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# THE WYOMING CRIMINAL CODE REVISITED: REFLECTIONS AFTER FIFTEEN YEARS

*Theodore E. Lauer\**

The Wyoming Criminal Code of 1982 has been in effect since July 1, 1983, a period of nearly fifteen years. During that time there have been thousands of prosecutions under the Criminal Code, and hundreds of Wyoming Supreme Court decisions construing the Code's provisions. The Wyoming Legislature has frequently amended various Code sections, has repealed a few sections and has enacted some new ones.<sup>1</sup>

Experience is now sufficient to justify a review of the Criminal Code, with an eye toward possible piecemeal or wholesale revision. Merely to review the Code in its entirety is an onerous task, not to be undertaken lightly. Meaningful review must be done by the Wyoming Legislature, which is currently preoccupied with serious problems of financing primary and secondary education as well as how to fund other necessary functions of state government. Unless Wyoming's criminal law is perceived to be "broke," the Legislature, given its limited resources, will be understandably reluctant to "fix" it.

This article does not purport to be the thoroughgoing review of the Criminal Code which might now prove beneficial. It is nothing more than a loose collection of somewhat unorganized impressions, acquired over the decade and a half since the Legislature adopted the Code in 1983. During that time the author has been privileged to supervise the Prosecution Assistance Program at the College of Law, and has thereby gained a working acquaintance with the Criminal Code. This article is only a beginning, written in the hope that it may provide a stimulus to a more thorough and organized study of the Code and to an improvement in Wyoming's criminal law.

## I. CODE REVISION SINCE 1983

The 1982 Wyoming Legislature adopted the Criminal Code and gave it an effective date of July 1, 1983.<sup>2</sup> However, before the Code went into effect, the 1983 Legislature made amendments in the great majority of the Code's

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1. A hasty count of Criminal Code sections shows that since 1983, five Code sections have been repealed and 14 new sections have been created.

2. 1982 Wyoming Sess. Laws ch. 75.

sections.<sup>3</sup> Through 1998, thirty-six of the Code's 204 sections remain unchanged since their original 1982 enactment, while ninety-one other sections have not been changed since the Code went into effect. Since 1983, some thirty-six sections have been amended once; sixteen sections have been amended twice; three sections have been amended three times; and three sections have been amended four times.<sup>4</sup>

This tally seems to show that while the Legislature has not been overactive in revising the Criminal Code, neither has it been hesitant to do so. In light of the fact that fifty-eight sections have been amended at least once, plus the adoption of fourteen sections and the repeal of five others, it is evident that the Legislature regards the Code as somewhat less than sacrosanct. Given the pace of present-day life in the United States, one should not be surprised to discover that over a fifteen year period more than one third of the Criminal Code has been amended, enacted or repealed.

Numbers alone, however, do not tell the story of whether the Legislature's nearly constant attention to the Criminal Code has been salutary, or whether there are parts of the Code which could stand revision in the public interest. That is an entirely different matter, some of whose fabric will be examined in this article. But as might be expected from a citizen legislature which meets for a very few frantic weeks each year, some of the changes have been good ones and some have been bad.

## II. THE PATH OF CRIMINAL JUSTICE IN WYOMING

It is difficult to know whether we live in an age in which there is a great deal more criminal conduct than in prior times, or whether we are experiencing a heightened awareness of crime in our communities, or perhaps some combination of both. One thing is plain: much more human activity is now subject to criminal sanctions than was the case in earlier, so-called simpler times, and with the increase in the number and reach of statutory crimes, we are seeing a lot more crime.

Wyoming has followed the pattern of the rest of our nation, expanding the reach of the criminal law to new forms of conduct, and increasing both the potential punishment for crimes and the sentences actually imposed in individual cases. As a result, the number of persons occupying our prisons and

3. 1983 Wyoming Sess. Laws ch. 171.

4. The champion sections with four amendments each are WYO. STAT. ANN. §§ 6-2-106 (vehicular homicide), § 6-5-208 (taking controlled substances into jails and institutions), and § 6-7-101 (the definitions for gambling) (Michie 1997). This may be revelatory of the nature of American life in the late 20th century. The astute observer will note that the figures do not add up to the 204 sections claimed earlier to be found in the Code. The reason is that 14 new and five repealed sections have not been included in the count.

jails has grown exponentially in recent decades. Much of this growth can be attributed to the "war against drugs," in that a significant percentage of inmates have been sentenced for controlled substance violations. But penalties for traditional crimes have also been increased. And, as will be seen, the side-effect of adopting new statutes such as the general inchoate offenses, particularly attempt and conspiracy, has been lengthier sentences of incarceration.

Societal sensibilities and sensitivities have experienced a great change in recent times, and the law has been fairly quick to respond. Punishing the physical and sexual abuse of women and children has become a matter of high priority in most communities. The incidence and consequences of driving motor vehicles under the influence of alcohol are matters of great public concern. Crime is seen as an offense against persons, rather than against the state, and crime victims are becoming active participants in criminal prosecutions. In all these areas, law enforcement has intensified, and offenders are subjected to continually increasing penalties. Over all, these changes must be regarded as a good thing. Yet while we might hope to consider ourselves a kinder, gentler society, the fact is that we accord a great deal less tolerance toward many forms of conduct considered criminal, with the result that transgressions which once were overlooked or produced mild sanctions are now the subject of penalties which formerly would have been regarded as Draconian. Whether more intense enforcement and harsher penalties will solve the "crime problem" is not known, but our society is proceeding upon the premise that the answer lies in that direction. Given the observable and possibly immutable characteristics of human beings, it may be that some not insignificant quantity of undesirable conduct will always be with us.

