruments affecting legal relations bears up to five years' imprisonment;165 and all other instances of forgery are misdemeanors.166 This graded punishment scheme makes acceptable the Model Penal Code's definition of "writing," just as Wyoming's unitary and severe punishment makes the identical definition of "writing" in the 1982 Criminal Code unacceptable.

b. Possession of Forged Writings and Forgery Devices

Section 6-3-603 is drawn from three prior Wyoming statutory sections which prohibited possession of counterfeit money,167 possession of forged notes or bonds,168 and making or possession of devices for counterfeiting.169 These crimes were felonies punishable "by confinement in the penitentiary for not more than fourteen (14) years." The new Criminal Code section imposes maximum punishment of imprisonment for five years and a fine of $5,000, for possessing a writing knowing it to have been forged and intending "to utter or pass it to defraud another person,"170 or for making or knowingly possessing, with intent to commit forgery, a die, plate or other device used to forge writings.171

c. Fraud Against Testamentary Instruments and Government Records

Section 6-3-604 provides that a person is guilty of a felony with maximum punishment of ten years' imprisonment and a fine of $10,000, "if he fraudulently steals, alters, defaces, destroys or secretes" an executed will or codicil, or all or part of a government record.172 A government record is one "which is authorized by law or belongs to or pertains to, or is filed with, a court of record, a county court, a justice of the peace or any governmental office or officer."173 This section reenacts and combines, in edited form, three prior Wyoming statutes.174

The exact meaning, or the precise utility, of the requirement in this statute that the act be done fraudulently is unclear. Does "fraudulently"

164. MODEL PENAL CODE § 224.1(2) (P.O.D. 1962) makes these acts second degree felonies, with an ordinary maximum punishment of ten years' imprisonment. See id. § 6.06(2).
165. Id. § 224.1(2) makes these acts third degree felonies, with an ordinary maximum punishment of five years' imprisonment. Id. § 6.06(3).
166. Id. § 224.1(2) makes these acts misdemeanors, with ordinary maximum punishment of imprisonment for one year. Id. § 6.08.
170. WYO. STAT. § 6-3-603(a) (i) (Supp. 1983).
171. WYO. STAT. § 6-3-603(a) (ii) (Supp. 1983).
172. WYO. STAT. § 6-3-604 (i) and (ii) (Supp. 1983).
173. WYO. STAT. § 6-3-604(b) (Supp. 1983). The full ramifications of this definition bear exploring; they are not immediately apparent.
174. WYO. STAT. §§ 6-8-701, 6-8-705, 6-8-706 (1977). The punishment is unchanged.
mean an act done in a deceptive manner, or does it mean an act done intending to defraud some person? In either case the "fraudulently" element may be unnecessary, serving only to impose an added burden upon the prosecution. The apparent legislative goals in the statute could better be achieved simply by substituting: "if he steals, alters, defaces or secretes a writing knowing it to be an executed will, codicil, or other testamentary instrument made by another person, or to be a government record." The mischief or social harm caused by the stealing, alteration or destruction of a testamentary instrument or a public record can be sufficiently grave in any case to warrant severe punishment, which should not be made to depend upon proof of a narrowly defined mental state.

d. Using Slugs in Coin Machines; Manufacturing Slugs

Section 6-3-605 of the 1982 Code makes it a misdemeanor “knowingly and without authorization” to use a slug to operate a coin machine, or to obtain property or services from a coin machine without depositing the required amount of money. The section also makes it a misdemeanor to manufacture or distribute slugs “knowing or reasonably believing they will be used for fraudulent or unlawful purposes.” Section 6-3-605 is a marked simplification of two prior statutory sections, without significant substantive change.

This section evidences the effect of the lack of any kind of comprehensive plan within the Wyoming Criminal Code. A violation of this section, by using a slug in a coin machine, is a misdemeanor. Yet a slug is also a writing under section 6-3-601, with the result that the person who passes a slug to a clerk in place of a genuine coin is guilty of felony and subject to ten years’ imprisonment and a fine of $10,000, under the forgery statute, section 6-3-602. In fact, a person who merely possesses a slug, intending to put it into a coin machine, is guilty of violating section 6-3-603, which is also a felony, with a maximum of five years’ imprisonment and a $5,000 fine.

The section makes a person guilty who knowingly and without authorization “obtains property or services from a coin machine without depositing the amount of legal tender required by the owner of the coin machine for the property or service.” This includes the citizen who puts a coin into a machine to purchase one candy bar, and two are delivered. Most Americans would feel that Providence had smiled upon them, and take both candy bars without feeling that they were violating the criminal law. With some justification, most persons appreciate that they are gambling by using a coin machine at all, remember that they have lost money in such machines on numerous occasions, and believe that they are only being justly recompensed when extra merchandise appears. But what are they to do when it does appear? There is no place to put the second candy bar back into the machine. If they put additional money into the machine, this will

175. Wyo. Stat. § 6-3-605(a) (Supp. 1983). “Coin machine” is defined in § 6-1-104(a) (ii). “Slug” is defined in § 6-3-605(c) to mean “an article or object which can be deposited in a coin machine as an improper substitute for a genuine coin, bill or token.” The maximum punishment is six months’ imprisonment and/or a fine of $750.


avail them nothing, since the machine will not understand the purpose of
the additional payment, and will simply deliver another candy bar, so that
the citizen now has paid for two, but has three. Conceivably the extra candy
bar could simply be left in the dispensing chute of the machine, but this
would be an unnatural act, as it would only leave it for the benefit of the
next passer-by, who had risked nothing. For the protection of the general
public, a statute is needed which provides that when a coin machine
delivers extra merchandise it belongs to the person who put the coin in. A
corollary statute might make it a crime to own a coin machine which failed
to deliver merchandise as promised.

A second consideration relates to the mental state of the manufacturer
or distributor of slugs. The prior statute provided "knowingly or having
cause to believe" that the slugs were intended for unlawful use.179 But the
new section declares "knowing or reasonably believing" the slugs will be
used for unlawful purposes. Just what can "reasonably believing" mean in
this context? Does it mean that a person is not guilty under this subsection
if he believes with all his heart that the slugs are to be used unlawfully, but
his belief turns out to be unreasonable?

e. Impersonation of Peace Officer

Under section 6-3-606, "A person is guilty of impersonation of a peace
officer if he falsely represents himself to be a peace officer with intent to
compel action or inaction by any person against his will." The crime is a
misdemeanor.

Originally, the 1982 Criminal Code contained a section on impersona-
tion generally, which made it a felony for a person to "misrepresent the
identity of himself or another person with intent to defraud."180 This sec-
tion was replaced in 1983 by the present statute on impersonation of a
peace officer.181 Presumably the Legislature concluded that other sections,
such as false pretenses, adequately covered impersonation for fraudulent
purposes.

The successor section on peace officers may require proof of too much.
Certainly there is a societal interest in preventing persons from im-
personating or misrepresenting themselves to be peace officers, and a statute
might well punish the simple act of impersonation. But under section
6-3-606 it must also be proved that the accused falsely represented himself
to be a peace officer with intent to compel action or inaction by any person
against his will. (Emphasis added.) Does this language mean that the in-
tent must be to compel the other person to do something he would not have
done in the absence of a request from a peace officer? Or does it mean in-
stead that the intended act must be something that the other person would
not have done but for the implied threat of use of lawful force by a peace of-
icer if he did not do it?

180. 1982 WYO. SESS. LAWS ch. 75, § 3, § 6-3-606.
181. 1983 WYO. SESS. LAWS ch. 171, § 1, § 6-3-606.
f. Defrauding Creditors

The crime of defrauding creditors, section 6-3-607, is committed when a mortgagor or a debtor who has given a security interest in property transfers or conceals the property,182 or removes it from "the jurisdiction of the district court of the county where the security interest was given,"183 or changes or disguises the identity of the property,184 "with intent to deprive the mortgagee or secured party of his interest."

Punishment for violation of the section is determined by whether the value of the mortgagee's or secured party's interest is $500 or more. If so, the crime is a felony with maximum punishment of ten years' imprisonment or $10,000 fine; if not, it is a misdemeanor.185 There is a further provision for aggregating values in a violation "pursuant to a common scheme or the same transaction," even if different mortgagees or secured parties are involved.186

The new section is derived from four prior sections dealing with fraudulent transfers to defeat, hinder or delay general creditors,187 disposing of mortgaged property with intent to deprive the mortgagee or secured party of his security,188 secreting or disguising mortgaged property or the property of another,189 and removing or selling property acquired subject to a conditional transfer.190 The first of these former crimes was a misdemeanor, subject only to a fine of $1,000; the others were felonies, with a ten year maximum sentence.

But the new section 6-3-607 does not completely embody the provisions of the prior statutes. It deals only with property that is mortgaged or subject to a security interest, and therefore is concerned only with rights of mortgagees and secured parties. No sanction is provided where a debtor conveys, hides or removes property with the intent to prevent his general, unsecured creditors from recovering. Further, it is not clear that the operative language of the new section, "with intent to deprive the mortgagee or secured party of his interest," is broad enough to cover instances where the debtor's acts are only to delay the secured party in seizing and realizing upon the security.

A further problem is encountered in the subsection dealing with removal of the property "from the jurisdiction of the district court of the county where the mortgage or security interest was given," without the written consent of the secured party.191 The difficulty is that this provision derives from a statute first enacted in 1882,192 when conditions were significantly different from what they are today, and property subject to

182. WYO. STAT. § 6-3-607(a) (i) (Supp. 1983).
183. WYO. STAT. § 6-3-607(a) (ii) (Supp. 1983).
184. WYO. STAT. § 6-3-607(a) (iii) (Supp. 1983).
185. WYO. STAT. § 6-3-607(b) (Supp. 1983).
186. WYO. STAT. § 6-3-607(c) (Supp. 1983).
187. WYO. STAT. § 6-3-101 (1977). Maximum punishment was a fine of $1000.
188. WYO. STAT. § 6-7-603 (1977).
189. WYO. STAT. § 6-7-604 (1977).
190. WYO. STAT. § 6-7-605 (1977).
191. WYO. STAT. § 6-3-607(a) (ii) (Supp. 1983).
192. 1882 WYO. SESS. LAWS ch. 11, § 20.
security interests was not as likely to be moved. Under this section, if property is moved from the county where the security interest was given, in a manner not violative of the statute, then the subsection no longer is applicable, and any protection afforded by it is lost. Thus a purchase is made and a security interest given in Cheyenne. The property is moved to Laramie with the consent of the secured party. Subsequently the debtor, with intent to deprive the secured party, moves the property to Colorado without the consent of the secured party. There is no violation of this subsection.

g. Fraudulent Use of Materials

Section 6-3-808 contains two provisions dealing with fraudulent acts by contractors or subcontractors. Subsection (a), a misdemeanor, deals with cases in which materials are purchased on credit and a representation is made that they will be used in a particular building, but the contractor or subcontractor, intending to defraud the seller, uses the materials elsewhere. The vice is that the credit seller will not be able to acquire and perfect his materialman’s lien if he does not know what became of the materials.

Subsection (b) deals with liens of materialmen and subcontractors, and provides that a contractor who receives money from an owner and provides the owner with a false affidavit that all materialmen and subcontractors have been paid, when they have not, is guilty of a felony, and may be punished by imprisonment up to five years and a fine of $10,000. The subsection provides: “Lien waivers signed by all materialmen, subcontractors and laborers are prima facie evidence that monies received from the owner were applied toward construction costs by the contractor.” This last sentence is bad, since securing lien waivers should exonerate the contractor, and not merely make a prima facie defense, unless the statute is intended solely to preserve the integrity of the affidavit. However, the section is designed to protect the owner against liens which the materialmen and others may assert if they are not paid, and to protect the materialmen and others against loss when money which should go to them is spent elsewhere by the contractor. But if lien waivers are secured, then it follows that neither the owner nor the materialmen and others will suffer loss if the contractor applies the money elsewhere.

h. Sports Bribery

Section 6-3-609, entitled “sports bribery,” is derived from seven statutory sections first enacted in 1963. The original provisions were somewhat cumbersome, and the 1982 Code simplifies them to a significant degree. The statute applies both to persons who give or offer bribes and to those who take them, for the purpose of affecting the outcome of an athletic contest or limiting “the margin of victory or defeat.” Violation is a felony. The section is highly particularized, and deals with a narrow range of conduct. While it is possible that a general bribery statute could be drafted to cover not only sports bribery, but other forms as well, it is

noteworthy that the Model Penal Code contains a separate section entitled "Rigging Publicly Exhibited Contest."  

i. Mislabeling Merchandise and False Advertising

Section 6-3-610 makes it a misdemeanor punishable by a fine of not more than $750 if a person, "with intent to promote the purchase or sale of a commodity, ... knowingly brands, labels, stamps or marks the commodity in a false, misleading or deceptive manner." The section replaces an earlier statute, enacted in 1913, which forbade falsely representing that a commodity was imported.  

It is unfortunate that the Legislature did not view business crimes of this nature with proper seriousness. Consumers may lose thousands of dollars to fraudulent schemes whereby mislabeled merchandise is sold; but the maximum punishment is so slight as to be no deterrent. One might almost say that this ridiculous section encourages fraud upon consumers.

Section 6-3-611, dealing with dissemination of advertisements known to be "false, misleading or deceptive, with intent to promote the purchase or sale of property or the acceptance of employment," is similar to the preceding section on false labels, carrying maximum punishment of a $750 fine. It is equally inadequate.

j. False Written Statements to Obtain Property or Credit.

Under section 6-3-612, a person who "knowingly makes or uses a false written statement of the financial condition of himself or another person with intent that the statement be relied upon to procure the delivery of property, the payment of cash, the making of a loan, the extension of credit," or similar acts, is guilty of a felony carrying maximum punishment of five years' imprisonment and a fine of the greater of $5,000 or the amount of credit sought or obtained.

The original version of the 1982 Criminal Code provided that this crime should be a misdemeanor, but the section was amended to its present form in 1983, when the "innovative" provision for a fine equal to the credit sought was also added. The principal problem with this section is that it imposes severe punishment for misstatements which may not be at all material. An innocuous "puffing," which has nothing whatever to do with the decision by the lender to extend credit, may create criminal liability. Thus if a person is applying for a $500 cash loan at a bank, for which he will give ample security in the form of a negotiable bond worth $2000, and falsely declares in a supporting financial statement that he earned $55,000 last year when in fact he earned only $52,000, he will be criminally liable under this section, even though the misstatement had nothing whatever to do with the making of the loan.

195. WY. STAT. § 6-3-102 (1977), first enacted as 1913 WYO. SESS. LAWS ch. 101, § 1.
196. WY. STAT. § 6-3-104 (1977), first enacted as 1917 WYO. SESS. LAWS ch. 63, §§ 1 to 3.
197. Originally WY. STAT. § 6-3-103 (1977), carrying a maximum punishment of six months' imprisonment and fine of $1000.
198. 1982 WYO. SESS. LAWS ch. 75, § 3, § 6-3-612.
199. 1983 WYO. SESS. LAWS ch. 171, § 2, § 6-3-612.
k. False Representation of Value

Section 6-3-613 punishes making or publishing statements of financial affairs which knowingly and with intent to defraud contain misstatements as to the value of stocks, bonds, or other property. The crime is a felony, with maximum punishment of five years' imprisonment and $10,000 fine. The section is taken from a statute first enacted in 1909, which applied to false statements of the value of the shares, bonds, or property of any individual or business association. Interestingly, the misstatement can come either in the form of overvaluing the shares, bonds or property, or undervaluing it.

7. Check Fraud

In 1980 the Wyoming Legislature enacted six sections on check fraud, principally dealing with insufficient funds checks and no account checks. The 1982 Criminal Code reenacted the 1980 legislation verbatim, on the ground that no change was needed because of the recent updating. In 1983 the Legislature made revisions in the check fraud sections, notably amending the felony/misdemeanor division in keeping with that year's general revision regarding property crimes. Further changes were made in 1984, when the Legislature again amended the division between felony and misdemeanor, and made other modifications.

The elements of the offense of fraud by check are found in section 6-3-702(a), which provides: "Any person who knowingly issues a check which is not paid because the drawer has insufficient funds or credit with the drawee, has issued a fraudulent check and commits fraud by check."

Understanding the language of this section requires reference to section 6-3-701(a), which contains definitions of terms. Three of these definitions are crucial:

(i) "Check" means a written unconditional order to pay a sum certain in money drawn on a bank payable on demand and signed by the drawer;

(ii) "Knowingly issues" means issuing a check and obtaining property with intent to defraud or deceive any other person;

(v) "Insufficient funds" means when the drawer issues a check from the drawee and has no checking account with the drawee or has funds in a checking account with the drawee in an amount less than the amount of the check plus the amount of all other checks outstanding at the time of issuance. A check dishonored for "no

201. 1980 WYO. SESS. LAWS ch. 18, § 1, codified as WYO. STAT. §§ 6-3-123 to -128 (Supp. 1983). See also WYO. STAT. § 6-3-110 (1977).
203. 1983 WYO. SESS. LAWS ch. 171, § 1, §§ 6-3-701 to -706.
204. 1984 WYO. SESS. LAWS ch. 44, § 2, §§ 6-3-701 to -703.
205. As amended 1984. The original version of the 1982 Criminal Code contained the added language "unless the check is paid by the maker [sic] within ten (10) days of receiving notice, sent to the address shown on the instrument of dishonor or nonpayment."
account[,] “account closed” or “nonsufficient funds” shall also be
deemed to be dishonored for “insufficient funds.”

The definition of “check” is not particularly remarkable, and restates
the common understanding. While the Legislature could have broadened
the definition to include other kinds of payment authorizations, such as
those allowing regular periodic deductions or transfers from a checking ac-
count, it chose not to do so. As explained below, this may have an undesired
narrowing effect upon the meaning of “insufficient funds.” It is not
altogether clear under this definition whether a postdated check, or one
which the drawer asks the payee to hold for a period before presenting for
payment, is to be considered a “check.” Also, a check must be “drawn on a
bank.” But “bank” is nowhere defined in the criminal code. Is a credit
union, or other financial institution which honors “share drafts” or some
other form of demand instruments drawn upon credits which the depositor
may have, to be considered a “bank”?

“Knowingly issues” bears a definition which is outside the ordinary
meaning of these words, but which is central to the check fraud provisions.
To fall within this definition, it is essential that a check be issued with the
intention to defraud or deceive, and that property be obtained thereby. Thus
although under a literal reading of section 6-3-702 it appears that a crime is
committed whenever a check is dishonored because of insufficient funds,
the definition makes clear that an intent to defraud must exist when such a
check is issued. The definition of “property” found in section
6-1-104(a)(viii) includes anything of value, whether real or personal, tangi-
ble or intangible, and therefore includes services. The definition, however,
does not appear to extend to a check given to discharge a preexisting
obligation such as an installment payment upon a charge account, since no
property is obtained thereby. But what of the check given to pay child sup-
port or alimony, or to pay a fine imposed in a criminal case?

The definition of “insufficient funds” is awkward. It begins by declar-
ing that the term “means when the drawer issues a check from the
drawee. . . .” (Emphasis added). Insufficient funds is a condition, not a
time, and therefore “when” is inapt. “From the drawee” does not ac-
curately describe the drawer-drawee relationship; moreover, it is un-
necessary and could be deleted without loss.\(^{206}\)

Getting down to substance, “insufficient funds” exists if the drawer
has no checking account, or “has funds in a checking account . . . in an
amount less than the amount of the check plus the amount of all other
checks outstanding at the time of issuance.” This definition is lacking in
several important respects. First, it does not embrace the situation where
the drawer has sufficient funds when the check is issued, but the drawer
goes to the bank before the check is presented and withdraws those funds.
Second, if there are sufficient funds when the check is issued, but a
withdrawal authorized by the drawer other than by check depletes the

\(^{206}\) The definition could better begin: “ ‘Insufficient funds’ means issuing of a check when the
drawer has no checking account with the drawee or has funds in a checking account with
the drawee,” etc.
funds before the check is presented, the definition does not apply. This could come about by a periodic deduction from the account which the drawer has authorized, by a set-off made by the bank, or through some other form of non-check authorization. Third, the definition may create difficult problems of proof for the prosecution, even in what may appear to be a simple case. Thus to establish insufficient funds the prosecution must prove that the amount of the check in question, "plus the amount of all other checks outstanding at the time of issuance," is less than the amount in the checking account at the time the check in question was issued. This may require proof not only of what checks were outstanding, but also of the precise time when those checks were issued. The proof is complicated by the fact that checks are not often presented for payment in the exact order in which issued by the drawer. And a determined writer of fraudulent checks can cloud the matter by issuing his checks in other than numerical order.

Further, what is the result where the drawer, having $700 in his checking account, issues a check for $600, and then issues a second check for $600 which is presented and paid first, so that the original check is not paid when presented? Under section 6-3-702(a), the prosecution must be upon the first check not paid; but when that check was issued, it did not fall within the requirement of "insufficient funds," since there were sufficient funds for its payment in the checking account.

Finally, the definition concludes with a declaration that a check shall "be deemed to be dishonored for "insufficient funds" if it is dishonored for "no account," "account closed" or "nonsufficient funds." The meaning of this is not clear. Is it intended that a bank stamp bearing one of these notations is by itself enough to satisfy the insufficient funds element, without regard to the state of the account when the check in question was issued? While this is an improbable construction, it is not clear what a rational construction would be.

The conclusion is irresistible that the check fraud article is simply too complicated to be workable.

Section 6-3-703 lists three circumstances under which a prima facie evidence of the drawer's intent that the check should not be paid exists. While at first it seems puzzling as to what place this intent has in the scheme of things, upon reflection it seems amply clear that the intent that the check not be paid is a necessary element of the intent to defraud or deceive under section 6-3-701(a)(ii). The first circumstance is that at the time of issuance the drawer did not have an account with the drawee. The other two are that when the check was issued, or when the check was presented within a reasonable time, the drawer did not have sufficient funds with the drawee, "and that he failed to pay the check or other order within five (5) days after receiving notice of nonpayment or dishonor, personally given or sent to the address shown on the check." The use of the term "after receiving notice" seems to require that actual notice be received by the drawer, and that simply sending a notice of nonpayment to the address will not suffice. It is not clear whether satisfaction of this five-day
provision by paying the check is intended merely to obviate the prima facie case, or whether it is intended to provide the drawer with a complete defense to prosecution. If the latter, the message seems to be that it is all right to give bad checks, so long as the drawer manages to pay them within five days of getting notice. Finally, the section requires that the drawer "pay the check." It says nothing about payment of the charges which many merchants seek to impose when an insufficient funds check is given.

Violation of section 6-3-702 is a felony, with maximum punishment of ten years' imprisonment and $10,000 fine, if the check was for $500 or more, or if the person is convicted of giving two or more fraudulent checks within a sixty-day period which aggregate $500; it is a misdemeanor in other cases. Section 6-3-702(c) provides that upon sentencing the court may require the defendant to make restitution up to twice the amount of the dishonored check. Section 6-3-704(b) supplements this somewhat by providing that when deferred prosecution or probation is ordered, the court may require restitution up to "twice the amount of the dishonored check on all checks issued by the defendant which are unpaid as of the date of commencement of the supervision."

Sections 6-3-705 and 6-3-706 are not criminal statutes, but instead provide civil and criminal immunity for release of information to the payee or holder of a check, or to law enforcement personnel, as to the status of a drawer's account.

8. Credit Card Fraud

Sections 6-3-801 and 6-3-802 deal with unlawful use of a credit card, and are derived from former sections 6-3-107 through 6-3-109. "Credit card" is defined as "an identification card or device issued by a business organization authorizing the person to whom issued to purchase or obtain property or services on credit." The crime of unlawful use of a credit card is committed when, with intent to obtain property or services by fraud, a person uses a credit card or the number or description thereof without the consent of the person to whom issued; or uses a credit card which he knows is expired, cancelled or revoked, or falsified or altered.

Punishment for unlawful use of a credit card is a felony, with maximum imprisonment of ten years and maximum fine of $10,000, if the value of the property or services so obtained exceeds $500 within any sixty-day period. The aggregation apparently will apply whether one or more credit cards are unlawfully used. It is a misdemeanor in other cases.

The sections on unlawful use of a credit card were evidently drafted with a fairly narrow purpose in mind. Thus the card must be issued by a "business organization," which term is not defined. Whether an identification card issued by some other organization, whether the University of Wyoming, or a state agency, which permits the holder to obtain property or

209. 1984 Wyo. Sess. Laws ch. 44, § 2, § 6-3-802(b) (iii).
210. 1984 Wyo. Sess. Laws ch. 44, § 2, § 6-3-802(b) (i).
services, falls within the definition is not clear. While some instances of falsification of credit cards would fall within the statutes on forgery or false pretenses,\textsuperscript{211} other unauthorized uses would not.

It should be noted that the 1982 Criminal Code has made two significant changes in the prior statutes dealing with unlawful use of credit cards. The prior statutes did not contain the element of intent to obtain property or services by fraud; it was a violation simply to use a credit card without the consent of the person to whom issued, or to use a revoked, cancelled, or expired card.\textsuperscript{212} At the same time, punishment under the prior statute was only a misdemeanor.

\section*{D. Chapter 4: Offenses Against Morals, Decency and Family}

\subsection*{1. Prostitution}

The 1982 Wyoming Criminal Code creates three crimes relating to prostitution: section 6-4-101, prostitution; section 6-4-102, patronizing a prostitute; and section 6-4-103, promoting prostitution. Eight prior sections on prostitution, enacted in 1890 and 1921, were replaced by the 1982 Code.\textsuperscript{213}

The 1890 legislation was a classic example of the nineteenth century approach to prostitution. First, it was a crime to be a prostitute. A prostitute was a "female who frequents or lives in houses of ill fame, or associates with women of bad character for chastity, either in public or at a house which men of bad character frequent or visit; or who commits fornication for hire. . . ." Prostitutes could be punished by a fine of not more than fifty dollars, "to which may be added imprisonment in the county jail not more than thirty (30) days."\textsuperscript{214} It was also a crime to be a pimp. "Whoever, being a male person, frequents houses of ill-fame, or of assignation, or associates with females known or reputed as prostitutes, or is engaged in or about a house of prostitution, is a pimp. . . ." Originally a pimp could be fined $100 and imprisoned for not more than sixty days.\textsuperscript{215} Keeping "a house of ill-fame, resorted to for the purpose of prostitution or lewdness," or letting a house for such purposes, or permitting a house which one had let "to be so kept," was subject to maximum punishment of a fine of $100 and six months in the county jail.\textsuperscript{216} Finally, enticing or taking away "any female of good repute for chastity from wherever she may be to a house of ill-fame, or elsewhere for the purpose of prostitution," was a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{211} See Hutchins v. State, 483 P.2d 519 (1971).
\item \textsuperscript{212} Wyo. Stat. § 6-3-108 (1977).
\item \textsuperscript{213} Wyo. Stat. §§ 6-5-103 to -110 (1977).
\item \textsuperscript{214} 1890 Wyo. Sess. Laws ch. 73, § 86, later codified as Wyo. Stat. § 6-5-110 (1977).
\item \textsuperscript{215} 1890 Wyo. Sess. Laws ch. 73, § 86, later codified as Wyo. Stat. § 6-5-105 (1977). The punishment was increased by 1917 Wyo. Sess. Laws ch. 89, § 1, to a term of one to three years in the penitentiary. The 1917 legislation also enlarged the definition to include "person, or persons, who shall knowingly accept, receive, levy, or appropriate any money or other valuable thing without consideration from the proceeds of earnings of any female engaged in prostitution."
\item \textsuperscript{216} 1890 Wyo. Sess. Laws ch. 73, § 79, later codified as Wyo. Stat. § 6-5-104 (1977). The section was amended by 1921 Wyo. Sess. Laws ch. 45, § 1, raising the punishment to a maximum fine of $200, and mandating a term of thirty days to six months in the county jail. Further, each day of continuance of the offense was to be regarded as a separate offense.
\end{itemize}
\end{footnotesize}
graded felony, which might be punished by imprisonment for not more than twelve months in the county jail, or not more than five years in the penitentiary.\textsuperscript{217}

The 1921 legislation covered some of the same ground without repealing the 1890 legislation, although there was substantial overlapping. "Prostitution" was defined "to include the giving or receiving of the body for sexual intercourse for hire, and, shall also be construed to include the giving or receiving of the body for indiscriminate sexual intercourse without hire."\textsuperscript{218} Prohibited acts included keeping, occupying or permitting to be occupied "any place, structure, building or conveyance for the purpose of prostitution, lewdness or assignation," or residing, entering or remaining in, directing persons to, or receiving persons into a place for such purposes.\textsuperscript{219} It was also forbidden to "[e]ngage in prostitution, lewdness, or assignation or to aid or abet prostitution, lewdness, or assignation by any means whatsoever."\textsuperscript{220} Punishment for any violation was not less than four months nor more than a year in jail, or commitment from one to three years "to such reformatory institution as may be designated by the judge of the district court."\textsuperscript{221} It is noteworthy, in light of recently developed societal attitudes, that the 1921 legislation did not distinguish in any way between males and females, so that a male as well as a female could be convicted of prostitution, but that it did equate indiscriminate sexual intercourse with prostitution.\textsuperscript{222}

a. Prostitution

Section 6-4-101 of the 1982 Code penalizes prostitution: "A person who knowingly or intentionally performs or permits, or offers or agrees to perform an act of sexual intrusion, as defined in W.S. 6-2-301(a)(vii), for money or other property commits prostitution." Sexual intrusion is more broadly defined than sexual intercourse, as it includes fellatio and cunnilingus.\textsuperscript{223} Prostitution is punishable as a misdemeanor, with maximum imprisonment of six months, and maximum fine of $750.

While this section appears straightforward, it is both narrower and broader than might reasonably be expected. Thus while it expands the prohibited activity from sexual intercourse to what the Criminal Code calls

\textsuperscript{217} 1890 WYO. SESS. LAWS ch. 73, § 78, later codified as WYO. STAT. § 6-5-103 (1977).
\textsuperscript{218} 1921 WYO. SESS. LAWS ch. 98, § 2. In this act, prostitution was clearly defined to be sexual intercourse. "Lewdness" and "assignation" were also defined. This enactment was later codified as WYO. STAT. § 6-5-106 (1977).
\textsuperscript{219} 1921 WYO. SESS. LAWS ch. 98, § 1, later codified as WYO. STAT. § 6-5-107 (1977).
\textsuperscript{220} 1921 WYO. SESS. LAWS ch. 98, § 1.
\textsuperscript{221} WYO. SESS. LAWS ch. 98, § 4, later codified as WYO. STAT. § 6-5-109 (1977), Sections 3 and 5 of the 1921 legislation dealt with admissibility of evidence of prior convictions and the reputation of a place and persons who frequented it, and with granting probation or parole to a person infected with venereal disease.
\textsuperscript{222} It is not clear whether, under the 1921 legislation, a person who paid another and engaged in sexual intercourse was guilty of a crime. Section 1 made it unlawful to "engage in prostitution . . . or to aid or abet prostitution," and conceivably might have been extended to customers of prostitutes. However, there are no reported judicial decisions raising this question.
\textsuperscript{223} WYO. STAT. § 6-2-301(a)(vii) (Supp. 1983) provides that "sexual intrusion" means sexual intercourse, cunnilingus, fellatio, analingus or anal intercourse; or intrusion of any object into a person's genital or anal openings if done for sexual arousal, gratification or abuse.
"sexual intrusion," it does not go so far as to take in other acts of a sexual nature which may commonly be performed for money or property in our society. Thus an act of masturbation of another, as may be practiced at some massage parlors, is not included. At the same time, the section is too broad, if literally applied, since it provides no exceptions for persons who are married to one another. Given the recognition that persons who are married to each other do not have a right to sexual acts with the other, unless there is consent, it follows naturally that some married persons will grant consent only where some form of consideration is offered by the other, whether in the form of money or property. The statute makes parties to such an act within a marriage guilty of prostitution or of patronizing a prostitute.\textsuperscript{225}

\textbf{b. Patronizing a Prostitute}

Patronizing a prostitute is a new crime,\textsuperscript{226} intended to give "balance" to the activity which constitutes paid-for sex, by penalizing the person who uses the services of the prostitute, as well as the prostitute.\textsuperscript{227} The penalty is the same for patronizer as for prostitute.

But section 6-4-102 on patronizing a prostitute may be too broadly worded:

A person who knowingly or intentionally pays, or offers or agrees to pay, money or other property to another person for having engaged in, or on the understanding that the other person will engage in, an act of sexual intrusion . . . with the person or with any other person commits patronizing a prostitute. . . .

Sexual intrusion in the form of sexual intercourse remains for most of us a necessary precondition to having children. Thus, if literally applied, this section would make a criminal of a person who gives his son-in-law a gift of money or property for having produced a grandchild.\textsuperscript{228} It would apply to some of the classical common law estates in real property, or to those instances in which A conveys to B for life, upon the further condition that if B shall produce a child, B shall have the fee. It could extend to many premarital property agreements, particularly those which may make provision for the birth of children. Could it extend to the wedding gift given by maiden Aunt Lucy?\textsuperscript{229}

\textsuperscript{224} Sexual intercourse only includes acts with other human beings. Therefore it follows that a place where animals were offered for sexual purposes for pay would not fall within this definition.

\textsuperscript{225} The provision would also apply to unmarried persons in socially common situations. Thus where A takes B to dinner, or gives B a gift, sexual intercourse may be an implicit part of the arrangement between the parties. Further, the provision would apply to Masters and Johnson type sexual treatment "clinics."

\textsuperscript{226} But see supra note 222.

\textsuperscript{227} This is rather plainly a women's movement issue. While it will probably have little effect upon the incidence of prostitution, it will serve to embarrass publicly some persons whose resort to prostitutes for sexual activity may be pitiful rather than antisocial.

\textsuperscript{228} Or the one who promises a gift when the first grandchild is born.

\textsuperscript{229} A respectable argument can be advanced that many wedding gifts are bestowed in contemplation of what a Victorian would have termed a "consummated" marriage.
Now it can be argued that no right-minded prosecutor would criminally charge and seek to convict a person who gave a gift to another for becoming a parent. After all, in spite of what these statutes say, all reasonable law abiding citizens know what they really mean, and certainly the police and prosecutors can be expected to act accordingly. But are our crimes so difficult to define that they must depend upon this process of narrowing by common understanding? Have we really progressed from those earlier laws which simply punished people for acting indecently or obscenely?

c. Promoting Prostitution

Section 6-4-103 combines the former statutes on enticing females to become prostitutes, pimping, and houses of ill fame, into a new crime, called "promoting prostitution" in the title to the section, but remaining nameless in the substantive paragraphs. This section is serious business, as violation is punishable by three years' imprisonment and a fine of $3,000, or by five years' imprisonment and $5,000 fine if a child under nineteen years of age is enticed or compelled to become a prostitute.230

Promoting prostitution comprises four acts: knowingly or intentionally enticing or compelling another to become a prostitute;231 knowingly or intentionally procuring, or offering or agreeing, to procure "a person for another person for the purpose of prostitution;"232 knowingly or intentionally permitting another to use for prostitution a place over which one has control;233 and receiving money or property from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution.234

This section is again entirely too vague, and too broad. Thus terminology is used which is not defined, particularly the word "prostitute." It is a violation of the section to entice or compel another person to become a prostitute. But who is a prostitute? While one reasonable interpretation is that a person who is engaging in an act of prostitution is a prostitute, whether that person engages regularly in such acts or has never done so before, the question remains as to how long one retains the status of prostitute after the act of prostitution is complete. Is the rule to be once a prostitute, always a prostitute? Or upon completion of the act, does the person cease to bear the shameful status of prostitute, and become a regular citizen like the rest of us?

The definition of prostitute is important in this section in two respects. First, if "prostitute" is not a status, but simply a term descriptive of one party to a particular commercial sex act (the other party being, perhaps, a patron), then arguably whenever a person solicits another by offering to pay for sexual acts, the act of enticing that other person to become a prostitute has occurred, and section 6-4-103(a)(i) is violated.235 But this is also

230. WYO. STAT. § 6-4-103(b) (Supp. 1983).
231. WYO. STAT. § 6-4-103(a) (i) (Supp. 1983).
232. WYO. STAT. § 6-4-103(a) (ii) (Supp. 1983).
233. WYO. STAT. § 6-4-103(a) (iii) (Supp. 1983).
234. WYO. STAT. § 6-4-103(a) (iv) (Supp. 1983).
235. Here "knowingly or intentionally" comes into play: is the person guilty of enticing or compelling another person to become a prostitute only if he has knowledge that the person has never before performed an act of prostitution? How likely is it that anyone can know this?
the crime defined in section 6-4-102 as patronizing a prostitute; how are we to choose between them? On the other hand, if "prostitute" is a status which is achieved by engaging in an act of prostitution, then one who offers money or property to another for an act of sexual intrusion is guilty of the felony of promoting prostitution only if the other has never before participated in such an act as a prostitute.

A part of the problem is the retention in the language of the statute of the now archaic notion that one "becomes a prostitute." If this is the case, then when one has already become a prostitute, it can no longer be a crime to entice or compel that person to become a prostitute. But could it have been the legislative intent that persons characterizable as prostitutes are to have no protection against being compelled to continue to be prostitutes?

A second problematic use of "prostitute" occurs in section 6-4-103(a)(iv), which prohibits receiving "money or other property from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution." Who is a prostitute under this section, and for how long does a person retain that status?

Subsection (iv) creates other difficulties in interpretation. While this provision may be aimed against the pimp, who lives off the earnings of his "girls," arguably it misses the target where the pimp provides services, including protection and career guidance, to women engaging in prostitution under his tutelage and control, which qualify as a consideration. Therefore the literal application of the section will be to persons whom the person denominated "a prostitute" may be supporting, such as her teen-age children, or perhaps her aged mother or paraplegic husband, who are aware of her "profession." It also applies to persons to whom gifts are given, such as a sister, to whom a Christmas present is given, and who is aware of the source of the donor's income. Under this section, does one become a felon by accepting an inheritance from a decedent who was known to be a "prostitute"? While all of this may seem far-fetched, it does point up some of the conceptual weaknesses in the prostitution sections of the 1982 Criminal Code. Any perceptive person can find others.

2. Public Indecency

There is a single section on public indecency. Section 6-4-201 applies to acts, while in a public place where one "may reasonably be expected to be viewed by others," of sexual intrusion, or of exposing one's intimate parts or engaging in sexual contact "with the intent of arousing the sexual desire of himself or another person." Violation of this section is a misdemeanor.

The remarkable aspect of this section is that it is limited to sexual acts or acts intended to arouse sexual desire. Neither this statute nor any other Wyoming statute prohibits acts in public which are intended to offend, as certain acts of exposing intimate parts would be, or prohibits acts which by their nature are offensive, such as urinating or defecating in a public place in the presence of others. 

236. For definitions of "sexual intrusion," "intimate parts" and "sexual contact," see Wyo. Stat. § 6-2-301(a) (Supp. 1983).
237. Thus breach of the peace covers only "using threatening, abusive or obscene language or violent actions." Wyo. Stat. § 6-6-102(a) (Supp. 1983).
It is true that one predecessor statute, section 6-5-301, was unduly broad, and probably void for vagueness, as it spoke to "indecent exposure," and to using or uttering "any obscene or licentious language or words in the presence or hearing of any female." 238 But while there may be potential difficulties with statutes which attempt to control offensive acts in public places, 239 there is no reason to abandon such statutes entirely, or to limit them solely to acts of a sexual nature.

Section 213.5 of the Model Penal Code is somewhat similar to the Wyoming statute, in that indecent exposure must be "for the purpose of arousing or gratifying sexual desire," but it is much narrower, in that it is limited to exposure of one's "genitals under circumstances in which he knows his conduct is likely to cause affront or alarm." 240 And Model Penal Code section 251.1 deals with other offensive conduct, providing "A person commits a petty misdemeanor if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed." 241

3. Obscenity

Two sections of the 1982 Criminal Code deal with obscenity. Section 6-4-301 seeks to provide definitions consistent with Miller v. California, 242 the most recent decision of the Supreme Court of the United States which delineates between obscenity and constitutionally protected speech. 243 Thus under the Wyoming definition, "obscene" material is that which the average person would find (a) applying contemporary community standards, taken as a whole, appeals to the prurient interest; (b) applying contemporary community standards, depicts or describes sexual conduct in a patently offensive way; and (c) taken as a whole, lacks serious literary, artistic, political or scientific value.

Section 6-4-302 declares that promoting obscenity consists of disseminating obscene material; or producing, reproducing, or possessing obscene material with intent to disseminate it. 244 Violation is a misdemeanor, with maximum punishment of imprisonment for one year, and a fine of $1,000 "if to an adult," and of $6,000 "if to a minor." 245 It is not clear whether the "if to an adult" language refers only to actual dissemination, or also to the intent to disseminate; or whether this language requires the prosecution to prove to whom the material was disseminated or intended to be disseminated in all cases. 246

239. Most of the constitutional difficulty has arisen through the interplay between obscenity and free speech. Compare Cohen v. California, 403 U.S. 15 (1971).
240. (P.O.D. 1982).
241. Id. Even the Model Penal Code appears fixated by sexual acts; thus it has chosen the descriptive word "lewd" rather than "indecent" for this section.
243. Interested persons should carefully compare the Wyoming statute with Miller to see whether Wyoming has achieved compliance.
244. Wyo. Stat. § 6-4-302(a) (Supp. 1983).
246. The statute could be clarified in several ways. One would be:
   (b) Promoting obscenity is a misdemeanor punishable upon conviction by imprisonment not to exceed one (1) year, or by a fine not to exceed six thousand dollars ($6,000.00), or both; except that if it shall appear that dissemination or intended dissemination was not made to any minor, the sentencing court shall not impose a fine greater than one thousand dollars.
While there may be a social benefit in a statute which effectively controls dissemination of obscene matter, particularly to children, it has not been possible in modern times to enact such a statute. The new Wyoming statute, like all others, will create more problems than it solves.

4. Offenses Against the Family

a. Bigamy

Bigamy is a crime which is a favorite of law professors, but is probably of only minor societal significance today. Originally an ecclesiastical offense, and later put into statutory form, bigamy and its consequences were of greater importance when divorce was not available, cohabitation without marriage was regarded as illicit and immoral, illegitimate children labored under dire legal disabilities, and women were subject to legal and economic dominance.

Wyoming’s first bigamy statute appeared in the 1876 Compiled Laws of Wyoming Territory: “Bigamy consists in the having of two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive.” Other provisions dealt with absence for five years, marriages terminated by divorce, and void marriages. Upon conviction, a person was to be fined not to exceed $1,000, and imprisoned in the penitentiary for not more than two years.

In 1890 the bigamy statute was amended to the form it was to take until the effective date of the 1982 Code: “Whoever, being married, marries again, the former husband or wife being alive, and the bond of matrimony being still undissolved, and no legal presumption of death having arisen, is guilty of bigamy, and shall be imprisoned in the penitentiary not exceeding five years.”

It is noteworthy that the 1876 statute was not a strict liability measure, since an element to be proved by the prosecution was that the defendant knew that the former spouse was alive. But the 1890 statute did appear to impart strict liability, for so long as the first spouse was in fact alive, or at least not presumed dead, the defendant contracted the second marriage at his peril. But while there are no Wyoming decisions in point, there is respectable judicial authority for the position that reasonable belief that the first spouse was not alive or had secured a divorce would have been a defense.

Section 6-4-401 of the 1982 Criminal Code returns to the language of the 1876 statute: “A person commits bigamy if, being married and knowing that his spouse is alive, he marries again.” The section provides the

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247. In hypothetical cases and in problems at examination time, and not in actual practice.
248. 4 W. Blackstone, Commentaries *163-65.
249. 1876 Wyo. Comp. Laws ch. 35, § 107. Conceptual difficulties are encountered in the language used, since one cannot have two spouses at the same time; the second marriage is void and of no effect. Id. § 107. See also Wyo. Stat. § 20-2-101 (1977).
251. See R. Perkins & R. Boyce, Criminal Law 1050-54 (3d ed. 1982); Note, Belief in Death of Absent Consort as a Defense to a Charge of Bigamy, 10 Wyo. L. J. 165 (1956).
defense "that the accused person reasonably believed that he was eligible to remarry." Bigamy is a felony, with maximum punishment of five years' imprisonment and a fine of $5,000.

The burden upon the prosecution to prove that the defendant married again, "knowing" that his first spouse was alive, may be very difficult. Given the fact of mortality, when can it be said that we "know" that another person is alive? In the most extreme sense, a man who saw his wife at the breakfast table does not know two hours later when he is at the office that she is still alive, unless he is talking with her on the phone at that moment. If this approach is taken, about the only way that a person could again marry, knowing that the first spouse is alive, would be for the first spouse to be present at the second marriage ceremony. But even taking a more practical view, in order to know that a person is still alive, there must be reasonably recent evidence of that fact. Evidence a month old may be adequate; evidence which is six months or a year old would seem too stale. It is not enough to say that a person must know that his spouse is alive unless he knows that she is dead.

The defense relating to reasonable belief in eligibility to remarry can only relate to a dissolution of the first marriage, through divorce or annulment. It cannot relate to a reasonable belief of death, since before a defense even becomes relevant the state must prove that the defendant knew the first spouse to be alive, which necessarily excludes any reasonable belief that the spouse was dead.

Finally, it is noteworthy that only the previously married party to a bigamous marriage is explicitly subject to criminal penalties. Whether a party who is free to marry can be punished for knowingly contracting a bigamous marriage has not been decided in Wyoming. Conceivably such a person could be charged and convicted as an accessory. The Model Penal Code contains a provision making a person guilty of bigamy who contracts a marriage with another "knowing that the other is thereby committing bigamy."

b. Incest

Traditionally incest has been committed when sexual intercourse occurs between persons who are closely related. The original Wyoming statute, set forth in the 1876 Compiled Laws, proscribed sexual intercourse only between persons closely related by blood, including parents and children, grandparents and grandchildren, brothers and sisters of the whole or half blood, uncles and nieces, aunts and nephews, and cousins in the first degree. The crime was a felony, punishable by up to ten years in prison. In 1890 the statute was amended to apply only to parents and children, brothers and sisters sixteen or older, and stepparents and stepp-

255. WYO. STAT. § 6-4-401(b) (Supp. 1983).
254. WYO. STAT. § 6-4-401(c) (Supp. 1983).
257. 1876 WYO. COMP. LAWS ch. 35, §§ 112, 113.
Punishment was either not more than five years in the penitentiary, or not more than twelve months in jail.

The 1982 Wyoming Criminal Code has wrought radical changes in the incest statute. Section 6-4-402(a) provides: "A person is guilty of incest if he knowingly commits sexual intrusion, . . . or sexual contact . . . with an ancestor or descendant or a brother or sister of the whole or half blood." The relationships include adopted children, illegitimates, and stepchildren. Incest is a felony with maximum punishment of five years' imprisonment and a fine of $5,000.259

"Sexual intrusion" and "sexual contact" are defined by reference to the article on sexual assault. Thus sexual intrusion includes sexual intercourse, cunnilingus, fellatio, anilingus and anal intercourse, as well as any intrusion into a genital or anal opening for "purposes of sexual arousal, gratification or abuse."260 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 the clothing covering the immediate area of the victim's or actor's intimate parts."261 Intimate parts include both genital and anal areas, as well as the breast of a female.262

Thus incest has been broadened to include sexual acts other than sexual intercourse, and also to include sexual acts between persons of the same sex. The expansion of incest to include sexual contact is startling.263 Plainly it is intended to deal with sexual exploitation of children, but is not so limited, and therefore extends substantially beyond the traditional justifications for punishing incest. Thus sexual contact between adult siblings is now incest. This extension is unnecessary, since there are other statutes adequately protecting against offensive sexual contact.264

The relationships covered by the statute are not clearly spelled out. Thus while parent and child by adoption are explicitly mentioned, the effect of adoption upon persons who are in the position of grandparents and siblings as a result of the adoption is not made plain. The same uncertainty exists as to persons in the position of grandparents and siblings with regard to stepchildren. Further, it is not clear as to when or how a person becomes a stepparent, or when and how the relationship ceases. In this regard, if marriage to a child's natural parent creates a stepparent-stepchild relationship, what relationship exists where there is no marriage, but instead the natural parent acquires a live-in cohabitant? The danger of exploitation within the "family" exists strongly here, too.

258. 1890 WY. SESS. LAWS ch. 73, § 75, later codified as WYO. STAT. § 6-5-102 (1977).
259. WYO. STAT. § 6-4-402(b) (Supp. 1983).
261. WYO. STAT. § 6-2-301(a)(vi) (Supp. 1983). By one reading of this subsection, sexual contact includes touching the clothing over one's own intimate parts. Can we no longer scratch without looking to see if Big Brother is watching?
262. WYO. STAT. § 6-2-301(a) (ii) (Supp. 1983).
263. Colorado has followed Wyoming's dubious lead in this regard. COLO. REV. STAT. §§ 18-6-301 through 18-6-305 (Supp. 1983).
264. See, e.g., 1984 WYO. SESS. LAWS ch. 44, § 2, §§ 6-2-304, 6-2-305.
Section 6-4-402 contains five additional subsections restricting the release of information in incest prosecutions.\textsuperscript{266} These provisions are identical to those in sexual assault cases, and are subject to the same criticisms.\textsuperscript{266}

c. Abandoning or Endangering Children

Section 6-4-403 of the 1982 Code is a child protection statute, imposing criminal sanctions for a whole catalog of acts which may adversely affect the welfare of children under the age of sixteen. Parents, guardians and custodians are forbidden to abandon a child without just cause, or to endanger a child's life or health knowingly or with criminal negligence.\textsuperscript{267} All persons are forbidden to cause, encourage, aid or contribute to a child's violation of law, or to a child's presence or employment in any place used for prostitution or professional gambling.\textsuperscript{268} Indecent or obscene acts in the presence of a child are forbidden, as is giving a child a drug "prohibited by law without a physician's prescription."\textsuperscript{1269} The health, welfare and morals of children shall not be endangered by employing or permitting them in dangerous business enterprises, allowing them to be beggars, permitting them to be in a place used for prostitution, or causing them to be exhibited to display their deformities or for obscene or indecent purposes.\textsuperscript{270} Finally, persons are forbidden to conceal or refuse to reveal the location of a runaway child to a parent, guardian, custodian, or peace officer, except when necessary to protect the child from immediate danger.\textsuperscript{271} Violation of the section is a misdemeanor, but a second conviction is a felony punishable by a maximum of five years' imprisonment and a fine of $5,000.\textsuperscript{272} The foregoing explication is cumbersome, but accurately reflects the statute.

5. Desecrating Graves and Bodies

Section 6-4-501 provides that a person who opens a grave and removes the remains of a deceased person "without the knowledge and consent of near relations of the deceased" is guilty of a misdemeanor punishable by a fine of $750. Exhumation may, however, be ordered "by a court of competent jurisdiction." The section is derived from a statute first found in the 1876 Wyoming Compiled Laws, and entitled "Resurrectionists."\textsuperscript{273} It carries forward two inadequacies. First, it is left to conjecture just who are the "near relations of the deceased" who can consent to opening a grave. Second, the punishment may be wholly inadequate to deal with true instances of grave robbing.

Section 6-4-502 provides that "a person who dissects or mutilates a dead human body is guilty of a felony" punishable by a maximum of three

\textsuperscript{265} WYO. STAT. § 6-4-402(c) through (g) (Supp. 1983).
\textsuperscript{266} See the discussion in the first part of this article, in 19 LAND & WATER L. REV. at 127-28 (1984).
\textsuperscript{267} WYO. STAT. § 6-4-403(a) (Supp. 1983).
\textsuperscript{268} WYO. STAT. § 6-4-403(b) (i), (ii) (Supp. 1983).
\textsuperscript{269} WYO. STAT. § 6-4-403(b) (iii), (iv) (Supp. 1983).
\textsuperscript{270} WYO. STAT. § 6-4-403(b) (v) (A) through (E) (Supp. 1983).
\textsuperscript{271} WYO. STAT. § 6-4-403(b) (vi) (Supp. 1983).
\textsuperscript{272} WYO. STAT. § 6-4-403(c) (Supp. 1983). Subsections (f) through (k) restrict the release of information in child endangerment cases, paralleling subsections in § 6-2-310 (sexual assault) and § 6-4-402 (incest).
\textsuperscript{273} 1876 WYO. COMP. LAWS ch. 55, § 129, later codified as WYO. STAT. § 6-5-201 (1977).
years' imprisonment and $5,000 fine. Exceptions are made for post-mortem examinations conducted upon the order of a court or coroner; "dissection to determine the cause of death when authorized by the nearest living kin of the deceased"; dissection of unclaimed bodies; embalming; and conduct authorized under the Uniform Anatomical Gift Act. This section is derived nearly unchanged from prior section 6-5-202, first enacted in 1913. It would benefit from revision and clarification.

E. Chapter 5: Offenses Against Public Administration

Chapter 5 of the 1982 Wyoming Criminal Code is entitled "Offenses Against Public Administration," and includes three articles dealing with: (1) offenses by public officials; (2) hindering government operations; and (3) perjury and criminal falsification.

These statutory provisions draw heavily upon prior law, and evidence an unease on the part of the Legislature in dealing with criminal acts affecting government, particularly those acts involving misconduct by public officials. This unease is not peculiar to Wyoming. Throughout American public life there is a tension between the demand that public officials perform their duties faithfully and well, and the willingness to excuse official misconduct when it does occur. Watergate and its sequelae reflected this tension at the national level, and reached a climax in the pardoning of Richard Nixon for his crimes before he had been convicted of any of them. He had suffered enough by giving up the presidency, it was said, and therefore should be punished no more. In the face of this attitude, what becomes of the axiom that the higher the office, the higher the trust; and the necessary corollary that when that trust is broken, the greater the crime?

This unease is also present in the Model Penal Code's article on bribery and corrupt influence, where the draftsmen exhibit an insecurity which is not present in the other Model Penal Code provisions dealing with crimes against persons and property.

1. Offenses by Public Officials
a. Bribery and Related Acts

The article on offenses by public officials is prefaced by section 6-5-101, which sets forth relevant definitions used throughout the article, including: "government," which includes both the state of Wyoming and all governmental subdivisions, agencies and districts; "governmental function," which includes any activity a public servant is authorized to undertake on behalf of a government; "public officer," who is a person holding an office created by the constitution or by statute, and who exercises a portion of the

274. WYO. STAT. § 6-4-502(a) (Supp. 1983).
275. WYO. STAT. § 6-4-502(b) (Supp. 1983).
278. An alternative explanation is that this is deadly boring stuff, and the Legislature simply lost interest, or never generated much interest in the first place.
sovereign power of the state; and "public servant," who is any officer or employee of government, or juror or witness, performing a governmental function.

Section 6-5-102 prohibits bribery of public servants, and forbids acts by persons who confer or offer to confer any pecuniary benefit or other advantage upon a public servant in exchange for action by the public servant, and acts by public servants in soliciting or accepting such benefit. Violation of the section is a felony, with maximum imprisonment of ten years, and maximum fine of $5,000.279

One very clear shortcoming of this section is that it applies only to pecuniary benefit or other advantage offered to or conferred upon, or solicited or accepted by persons who are already public servants.280 It does not, as the earlier statutes did, apply to public servants "either before or after" their "election, qualification, appointment or employment."281 Thus it is no longer a crime in Wyoming to bribe a person, or for a person to solicit or accept a bribe, before he becomes a public servant. Exchanges of pecuniary and other benefits for official action may be made with impunity before election or appointment, or even after election or appointment but before the person assumes public office or employment.

Plainly an amendment to section 6-5-102 is needed. While the Model Penal Code is not recommended as a drafting model for this purpose, its substance points the direction that amendment should take: "It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason."282

A second curious omission is in the definition of "pecuniary benefit" found in section 6-5-101(a)(v), which excludes three classes of benefit: (a) property valued under $20.00; (b) food, drink or entertainment "authorized as a proper deductible expense for income tax purposes under the United States Internal Revenue Code up to an amount of one hundred dollars ($100.00) per year"; and (c) contributions to a political campaign of a public servant.283 While the Legislature may have excluded these benefits from serving as a basis for convictions of bribery or related offenses because it believed they were de minimis or were proper contributions to political campaigns, it is submitted that in the context in which "pecuniary benefit" is used, the exclusion is wholly inappropriate.

The Legislature has lost sight of the fact that the bribery statute involves corrupt acts by public servants and persons who seek to influence

279. The 1983 amendment reduced the maximum punishment from 14 years and $14,000. 1983 WYO. SESS. LAWS ch. 171, § 1, § 6-5-102. The source of this section is WYO. STAT. §§ 6-5-201 and 6-5-202 (1977).
280. Support for this conclusion is found in the language of § 6-5-202. Thus the third person must offer or confer a benefit "upon a public servant," § 6-5-202(a)(i); and a public servant must solicit or accept a benefit "while a public servant." § 6-5-202(a)(ii).
the performance of governmental functions. It is the bestowing of influence in exchange for a pecuniary benefit which is wrong, and not the nature or the amount of the benefit which is offered or accepted. Bribery is bribery, whether for a groat or a million dollars; nor does its nature change if it is done in the form of a campaign contribution. What the Legislature has told us is that if a public servant is willing to trade his vote or other official action for less than $20.00, or for a meal or a drink or entertainment under $100 to a person who can deduct the cost from his income tax, then he commits no crime for doing so, and neither does the person who confers the benefit. Thus under section 6-5-102 it is not a crime for a motorist, stopped for a traffic violation, to offer $19.95 to the police officer not to issue a traffic summons.

Moreover, it is questionable whether section 6-5-102 is consistent with either the letter or the spirit of Wyoming's constitutional provisions respecting bribery of members of the Legislature and public officers.

Section 6-5-103 makes it a felony for a person to solicit, accept, or agree to accept any pecuniary benefit for actions taken while he was a public servant. Acceptance of employment is excluded from this section, although it exempts one current area in which corruption needs to be controlled.

Section 6-5-104 makes it a felony for a public servant to solicit, accept or agree "to accept a pecuniary benefit for the performance of an official action knowing that he was required to perform that action without compensation or at a level of compensation lower than that requested."

Finally, section 6-5-117 provides that "A public officer who requires a deputy appointed by him to divide or pay back to the officer a part of the legal fees of the deputy is guilty of a felony," with maximum punishment of three years' imprisonment and fine of $5,000. This section is derived from a statute first enacted in 1890, when public employees derived all or a substantial part of their income from fees collected. But this is no longer the case, and the modern evil would arise from a system of salary kickbacks or other payments to the appointing officer. But it is not at all clear that salary kickbacks or other monetary payments fall within the language of this section.

284. The food, drink or entertainment exclusion is unclear in the extreme. Does it permit the expenditure of one hundred dollars by each person for each public servant in a taxable year, or is the $100 figure some kind of cumulative total? Worse yet, must the public servant at his peril ascertain: (1) whether the food, drink, or entertainment will be a proper deduction for the person who bestows it, and (2) whether the sum of $100, however computed, has been exhausted for the particular year?

285. But although the officer who accepts the money cannot be guilty under § 6-5-102, if he has a duty to make the arrest, he may be in violation of § 6-5-107. However, given the officer's de facto if not de jure discretion not to issue a summons, there may be no duty to issue one.

286. WYO. CONST. art. 3, §§ 12, 42, 43, 44 and 45.

287. Punishment maxima are 10 years' imprisonment and fine of $5,000.


289. The maximum punishment is imprisonment for 10 years and a fine of $5,000. Compare former WYO. STAT. § 6-8-510 (1977).

290. 1890 WYO. SESS. LAWS ch. 73, § 110, later codified as WYO. STAT. § 6-8-510 (1977). The earlier provision was a misdemeanor.
b. Conflict of Interest

Section 6-5-106 is entitled conflict of interest, but is very narrow in scope, extending only to cases in which a public servant has an interest in a contract with or an appointment by government. Furthermore, a public servant exempts himself from this section if he discloses his interest and refrains from participating in deliberations, voting, acting for the governing body, or influencing the parties. Banking and deposit contracts are also exempted. Violation is a misdemeanor, with a fine of up to $5,000, but no provision for imprisonment.291

Plainly the problem of conflict of interest in government extends significantly beyond the scope of this section. The Legislature should not simply have reenacted a statute dating from 1890,292 but should have examined carefully modern federal and state legislation on this subject, in light of perceived conflict of interest problems which now exist in Wyoming.

c. Abuse of Powers

Four sections in this article deal with abuse of governmental powers by public servants or public officers. Section 6-5-105 makes it a misdemeanor for any public servant to require a “bidder or contractor to deal with a particular person in procuring any goods or service required in submitting a bid or fulfilling a contract with any government.” This section relates to situations in which corruption or conflict of interest may exist, but does not require proof of either, as proof might be difficult or impossible. At the same time, since governmental contracts may run into enormous sums, it is questionable whether the sanction is adequate.

Section 6-5-107(a) applies to public servants or public officers who, “with intent to obtain a pecuniary benefit or maliciously to cause harm to another,” knowingly commit unauthorized acts, refrain from performing duties, or violate statutes relating to their official duties. Punishment is a misdemeanor carrying a maximum fine of $5,000. The scope of this section is not altogether clear; in some respects it may apply to acts covered by the bribery statute. Since this is a specific intent crime, the prosecutorial burden is substantial. If the specific intent cannot be proved, subsection (b) may come into play, which punishes by a fine of not more than $750 a public officer’s intentional failure “to perform a duty in the manner and within the time prescribed by law.”

Section 6-5-115 makes it a misdemeanor for a ministerial officer to refuse or neglect to perform any duty in a criminal case, or to delay unnecessarily in serving a warrant in a criminal case.293 And section 6-5-116 imposes a fine of not more than $1,000 for any public officer or deputy to perform any duty of office prior to taking the oath and giving bond as required by law.294

292. 1890 Wyo. Sess. Laws ch. 73, § 129.
293. This section is a rewording, without substantive change, of 1890 Wyo. Sess. Laws ch. 73, § 124, later codified as Wyo. Stat. § 6-8-505 (1977).
294. This section is a slight rewording of 1890 Wyo. Sess. Laws ch. 73, § 127, later recodified as Wyo. Stat. § 6-8-506 (1977).
d. False Certificate

Section 6-5-108 covers public servants who knowingly make false official certificates. Under subsection (a), it is a felony with maximum imprisonment of ten years and maximum fine of $10,000, for a public servant to issue such certificate “with intent to obtain a benefit or maliciously to cause harm to another.” Under subsection (b), where the specific intent is absent, the crime is a misdemeanor. Given the potentially serious consequences of false official certificates, whether or not made to obtain a benefit or maliciously to cause harm, it is questionable whether the novel felony/misdemeanor distinction is supportable. Under prior law, which admittedly was narrower in scope, the offense was a felony in all cases, with a maximum sentence of three years.295

Section 6-5-114 deals with the act of a notary public in affixing his seal to a certificate of acknowledgement “when the person executing the instrument has not first acknowledged the execution of the instrument before the notary public.” The section is limited to those instruments which are required by law to be filed or recorded, and which cannot be filed or recorded without the certificate of acknowledgement. The crime is a misdemeanor.296 This section has been so narrowed that it covers few of the false acts which a notary public may commit. Thus the limitation to acknowledgements eliminates those instruments which contain a jurat;297 and the limitation to instruments required to be filed or recorded and which require an acknowledgement means that many significant instruments such as deeds, mortgages, releases and wills, which either do not have to be filed, or which can be filed without an acknowledgement, are not covered. Moreover, the misdemeanor punishment may be wholly inadequate.

e. Offenses Relating to Public Property

In the 1982 Criminal Code as originally enacted, there were three sections covering a public servant’s improper dealing with public property. The first of these, section 6-5-109, embezzlement of public property, was repealed in 1984 because it merely duplicated the elements and punishment of the general larceny statute.298

Two sections remain. Section 6-5-110 creates the misdemeanor of wrongful appropriation of public property. It is committed by a public servant “who lawfully or unlawfully comes into possession of any property of any government and who, with intent temporarily to deprive the owner of its use and benefit, converts any of the property to his own use or any use other than the public use authorized by law.” The section is intended to punish temporary unauthorized use of governmental property by a public

295. See WYO. STAT. §§ 6-8-501, 6-8-502 (1977).
296. The section is derived from prior WYO. STAT. §§ 6-8-501 and -502 (1977), first enacted as 1890 WYO. SESS. LAWS ch. 73, §§ 111, 112, which imposed felony punishment with a maximum of three years' imprisonment.
297. Wyoming Legislative Service Office, Wyoming Statutes Title 6, Criminal Code Annotated 165 (1982), states in the comment to § 6-5-114 that “False jurat, W.S. 6-8-501, was removed from 1981 H.B. 220 in the House, thereby indicating the intent to repeal it.” A jurat is a certificate of an officer or notary before whom a writing is sworn to.
employee, but it presents serious problems of scope and application. Under the language of the section, any taking and conversion of governmental property by a public servant, no matter what the nature or value of the property, can only be a misdemeanor if the taking is "with intent temporarily to deprive the owner." Therefore if a public servant takes $100,000 in government funds to invest in soybean futures, intending to use the money temporarily and to return it after he has made a profit on the transaction, the most that he can be guilty of under this section is a misdemeanor, even if he loses all the money in the transaction. It is doubtful whether this is the legislative intendment. But even cases which do not involve money may reach similarly unintended results. Thus the public servant who uses expensive governmental equipment for his own private purposes for an extended period of time may be guilty only of misdemeanor. The result could depend upon whether "deprive" as used in this section is to be defined under section 6-3-401, where "deprive" means a permanent withholding of the property, or one so lengthy "as to appropriate a major portion of its economic value." But if so, the result is incongruous, since section 6-5-110 requires an intent "temporarily to deprive," and there can hardly be a temporary permanent withholding. It is submitted that this section needs rewriting after careful study.

Also it should be noted that there is no general provision dealing with temporary taking of property in the Wyoming Criminal Code, other than motor vehicles.\(^{299}\) Therefore it is not a crime for a person who is not a public servant temporarily to take governmental property other than motor vehicles.

Section 6-5-111 makes it a felony, with maximum punishment of five years' imprisonment and $5,000 fine, for a public servant to fail or refuse "to account for, deliver and pay over property received by virtue of the office, when legally required" to do so. If literally interpreted, this section appears to create strict liability, since no wrongful misappropriation of the property or other wrongful act or intent by the public servant is required. If the property has been lost or destroyed due to no fault of the public servant, it is no defense. It should be noted that this section is derived from former section 6-7-306, which imposed criminal liability only when the public servant fraudulently failed or refused to account for, deliver and pay over the property.\(^{300}\)

\(f.\) Mistreating Persons in Institutions

Section 6-5-112, titled "Mistreating persons in institutions or mental hospitals," is hopelessly vague and garbled. The section is taken, with little change, from an equally vague statute enacted in 1925.\(^{301}\) While the clear intent is to prevent mistreatment of inmates and patients in penal, mental health, and other institutions, this section is a poor vehicle indeed to achieve the desired result. Violation of the section is a felony, punishable by a maximum of three years' imprisonment and a fine of $3,000.

\(^{299}\) See supra text at note 101.

\(^{300}\) Conceivably this section was intended to impose a strict liability, which would force the public employee to be an insurer of the property, or to secure insurance against its loss. But if the employee secured insurance, could he use public funds for this purpose, or if he did so would the section give the insurer a right of subrogation against the employee?

Section 6-5-112(a)(i) applies to a person who is "an employee of, or is responsible for the care of a person in, a reformatory, penal or charitable institution or mental hospital and treats him with unnecessary severity, harshness or cruelty." Several problems of construction are present. First, it is not clear whether this section applies only to persons who are public servants, as defined in this article;\textsuperscript{302} or only to persons who are employees of the institution, whether public servants or not; or to employees and anyone else legally responsible for the care of the inmate or patient. Thus if it extends to anyone legally responsible for care, a guardian, spouse or parent of an inmate could be included. Second, as to the institutions covered, must they be public institutions? Or may a charitable institution or mental hospital be private? Nor is a definition of "reformatory" provided. Does this include a jail, or a juvenile detention home, or a home for children adjudicated delinquent or in need of supervision? Third, the standard of "unnecessary severity, harshness or cruelty" is so vague that it provides virtually no guidance to persons who may be charged under the statute, or to judges or juries in criminal cases. Since violation is a felony, a clearer standard is required if the section is to survive constitutional attack.

Subsection 6-5-112(a)(ii) applies to a person who is "an officer required by law to perform an act with regard to persons in a reformatory, penal or charitable institution or a mental hospital and he intentionally refuses or neglects to perform the act." This subsection is at least as inadequate as the prior subsection. First, it is unfortunate that, having specifically defined "public servant" and "public officer" in section 6-5-101 of this article, the Legislature chose to retain the term "officer" found in the 1925 legislation. Thus it is unclear whether "officer" means simply an employee, or means a custodial officer such as a prison guard, or means a person in an executive or supervisory capacity such as a warden or hospital director or superintendent. Second, it is not at all clear what acts an officer may be "required by law" to perform. Must the act be specified in a statute, or is an administrative regulation sufficient? Or does it mean any act which the officer is legally required to perform, whether by statute, regulation, or the direction of his superior? Third, there is no guidance as to what kinds of acts "with regard to persons" the statute embraces. Are these acts which relate directly to the necessities of life for the inmates, such as food, shelter, medical care and protection? Or are these acts broader, extending to general institutional administration, record-keeping and matters of accounting? This uncertainty is exacerbated by the fact that criminal liability results from either intentional refusal or neglect to perform the act. As an example, if a prison guard has as one of his duties to make a daily list of prisoners under his charge, and he forgets to make the list on a given day, is he guilty of a felony?

Plainly, if this section is intended to have any serious purpose, it needs to be rewritten and made more definite.

\textsuperscript{302} While this is not an interpretation which is compelled or even strongly suggested by the language of the section, it is at least consistent with the placement of the section within an article dealing with crimes by public servants and public officers. If not limited to public servants and public officers, then this subsection belongs elsewhere in the Code, perhaps under crimes against persons.
g. Consequences of Violations

Section 6-5-113 provides that a judgment of conviction under any section of this article, except those applying to notaries public, neglect to perform duties in criminal cases, and acting before qualifying, shall result in a public servant's removal from office or discharge from employment. An exception is made for elected state official and judges who under the Wyoming Constitution can be removed from office only by impeachment proceedings.

2. Hindering Government Operations

Article 2 of Chapter 5 of the Criminal Code contains nine sections dealing with a variety of acts which may interfere with law enforcement or other governmental activity.

a. Accessory After the Fact

Section 6-5-202 recognizes that an accessory after the fact is not, strictly speaking, a party to the crime committed by the principal, but instead is one who, after the principal has committed a crime, commits a new crime by aiding him with the intention of avoiding his arrest and prosecution. "A person is an accessory after the fact if, with intent to hinder, delay or prevent the discovery, detection, apprehension, prosecution, detention, conviction or punishment of another for the commission of a crime, he renders assistance to the person." Section 6-5-201(a)(iv) defines "render assistance" to include a number of acts to aid the principal, including concealing, warning, providing money or other tangible aid, obstructing others, and concealing or destroying evidence.

Punishment of an accessory after the fact is determined by three factors: whether the crime committed by the principal was a felony or misdemeanor; whether the accessory is a "relative" of the principal; and whether the principal is a minor. "Relative" is defined in section 6-5-201(a)(iii) to mean "a grandparent, grandchild, mother, father, husband, wife, sister, brother or child."

If the crime of the principal is a felony, and the person rendering assistance is not a "relative," the accessory after the fact is guilty of felony with maximum punishment of three years' imprisonment and fine of $3,000. If the crime of the principal is a felony and the accessory is a "relative," or the crime is a misdemeanor and the accessory is not a relative, or the principal is a minor, the accessory is guilty of a misdemeanor with maximum punishment of six months' imprisonment and fine.

307. This raises the question of whether, for a person to be an accessory after the fact, the principal must actually have committed a crime. If the person mistakenly believes the principal has committed a crime and renders assistance, he may be guilty of attempted accessory after the fact under Wyo. Stat. § 6-1-301 (Supp. 1983).
of $750. If the crime is a misdemeanor and the accessory is a relative of the principal, no crime is committed by the accessory.

While the schedule of punishments for accessories after the fact appears to be harmoniously balanced, there are severe shortcomings. First, inasmuch as there are felonies for which the maximum imprisonment is two years, it is possible that the accessory after the fact could be punished more severely than the principal.

Second, the provision that if the principal is a minor, it is only a misdemeanor to aid him whether he has committed a felony or a misdemeanor, is clearly a mistake. Section 6-5-202(b)(ii)(C) originally provided that the accessory committed a misdemeanor if "The principal is a juvenile against whom a petition has been filed in juvenile court or who has been found to be delinquent or in need of supervision." This provision was unworkable, and further was too broad because a child in need of supervision has not committed a criminal offense. To correct this section, the Legislature amended the subsection in 1984 to its present form. However, it is seriously to be doubted whether the Legislature intended that one aiding a 17 or 18 year old murderer or armed robber should only suffer a misdemeanor penalty.

Third, the reduced punishment for relatives is too broad. Relatives of a principal who has committed a crime are given milder treatment because it is felt that their strong natural inclination to render assistance to one close to them excuses their actions in some measure. For some acts, such as concealment, warning or furnishing money or transportation, it may be appropriate to grant a concession to relatives. But for other acts such as obstructing law enforcement officers or others by force or intimidation, or destroying evidence, there is no justification for excusing relatives even partially. Nor is there any justification for giving relatives a "free ride" when the principal has committed a misdemeanor.

b. Compounding

Section 6-5-203, which creates the crime of compounding, combines three prior statutory sections dealing with compounding a felony, compounding a misdemeanor, and compounding prosecution, which were first enacted in 1890. Compounding is committed when one takes property or accepts an offer of property to conceal a crime, abstain from prosecuting a crime, withhold evidence of a crime, or procure or encourage the absence of witnesses at examination or trial of the crime.  Compounding is a misdemeanor if the crime compounded was a misdemeanor, or if the person did not have knowledge of the actual commission of the crime compounded.  

310. WYO. STAT. § 6-5-202(b) (iii) (Supp. 1983).
311. See, e.g., WYO. STAT. §§ 6-5-303, 6-5-304 (Supp. 1983).
312. In this connection, it is noteworthy that only accessories after the fact can be punished for destroying, concealing or altering evidence. It is not a crime for the principal or an accessory after the fact to destroy evidence. This is an omission which should be corrected.
313. 1890 WYO. SESS. LAWS ch. 73, §§ 104, 105 and 106, later codified as WYO. STAT. §§ 6-8-203, 6-8-204 and 6-8-205 (1977).
314. WYO. STAT. § 6-5-203(a), (b) (Supp. 1983).
315. WYO. STAT. § 6-5-203(c) (i) (Supp. 1983).
It is a felony if the crime compounded was a felony, the maximum punishment is three years' imprisonment and a fine of $3,000, except where the crime compounded is punishable by death the maximum is five years and $5,000.

c. Interference with Law Enforcement

Under section 6-5-204, a person is guilty of a misdemeanor "if he knowingly obstructs, impedes or interferes with or resists arrest by a peace officer while engaged in the lawful performance of his official duties." A person is guilty of a felony punishable by a maximum of ten years' imprisonment if he "intentionally and knowingly causes or attempts to cause bodily injury to a peace officer engaged in the lawful performance of his official duties." It is not clear from this section whether a crime is committed if the peace officer is not acting lawfully, as where he is seeking to make an improper arrest.

Under section 6-5-205, it is a misdemeanor to travel or proceed through a roadblock supervised by a uniformed peace officer without stopping and observing the instructions of the peace officer. The section does not specify any mental state as an element of the offense.

d. Escape

Section 6-5-206 defines escape as "escape from official detention." Beyond this, neither "escape" nor "official detention" is defined, nor is any mental element stated. If the detention is the result of a felony conviction, escape is a felony punishable by imprisonment for not more than ten years; if detention is the result of a misdemeanor conviction or arrest or charge of crime, escape is a felony with maximum imprisonment of three years and a maximum fine of $3,000. There is no explicit language covering escape by juveniles or material witnesses. As to a parolee or probationer taken into official detention for parole or probation violation, it would be reasonable to refer back to the crime for which parole or probation was granted.

If the escape from official detention is by violence or while armed with a deadly weapon, or by assault upon a person in charge of the detention, section 6-5-207 provides that the crime is a felony punishable by not more than ten years' imprisonment. However, since simple escape after felony conviction already bears a ten year maximum, it is curious that aggravated escape does not bear a more severe maximum punishment.

316. WYO. STAT. § 6-5-203(c) (ii) (Supp. 1983).
317. WYO. STAT. § 6-5-203 (c) (iii) (Supp. 1983).
318. Maximum punishment is one year and $1,000. It is assumed that "knowingly" modifies both "obstructs, impedes or interferes with" and "resists."
320. 1983 WYO. SESS. LAWS ch. 171, § 1, § 6-5-207 reduced the maximum punishment from 14 to 10 years; this was probably done by oversight. The 1983 legislative session also repealed original § 6-5-208, which made it a felony punishable by ten years' imprisonment and a fine of $10,000 for a person "responsible by law for the detention of a person charged with or convicted of a felony" to permit the person to escape through gross negligence. This section had been derived from WYO. STAT. § 6-8-304 (1977).
e. Taking Controlled Substances, Intoxicating Liquor and Deadly Weapons into Jails, Penal Institutions and Mental Hospitals

Section 6-5-208 makes it a felony with maximum imprisonment of three years and maximum fine of $3,000 to take or pass any controlled substance or intoxicating liquor into a jail, a penal institution, the industrial institute, the girls' school, the state children's home, or the state hospital, except "as authorized by the person in charge." The exception creates a severe problem of interpretation. First, who is the "person in charge"? Conceivably this could be a warden or superintendent, or it could be merely the supervisory employee who is present at the time. Second, if this person does unlawfully authorize the taking of heroin or other controlled substance into an institution, does this provide a complete defense to prosecution?

Section 6-5-209 is a parallel section dealing with taking deadly weapons into the enumerated institutions, again except "as authorized by the person in charge." Violation of section 6-5-209 is a felony with maximum imprisonment of ten years and fine of $10,000.

f. False Reporting to Authorities

Section 6-5-210 provides punishment for falsely reporting to a law enforcement agency or fire department that a crime has been committed or that an emergency exists. False reporting of a crime is a misdemeanor; false reporting of an emergency is a misdemeanor punishable by imprisonment for a year and a fine of $1,000, except that where the false report results in serious bodily harm to any person, the crime is a felony with punishment of up to five years' imprisonment and a fine of $5,000. If the false report of an emergency "results in the death of any person," the crime is manslaughter.

The section is not without problems. First, the definition of "emergency," found in section 6-5-201(a)(i), is phrased in terms of a situation which "could result" in certain consequences, or which "could jeopardize public safety," without any specification of how probable the result must be in order to impose criminal liability. While a superficial answer is that it is appropriate that persons who make false reports of emergencies should be required at their peril to predict what a jury might subsequently determine "could" result from their actions, due process seems to require more in the way of specificity. Second, the list of agencies to which a false report may be made is not sufficiently inclusive. A false report of emergency to a school or other institution, or to a public facility where persons have congregated, or to a hospital or ambulance service may have serious consequences, and these institutions should be included. Lastly, the requirement that the report be made "to a law enforcement agency or fire department" appears to exclude reports which are made to others, when the natural consequence is that the reports will be forwarded to a law enforcement agency or fire department. Thus, a person does not expressly violate this section by calling the phone operator and falsely reporting that the elementary school is on fire, even though the resulting danger may be the same as if the police or fire department had been called, as the operator will surely report the matter further.
§§ 3. Perjury and Criminal Falsification

a. Perjury

Section 6-5-301, punishing perjury, is taken from former section 6-8-101 without substantial modification, other than to reduce the maximum punishment from fourteen years to five years in the penitentiary. Perjury is committed when, under oath or affirmation in a judicial, legislative or administrative proceeding in which an oath may be required by law, a person "knowingly testifies falsely or makes a false affidavit, certificate, declaration, deposition or statement . . . touching a matter material to a point in question."

Model Penal Code section 241.1 suggests several respects in which the Wyoming perjury statute might be improved. First is the mental state required to be proved in order to convict. Section 6-5-301 requires that a person knowingly testify falsely or make a false affidavit or other submission. Read literally, this requires that the prosecution prove that the person knew his testimony to be false, and it is not enough that the person did not know one way or the other whether his testimony was true. The Model Penal Code eases this burden somewhat by providing that it is sufficient for testimony to constitute perjury if the person "does not believe it to be true." 321 Second, the Wyoming statute adheres to an unnecessary formalism by requiring that the oath or affirmation be "lawfully administered," thereby encouraging attack upon the qualifications of the person who administered the oath, or upon the manner in which the oath was administered. The Model Penal Code expressly provides that irregularities of this nature do not constitute a defense. 322 The Model Penal Code also has explicit provisions governing the effect of retraction of false testimony, and how proof of perjury may be made when inconsistent statements have been made under oath, which should be beneficial additions to the Wyoming statute. 323

In section 6-5-302, the "two-witness" rule for prosecutions for solicitation of perjury has been retained: "In a trial for soliciting perjury, no conviction shall be had on the evidence of the person solicited, unsupported by other testimony." This rule, which has been embodied in the Wyoming criminal statutes since 1876, 324 is also applicable in prosecutions for perjury. 325

b. False Swearing in Nonjudicial Proceedings

Perjury applies only to judicial, legislative or administrative proceedings in which an oath or affirmation may be required by law. False statements while under oath or affirmation in other circumstances, as well as false claims or vouchers, are covered by section 6-5-303, which makes the crime a felony punishable by a maximum of two years' imprisonment and a fine of $2,000. This section is derived from prior section 6-8-201 without significant modification, other than a reduction in the maximum


322. § 241.1(3) (P.O.D. 1962).


324. 1876 Wyo. COMP. LAWS ch. 14, § 137.

imprisonment from five years to two. One disparity between section 6-5-301 and section 6-5-303 is that while the former applies to judicial, legislative and administrative proceedings, the latter exempts its application only to judicial and administrative proceedings, thereby leaving both sections applicable to legislative proceedings in which an oath or affirmation is administered.

Section 6-5-304 makes it a felony punishable by two years' imprisonment and a fine of $2,000 to offer for filing in the county clerk's office a false location certificate for a mining claim or a false affidavit of assessment work. This section might better be placed with the other sections on fraud; moreover, a unified section dealing with filing false claims of all kinds could be enacted.

c. Obstructing the Administration of Justice

Section 6-5-305(a) makes it unlawful for a person, by force or threats, to attempt "to influence, intimidate or impede a juror, witness or officer in the discharge of his duty." The meaning of "officer" is not entirely clear, but should probably be drawn from the context to mean a judge or an officer of the court. Subsection (b) applies to a person who, "by threats or force . . . obstructs or impedes the administration of justice in a court." These provisions are taken from former section 6-8-708, which was first enacted in 1890. Under the 1982 Criminal Code as originally enacted, violation of section 6-5-305 was a misdemeanor, as it had been in the prior statute. In 1983 the Legislature, acknowledging the serious nature of using force or threats to affect witnesses and jurors, increased the punishment for violation of 6-5-305(a) to a felony with maximum punishment of ten years' imprisonment and fine of $5,000. A strong argument can be made that punishment for violation of both subsections should have been made a felony.

Section 6-5-305 enforces the integrity of the subpoena process; a person who hides or leaves his residence to avoid being served with a subpoena, or who intentionally disobeys a subpoena, or who refuses to take an oath or affirmation or to testify, is guilty of a misdemeanor punishable by imprisonment for not more than six months and a fine of not more than $750.

d. Usurpation

Section 6-5-307 covers the crime of usurpation, which is a misdemeanor with standard maximum punishment of six months and a fine of $750. The section is an enlargement of former section 6-8-707, which provided a fine of $500 for any person who "officiates in any place of authority without being legally authorized." Under the 1982 Criminal Code, usurpation has been broadened to include a person who "falsely represents himself to be a public servant with the intent to induce anyone to submit to the pretended official authority or to act in reliance upon the pretense to his detriment." Increasing the scope of this section may make it applicable to cir-

326. 1890 Wyo. Sess. Laws ch. 73, § 122.
328. This section originated in 1890 Wyo. Sess. Laws ch. 73, § 126.
cumstances in which the punishment is thoroughly inadequate. Furthermore, in light of the principle that specific statutes govern general ones, it can be argued that serious crimes in which false representations are made about the offender's status as a public servant must be prosecuted under this section. Thus would a person who, intending to steal or commit a felony, gains entry to another's occupied structure on the false representation that he is a public inspector or law enforcement officer be insulated from burglary conviction by section 6-5-307?

F. Chapter 6: Offenses Against Public Peace

Chapter 6 of the 1982 Criminal Code is divided into three articles dealing with disturbances of public order, nuisances, and unlawful conduct within governmental facilities. These provisions replace a number of minor offenses relating to maintaining the public peace. Gone are riot, affray, disturbing meetings, disturbing worship, criminal provocation, failure of spectators to remove headwear at theaters, opera houses and indoor places of amusement, libel, slander, challenging to duel, and dueling. At the same time, lengthy and complex provisions relating to nuisances, which more properly belong in the civil code, are retained without change.

1. Disturbances of Public Order

Section 6-6-101 makes it a misdemeanor to fight, by agreement, with one or more persons in public. This section has reworded a prior provision on "affray" which was first enacted in 1890. If read literally, the section would prohibit prize fighting as well as other forms of professional and amateur conflict including wrestling matches and brewery-sponsored "fight nights." It is doubtful whether this was the legislative purpose; but certainly the sweeping language of the section could well have been tempered with a few judicious exceptions. Otherwise the statute appears an exercise in hypocrisy.

Section 6-6-102 provides that "A person commits breach of the peace if he disturbs the peace of a community or its inhabitants by using threatening, abusive or obscene language or violent actions with knowledge or probable cause to believe he will disturb the peace." In enacting this section, the Legislature has rewritten the former breach of the peace statute and

331. WYOMING STATUTES § 6-6-103 (1977).
332. WYOMING STATUTES § 6-6-105 (1977).
333. WYOMING STATUTES § 6-6-106 (1977).
334. WYOMING STATUTES § 6-6-202 (1977).
335. WYOMING STATUTES § 6-6-203 (1977).
336. WYOMING STATUTES § 6-6-204 (1977).
337. WYOMING STATUTES § 6-6-205 (1977).
338. WYOMING STATUTES § 6-6-301 (1977).
339. WYOMING STATUTES § 6-6-302 (1977).
340. Punishment is imprisonment for not more than six months, and a fine of not more than $750.
341. 1890 WYOMING SESSION LAWS ch. 73, § 91, later codified as WYOMING STATUTES § 6-6-103 (1977).
342. The violation is a misdemeanor, with standard punishment of six months and $750.
343. WYOMING STATUTES § 6-6-201 (1977), first enacted as 1901 WYOMING SESSION LAWS ch. 94, § 1.
deleted some of the proscribed forms of conduct, such as "loud or unnecessary talking," "halloowing," and "any other rude behavior." Perhaps some of these were vague and others antiquated. But the new provision fails to afford any protection against the most common forms of disturbance: loud noises, amplified music, disorderly assemblies, shouting and singing other than obscenities and abuses. In a peaceful neighborhood after midnight, singing "God Bless America" at top volume can be fully as disturbing as loudly cursing one's enemies.

The breach of the peace section has also added a mental element; the person must have "knowledge or probable cause to believe he will disturb the peace." It is unclear whether this added element will impose any substantial additional burden upon the prosecution, or whether it will benefit the defendant in any way. The section includes obscene language, but not profane or indecent language; whereas once these terms may have been indistinguishable in meaning, at the present day they have clearly distinct definitions, and one may be very indecent in his speech without being obscene.

Section 6-6-103 is derived from three former statutes, and prohibits telephone calls of three kinds: (1) anonymous calls or those under a false or fictitious name which use obscene, lewd or profane language or suggest "a lewd or lascivious act with intent to terrify, intimidate, threaten, harass, annoy, or offend"; (2) repeated anonymous calls which disturb "the peace, quiet or privacy of persons where the calls were received"; and (3) calls which threaten "to inflict injury or physical harm to the person or property of any person." The crime is a misdemeanor, with maximum punishment of imprisonment for one year and a fine of $1,000. It is committed "at the place where the calls either originated or were received."

The section is designed to deal with several narrowly defined types of conduct manifested by socially undesirable use of the telephone. But while covering some acts, it fails to deal with others which are at least equally offensive or disturbing. Thus calls which are obscene, lewd or profane, or which suggest lewd or lascivious acts, are not prohibited by this section if the caller identifies himself, or if there is no intent to terrify, intimidate, threaten, harass, annoy or offend. This latter intent must be in the mind of the caller, and cannot be found solely in the effect upon the person who receives the call. Thus if the caller, even if anonymous, seriously intends that the lewd or lascivious act be performed, there is no violation of the section. Likewise, under the second category, calls which disturb the peace, quiet or privacy, there is no violation if the caller uses his own name. Finally, it is curious that while it is a crime to make a threat over the telephone to inflict injury or physical harm upon a person, it is not a crime to make the same threat in person.

344. Wyo. Stat. §§ 6-4-612, 6-4-613 and 6-4-614 (1977).
349. It is not clear whether a person who uses a false name can be said to be making an anonymous phone call.
2. Nuisances

The provisions on nuisances, contained in sections 6-6-201 through 6-6-209, are properly civil in content, and have no place in the Criminal Code. The sections were originally in the code of civil procedure, and could well have been left there. The only mention of criminal sanction is found in section 6-6-208, whereby a person who violates an injunction may be punished by imprisonment and fine, and in section 6-6-209, which punishes as misdemeanor the keeping of a public nuisance. In any case, the sections are cumbersome and verbose, and should have been rewritten.

3. Unlawful Conduct Within Governmental Facilities

The sections on unlawful conduct within governmental facilities are taken without significant change from a 1971 enactment, which was formerly codified as sections 9-16-101 through 9-16-107. The operative provisions forbid persons to enter or go upon lands, buildings or structures owned or controlled by a governmental body and obstruct or disrupt the use of the facility or activities therein. Persons may be required to desist from conduct or to leave the facilities when their conduct or presence is contrary to the policies or regulations of the governing body. Persons within or upon governmental facilities may be required to identify themselves. The maximum punishment for violation is sixty days in jail and a fine of $750. It is noteworthy that nongovernmental facilities, such as businesses, churches, clubs and private schools, find similar protection under the laws relating to criminal entry and criminal trespass, which bear a heavier penalty for violation, with maximum imprisonment of six months.

G. Offenses Against Public Policy: Gambling

Chapter 7 of the 1982 Criminal Code deals exclusively with gambling, and represents an effort to modernize and condense the Wyoming laws on this subject. In this manner, the time-honored sections against gambling on passenger trains and 3-card monte have been lost. The new provisions are drawn from the Colorado statutes.

The three sections within Chapter 7 distinguish between ordinary gambling and professional gambling. Ordinary gambling is a misdemeanor with the customary six months and $750 maximum punishment, while professional gambling is a felony punishable by imprisonment for not more than three years and a fine of not more than $3,000.

351. 1945 Wyo. Comp. Laws §§ 3-6801 through 3-6809.
Gambling is defined as "risking any property for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, over which the person taking a risk has no control." Exempted from this definition are contests of skill in which awards are made only to entrants; bona fide business transactions "valid under the law of contracts"; acts expressly authorized by law; raffles or bingo conducted by charitable or nonprofit organizations where the tickets are sold only in Wyoming; social gambling "in which no person is participating, directly or indirectly, in professional gambling"; and Calcutta wagering, limited to amateur contests involving trap shoots, hog wrestling, tractor pulls or cutter horse racing events, conducted by "a bona fide nationally chartered veterans', religious, charitable, educational or fraternal organization or nonprofit local civic or service club organized or incorporated under the laws of this state," and subject to clear restrictions.

Gambling becomes professional gambling when others are aided or induced to engage in gambling with the intent to derive a profit therefrom; and gambling in which one participant has a greater chance of winning than the others, for reasons other than skill or luck. Any place where a gambling device is found is presumed to be used for professional gambling. Gambling device is defined to include any device, machine, paraphernalia or equipment which can be used in professional gambling.

Section 6-7-103 permits seizure by any peace officer of "all gambling devices, gambling records and gambling proceeds," which "shall be disposed of in accordance with law." This section is entirely too broad and vague, as it would permit seizure as gambling devices of common items such as playing cards and dice which are "used or usable" in professional gambling, whether they were actually being used for this purpose. Moreover, it is not clear what law governs the disposition of gambling devices, records and proceeds; prior section 6-9-108 made specific provision for destruction of devices and paraphernalia, but was not reenacted.

Chapter 8: Weapons

1. Weapons Offenses

Section 6-8-101 provides for the enhancement of felony sentences when the defendant has used a firearm while committing a felony. Subsection (a) provides: "A person who uses a firearm while committing a felony shall be imprisoned for not more than ten (10) years in addition to the punishment for the felony. For a second or subsequent conviction under this section a

366. WYO. STAT. § 6-7-101(a) (iii) (Supp. 1983).
367. WYO. STAT. § 6-7-101(a) (i) (Supp. 1983).
368. WYO. STAT. § 6-7-101(a) (iii) (A) through (F) (Supp. 1983).
369. WYO. STAT. § 6-7-101(a) (viii) (Supp. 1983).
370. WYO. STAT. § 6-7-101(a) (v) (Supp. 1983).
371. WYO. STAT. § 6-7-101(a) (iv) (Supp. 1983).
372. See also WYO. STAT. § 15-1-103(a)(xvii) (A) (1977), empowering governing bodies of cities and towns to suppress or prohibit all gambling games or devices and to authorize their destruction.
person shall be imprisoned for not more than twenty (20) years in addition to the punishment for the felony.”

When this provision was first enacted in 1979, it applied to a person “who has in his possession a firearm while committing a felony.” The term “in his possession” was unclear, since the concept of possession extends from those things which one has upon his person to other things remote from his person over which he exercises control and dominion. The Criminal Code as enacted in 1982 modified this language somewhat, but probably not enough: a “person who possesses a firearm while committing a felony.” Even if this revised language could be read to require possession upon one’s person, it still did not require any relationship between the firearm and the felony. Thus a person might possess a firearm while committing a nonviolent, impersonal felony such as making plates for counterfeiting. The section was put into its present form in 1983, and requires use of the firearm. Arguably the meaning could be improved still further: “A person who uses a firearm in the commission of a felony. . . .”

It is not clear what procedures are to be used under this section. Does the use of a firearm constitute a separate criminal offense, which must be charged as such in a count of the information or indictment? The language of the second sentence supports this interpretation: “a second or subsequent conviction under this section.” By this construction, the jury would be required to return a verdict upon the issue. Alternatively, the section could be construed as a sentencing enhancement provision, in which case the question arises as to what if any notice must be given to the defendant that he is liable to the enhanced sentence, and as to whether the finding that a firearm was used is to be made by the jury, per special interrogatory, or by the court.

Subsection (b) of section 6-8-101 provides that subsection (a) “does not apply to those felonies which include as an element of the crime the use or possession of a deadly weapon.” This provision applies to such felonies as robbery, aggravated assault and battery, aggravated burglary, taking a deadly weapon into a jail, and firearm possession by a person previously convicted of a violent felony. The reason for this provision is that the use or possession of a firearm will already have been taken into account in setting the punishment for those crimes. However, it must appear that deadly weapon use or possession is an element of the particular crime which the defendant committed. Thus aggravated assault and battery may be committed in several ways, some of which involve use or possession of deadly weapons, but others of which require only that injury be caused to another. Accordingly, if a person intentionally causes serious bodily injury to another under circumstances manifesting extreme indifference to the value of human life, it is immaterial that a deadly weapon was used in doing

so; and therefore if a firearm was actually used in inflicting the injury, sentence enhancement can result under section 6-8-101.

Section 6-8-102 provides that a person who has pleaded guilty to or been convicted of commission of or attempt to commit a violent felony and who uses or knowingly possesses a firearm is guilty of a felony punishable by three years' imprisonment and fine of $3,000. "Violent felony" is defined to mean murder, manslaughter, kidnapping, sexual assault in the first or second degree, robbery, aggravated assault, aircraft hijacking, arson in the first or second degree or aggravated burglary. The only serious problem with this section is whether former crimes of violence such as rape or mayhem or assault with intent to commit murder, which have now been repealed, fall within its scope.

Section 6-8-103 makes it a felony knowingly to possess, manufacture, transport, repair or sell a deadly weapon "with intent to unlawfully threaten the life or physical well-being of another or to commit assault or inflict bodily injury upon another." Maximum punishment is imprisonment for five years and fine of $1,000. This section is drawn from prior section 6-11-101, first enacted in 1971. It was revised in the 1982 Criminal Code principally through deletion of a cataloging of types of deadly weapons ("knife, dirk, club, bludgeon, chain, rock, bottle"), and deletion of a section exempting law enforcement officers in the performance of their official duties.

Several problems of construction suggest themselves. First, does the required intent relate to threatening, assaulting or inflicting bodily injury upon a particular person, or is an unfocused intent, involving persons generally, sufficient? The purpose of the statute would seem to support a generalized intent as being sufficient. What, then, of the person who manufactures, transports or sells weapons which are to be used for national defense, or for sale to other nations? Finally, how does the section apply to peace officers, or to persons who possess weapons for self defense? Thus a man may have a gun by his bedside for the express purpose of shooting burglars.

Section 6-8-104 makes wearing or carrying a concealed deadly weapon a misdemeanor, punishable by six months in jail and a fine of $750. A specific exception is provided for peace officers and persons possessing permits issued by the county sheriff. Subsection (b) authorizes the county sheriff to "issue permits to travelers, merchant police, private detectives or other persons whose work, vocation or profession requires them to carry a weapon and who the sheriff believes are qualified." Permits are issued for three year periods, and may be revoked by the sheriff "if the conduct of the permittee is contrary to the best interests of the state or its political subdivisions." The Criminal Code reenacts a statute first adopted in 1890.

381. Deadly weapon is defined in Wyo. Stat. § 6-1-104(a) (iv) (Supp. 1983).
This is an archaic statute which leaves much to prosecutorial discretion. Since "deadly weapon" is defined very broadly, so as to include anything which is capable of inflicting death or great bodily harm, many items such as pocket knives, nail files, keys, and cigarette lighters which are commonly carried concealed in pockets or handbags may subject a person to prosecution under this section. Further, as to the permits issued by the county sheriff, there may be a problem of standards and discretion. Is there any review available if the sheriff refuses or revokes a permit? Moreover, what is the territorial reach of the permit? Does it apply only to the sheriff's county, or does it have statewide application? The section has not been judicially construed.

2. Firearms Regulation and Rifles and Shotguns

Articles 2 and 3 of Chapter 8 deal with keeping a register of firearms sales, and with the sale and delivery of rifles and shotguns. These articles are not properly criminal statutes, but instead are regulatory statutes which deal with the manner in which firearms may be sold or imported into Wyoming. There are mild criminal sanctions for violation of Article 2, "Firearms Regulation," but none for violation of Article 3, "Rifles and Shotguns."

I. Chapter 9: Miscellaneous Offenses

Chapter 9 is entitled "Miscellaneous Offenses," and contains five sections bearing criminal penalties which could probably have been placed elsewhere in the Criminal Code. Three of these sections are in an article denominated "Discrimination," while two are in an article simply called "Other."

Section 6-9-101 provides that "persons of good deportment" shall enjoy full and equal access to facilities and agencies "which are public in nature, or which invite the patronage of the public, without any distinction, discrimination or restriction on account of race, religion, color, sex or national origin." Violation is a misdemeanor. The section is taken almost without change from a provision first enacted in 1961.

The following section, 6-9-102, expresses a great democratic ideal, but is probably the most unenforceable in the entire Criminal Code. It provides "No person shall be denied the right to life, liberty, pursuit of happiness or the necessities of life because of race, color, sex, creed or national origin." Violation is a misdemeanor, with customary punishment of six months' imprisonment and fine of $750.

384. WYO. STAT. § 6-1-104(a) (iv) (Supp. 1983).
385. The article requires the keeping of a firearms register by all sellers of firearms. WYO. STAT. §§ 6-8-201 to -203 (Supp. 1983). Violation is a misdemeanor punishable by imprisonment of not more than six months, and fine of not more than $750. WYO. STAT. § 6-8-204 (Supp. 1983).
386. 1961 WYO. SESS. LAWS ch. 103, §§ 1, 2, later codified as WYO. STAT. §§ 6-4-610 and 6-4-611 (1977).
Section 6-9-103, on the other hand, is very much enforceable, and represents a triumph of the common man: "A person commits a misdemeanor punishable by a fine of not more than one hundred dollars ($100.00) if he charges for the use of toilet facilities which are generally available to the public." The section was first enacted in 1975, and originally provided that each day of violation is a separate offense;\(^ {387}\) this was deleted from the 1982 Code.

The first of the "other" offenses bears what may be a somewhat deceptive title: "Trespass on unsafe areas within ski areas." Section 9-2-101 applies only to state or federal land leased and in use as a ski area, and prohibits entry if the lessee has designated the land as an unsafe area, or if warning signs prohibiting entry have been posted. There is no requirement that the posted area be unsafe, which would make this a general trespass statute. The penalty for violation is a fine of $100.

Finally, section 6-9-202 imposes a fine not to exceed $750 for failure "to close a gate or replace bars in a fence which crosses a private road or a river, stream or ditch." The 1982 Code deleted the provision that the failure must be willful or careless;\(^ {388}\) and the 1983 amendments increased the fine from $25 to $750.\(^ {389}\)

\( J. \) Chapter 10: Sentencing

1. Generally

A distinction between felonies and misdemeanors is drawn by section 6-10-101: "Crimes which may be punished by death or by imprisonment for more than one (1) year are felonies. All other crimes are misdemeanors." This differs somewhat from prior section 6-1-102, which drew the distinction on the basis that felonies were punishable by death or imprisonment in the penitentiary. At first glance, it appears that an inconsistency may exist in the 1982 Criminal Code between section 6-10-101 and 6-10-107, which provides "The minimum term of imprisonment in the penitentiary is not less than one (1) year." Thus under 6-10-107 it is permissible to imprison in the penitentiary for one year, although a crime does not become a felony unless the authorized punishment is for more than one year. Within the Criminal Code, however, every crime denoted a felony may be punished by imprisonment for at least two years, except interference with custody which is punishable under section 6-2-204(e) by imprisonment for a year and a day, and consequently there is no conflict between these two sections.

Section 6-10-102 provides that as part of the punishment for any felony, the court may impose a fine,\(^ {390}\) and if no maximum fine is set forth in the statute, the fine shall not exceed $10,000. The predecessor section, 6-1-106,

\(^ {388}\) 1905 WYO. SESS. LAWS ch. 28, § 1, later codified at WYO. STAT. § 6-10-106 (1977).
\(^ {390}\) There may be an inconsistency here, since the standard language in many Wyoming felony statutes prescribes imprisonment, or a fine, or both, thereby making possible a fine alone, which becomes the entire punishment, and not simply "part of the punishment."
permitted the court to impose a fine of $1,000 as part of the punishment for any felony. Under the prior criminal statutes most felonies did not make any specific provision for a fine, while under the 1982 Criminal Code fines are specifically provided for the majority of felonies, but not for all felonies, especially those involving crimes against persons. Thus there is no specific provision in the 1982 Code for a fine in the statutes creating the felonies of murder in the first degree,\textsuperscript{391} murder in the second degree,\textsuperscript{392} manslaughter,\textsuperscript{393} aggravated homicide by vehicle,\textsuperscript{394} kidnapping,\textsuperscript{396} felonious restraint,\textsuperscript{397} interference with custody,\textsuperscript{397} sexual assault in the first, second or third degree,\textsuperscript{398} robbery,\textsuperscript{399} blackmail,\textsuperscript{400} aggravated assault and battery,\textsuperscript{401} child abuse,\textsuperscript{402} terroristic threats,\textsuperscript{403} intentionally causing or attempting to cause bodily injury to a peace officer,\textsuperscript{404} escape,\textsuperscript{405} and use of a firearm while committing a felony, if this is a substantive crime.\textsuperscript{406} As to these crimes, which bear penalties of imprisonment for as little as a year and a day, the Legislature has made no independent determination of what the appropriate maximum fine should be.

In some cases, in which acts have resulted in great public harm, fines of more than $10,000 should be possible. Particularly is this true where corporations, which cannot be punished by imprisonment, have engaged in massive acts of fraud.

Section 6-10-103 provides that where a specific penalty for misdemeanor is not prescribed, the punishment shall be imprisonment for not more than six months in the county jail, a fine of not more than $750, or both. Given the fact that throughout the Criminal Code this is the specific penalty spelled out for most misdemeanors, it could have resulted in substantial economies to have omitted the specific punishment for misdemeanor in those sections.

Section 6-10-104 reaffirms the principle that the court and not the jury fixes punishment, except in capital cases: "Within the limits prescribed by law, the court shall determine and fix the punishment for any felony or misdemeanor, whether the punishment consists of imprisonment, or fine, or both." This section should be read in light of section 7-13-201, which provides that when a person is sentenced to the state penitentiary, the court "shall not fix a definite term of imprisonment, but shall establish a maximum and minimum term," within the maximum and minimum limits fixed by law.

\textsuperscript{391} WYO. STAT. § 6-2-101 (Supp. 1983).
\textsuperscript{392} WYO. STAT. § 6-2-102 (Supp. 1983).
\textsuperscript{393} WYO. STAT. § 6-2-104 (Supp. 1983).
\textsuperscript{394} WYO. STAT. § 6-2-105 (Supp. 1983).
\textsuperscript{395} WYO. STAT. § 6-2-106(b) (Supp. 1983).
\textsuperscript{396} WYO. STAT. § 6-2-107 (Supp. 1983).
\textsuperscript{397} WYO. STAT. § 6-2-201 (Supp. 1983).
\textsuperscript{398} WYO. STAT. § 6-2-202 (Supp. 1983).
\textsuperscript{399} WYO. STAT. § 6-2-204 (Supp. 1983).
\textsuperscript{400} WYO. STAT. § 6-2-306 (Supp. 1983).
\textsuperscript{401} WYO. STAT. § 6-2-401 (Supp. 1983).
\textsuperscript{402} WYO. STAT. § 6-2-402 (Supp. 1983).
\textsuperscript{403} WYO. STAT. § 6-2-502 (Supp. 1983).
\textsuperscript{404} WYO. STAT. § 6-2-503 (Supp. 1983).
\textsuperscript{405} WYO. STAT. § 6-2-505 (Supp. 1983).
\textsuperscript{406} WYO. STAT. § 6-2-204(b) (Supp. 1983).
\textsuperscript{407} WYO. STAT. §§ 6-5-200(a), 6-5-207 (Supp. 1983).
\textsuperscript{408} WYO. STAT. § 6-8-101 (Supp. 1983).
Section 7-11-515 permits the court, when a fine is imposed, to commit the defendant to jail until the fine and costs are paid. Under section 6-10-105, a person who is committed to jail for refusal to pay a fine or costs shall be credited with $15 per day against the fine and costs. The prior statute, section 6-1-108, gave credit of only $1 per day.

Under 6-10-106 a person convicted of a felony "is incompetent to be an elector or juror or to hold any office of honor, trust or profit," unless the conviction is reversed or annulled, he is pardoned, or his rights are restored by a certificate of the governor.407

The 1984 session of the Wyoming Legislature added a new section 6-10-110, which provides: "In addition to any other punishment prescribed by law, . . . the court may, upon conviction for any misdemeanor or felony, order a defendant to pay restitution to each victim as prescribed under W.S. 7-13-109."408 An exception is specifically made for the restitution provision contained in the fraudulent check statute, section 6-3-702(c). Section 7-13-109, which is also a part of the 1984 enactment, prescribes the manner in which the amount of restitution to be paid is determined.409 The enactment further requires as a condition of parole that a parolee be ordered to make restitution "for the pecuniary damage resulting from his criminal activity."410

2. Habitual Criminals

The Wyoming Criminal Code, as amended in 1983,411 made substantial changes in the habitual criminal statute, narrowing the class of persons to whom habitual criminal sentence enhancement is applicable. The habitual criminal statute was first enacted in 1937,412 and amended in 1973;413 and the Criminal Code as enacted in 1982 merely restated the former law. Under the former law, a person convicted of any felony who twice before had been convicted of felonies separately brought and tried was declared to be an habitual criminal and subjected to a sentence of from ten to fifty years. A fourth such felony conviction brought a life sentence.

Under the 1983 amendment, the section 6-10-201 definition of habitual criminal was changed to provide that a "person is an habitual criminal if: (i) He is convicted of a violent felony; and (ii) He has been convicted of a felony on two (2) or more previous charges separately brought and tried which arose out of separate occurrences in this state or elsewhere." Punishment remained the same: if there were two prior felony convictions, imprisonment for ten to fifty years; if there were three, imprisonment for life.

The restriction to an ultimate conviction of a violent felony meant that "ordinary" felons committing property crimes would not be subject to habitual criminal enhancement. The term "violent felony" is defined in

408. 1984 WYO. SESS. LAWS ch. 27, § 1.
409. Id.
410. Id. The requirement of restitution for parolees will be codified as WYO. STAT. § 7-13-423 (Supp. 1984).
412. 1937 WYO. SESS. LAWS ch. 68, §§ 1, 2, 3.
413. 1973 WYO. SESS. LAWS ch. 15, §§ 1, 2, codified as WYO. STAT. §§ 6-1-109 to -111 (1977).
section 6-1-104(a)(xii) to mean "murder, manslaughter, kidnapping, sexual assault in the first or second degree, robbery, aggravated assault, aircraft hijacking, arson in the first or second degree or aggravated burglary."

Section 6-10-201 contains one uncertainty and one incongruity. The statute is put into motion by prior felony convictions "in this state or elsewhere." But it is not clear, in cases of convictions outside Wyoming, how "felony" is to be determined. Does it relate to a crime which would be a felony if committed in Wyoming, or does the other state's definition of felony control? Second, there are crimes for which the "enhanced" habitual criminal punishment is less than that specifically prescribed for the crime. Thus the punishment prescribed for second degree murder is twenty years to life; but if the second degree murderer has been convicted of two prior felonies, the habitual criminal statute appears to mandate a sentence of only ten to fifty years. The practical answer is not that the habitual criminal murderer gains a benefit, but instead that the habitual criminal proceeding is not mandatory, and consequently the murderer will not be informed against as an habitual criminal.

Section 6-10-202 provides that the habitual criminal statutes shall not abrogate or affect the punishment of death in crimes for which the death penalty is imposed.

Finally, the procedure to be followed in habitual criminal cases is set forth in section 6-10-203. The information or indictment must both set forth the charged felony and allege the prior convictions.414 In the trial of the charged felony, the jury shall not be informed of the prior convictions. If the defendant is convicted of the charged felony, he is accorded the opportunity to "plead guilty to the charge of the previous convictions," and if he does not do so, he is "tried immediately by the same jury or judge on the charge of the previous convictions."415 This procedure is unduly cumbersome, and treats the question of whether the accused is an habitual criminal as if it were a criminal charge in itself. There is no sound reason for not treating the matter of prior felony convictions as an issue of sentence enhancement alone, and leaving to the court the fact-finding determination of whether the defendant has been convicted of the requisite number of prior felonies. This would be in keeping with other sound practice regarding sentencing.

V. Conclusion

What conclusions can be drawn? Is the 1982 Wyoming Criminal Code a more workable collection of criminal statutes than was its predecessor? Has the result been worth the monumental effort required? Quantitative or definitive answers to these questions may not be possible. Subjective answers will come from judges, prosecutors, defense counsel, peace officers, corrections personnel, legislators, citizens, and professors; and perhaps also from convicted or acquitted criminal defendants and their

414. WYO. STAT. § 6-10-203(a) (Supp. 1983).
415. WYO. STAT. § 6-10-203(b) (Supp. 1983).
victims. Those answers will be shaped by the effect which the new Criminal Code, or the part of it with which the person came in contact, had upon that person's particular interests and beliefs. It can be expected that the answers will be as varied as the persons who give them.

What is evident is that Wyoming has reexamined its criminal statutes and has discarded some in favor of new formulations, while retaining others. If timeworn statutes no longer appeared efficacious, they were discarded; if they still seemed useful, they were kept. The fact that a statute had been enacted in 1876 or 1890 gave it no shroud of sanctity. Thus the 1982 Criminal Code is the expression of today's lawmakers in response to today's problems as they perceive them.

The art of legislation is mainly the art of drawing distinctions with precision. Criminal legislation must carefully distinguish between those acts which are innocuous and those which are societally harmful and are to be punished. If the legislature fails to draw distinctions with care, then the courts must face the task of saying where the dividing lines are located. The Wyoming Criminal Code of 1982 leaves a great deal to judicial interpretation. Given Wyoming's small population, and the relatively few criminal appeals which are decided involving issues of substantive criminal law, many of the uncertainties in the 1982 Criminal Code will probably never be resolved.

Is the lack of clear differentiation a problem of truly serious consequence? Or can it safely be said that even where the statutes fail to make nice distinctions, the kinds of conduct in the "gray area" on both sides of the line are at least suspect in character, and perhaps reprehensible, so that they are not the kinds of things a law-abiding citizen is likely to become involved in? If this is true, then the consequence is that, however the line is drawn, criminal law punishes the acts of bad people, some of whom will be convicted and some of whom will be acquitted, but it has nothing to do with the acts of good people. Holmes said as much nearly ninety years ago. 416

Undeniably the 1982 Criminal Code needs more work, and it will command the attention of the Legislature in the years ahead. But this would be true in any case, even if the Code was an acknowledged masterpiece of the legislative draftsman's art, because there can never be such a thing as a completed criminal code. 417

416. The Path of the Law, 10 Harv. L. Rev. 457, 460 (1897).
417. This article began with 3-card monte, and it is fitting that it should end with the same subject. Upon publication of the first part of this article, the author was gratified to discover that some Wyoming lawyers were reading it. This intelligence came largely through kind offers to dispel the author's claimed ignorance of the true nature of 3-card monte. Thus Mr. Bryan Sharratt of Wheatland sent some pages copied from a book on gambling, detailing the history and practice of 3-card monte; and Mr. Gerald Stack, Deputy Attorney General, offered instruction not only on the attributes of 3-card monte, but also on "percentage dice, including 'bust outs' and flats, the use of a stripped deck in a black-jack game, 'mechanic's grip,' and 'words of art.'" The generosity of Wyoming lawyers is legendary, and perhaps I shall learn a new trade.