What has all of this to do with the content of the Wyoming Criminal Code? Perhaps very little. It may be that the shape and content of our criminal statutes have an imperceptible effect upon the behavior of persons in our society. The real causes of antisocial conduct—and the real cures, if there are any—may well lie far outside the law. Criminals, after all, do not study the criminal code. On the other hand, the criminal code is a human creation, and as humans (and perhaps even more so as lawyers) we pride ourselves in the rationality of our institutions. A rational criminal code will never be a thing of beauty, but its consistency is a thing we value, and it is an article of faith that a rational law will more likely be accepted and obeyed than an irrational one. Therefore, it is important that our criminal laws be consistent and predictable, and that we strive to eliminate irrationalities and consequences which could not reasonably be foreseen.

It is with the content of the Wyoming Criminal Code, and some of its irrationalities and unintended consequences that the remainder of this article

will deal. The arrangement of the observations will generally follow the organization of the Criminal Code itself, starting with the general provisions and ending with sentencing.

### III. GENERAL PROVISIONS OF THE CRIMINAL CODE

The Code's general provisions, which are meant to apply to all of the crimes within the Code, give rise to a number of problems of definition and construction. Some of these matters arise under the specific language of the Code's sections, and some are generic matters not found in the Code sections, but inherent to substantive criminal law.

#### A. *Parties to Crimes*

Crimes may be committed by persons acting alone, or by two or more persons acting together. At common law, sharp distinctions were drawn between principals, or the persons who were the immediate perpetrators of crimes, and accessories, who in some manner aided the principals, either before, during or after the commission of the crime.<sup>5</sup> Because of the highly technical distinctions between principals and accessories at common law, combined with arbitrary limitations (e.g., an accessory could not be tried until after the principal had been convicted), most jurisdictions have sought to simplify the matter by statute.

In Wyoming, section 6-1-201(a) of the Criminal Code provides:

A person who knowingly aids or abets in the commission of a felony, or who counsels, encourages, hires, commands or procures a felony to be committed, is an accessory before the fact.

Section 6-1-201(b) goes on to provide that accessories before the fact<sup>6</sup> are to be treated in criminal prosecutions as if they were principals.

One potential problem with section 6-1-201(a) is that it expressly applies only to persons who aid or abet in the commission of a *felony*. It says nothing about misdemeanors. At common law, all parties to misdemeanors were regarded as principals, and there was no need to provide in a statute that persons who aided and abetted misdemeanors were to be dealt with as

5. The classical definition of parties to crime at common law is found in 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 34-40 (1769).

6. Accessories after the fact, who provide assistance to persons who have already committed crimes, are treated separately in the Wyoming Criminal Code, in section 6-5-202. They are subject to considerably reduced penalties, in recognition of the fact that their crime is not involvement in the commission of the original offense, but rather consists of interfering with the apprehension and prosecution of persons who have committed offenses.

principals.<sup>7</sup> But section 6-1-102(a) expressly abolishes common law crimes, and goes on to state that “[n]o conduct constitutes a crime unless it is described as a crime in this act or in another statute of this state.” This leaves open the question whether persons who aid and abet in misdemeanors have committed “conduct” which “constitutes a crime.” At least one Wyoming district court judge has concluded that a person who aids and abets a misdemeanor cannot be punished.<sup>8</sup>

Arguably the decision that a person who aids and abets a misdemeanor is not subject to criminal prosecution is patently wrong. But knowledge of that wrongness depends upon an understanding of the now arcane common law relating to parties to crimes, and judges and lawyers can be at least partially forgiven for not being familiar with the common law. A person who reads the Criminal Code can reasonably come to the conclusion that persons who aid and abet misdemeanors are not to be punished. At the very least, the Criminal Code should clearly state the applicable principles of law, so that it does not become necessary to resort to Blackstone or other uncommon sources to determine the outcome of cases in justice courts in Wyoming. Section 6-1-201(a) should be amended to reflect that all persons involved in the commission of misdemeanors are subject to punishment.<sup>9</sup>

Section 6-1-201 appears to make clear that it is no longer necessary to distinguish in criminal proceedings between principals and accessories before the fact. An accessory before the fact “[m]ay be indicted, informed against, tried and convicted as if he were a principal.” This seems to authorize charging defendants without reference to whether they are principals or accessories. Yet many Wyoming prosecutors have difficulty in applying the statute in that manner, and retain the practice of designating accessories before the fact as such.

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7. The common law principle was recognized in *State v. Weekley*, 275 P. 122 (Wyo. 1929), where it was held that in the absence of a Wyoming statute on parties to misdemeanors, the common law would apply under section 4547, WYO. COMP. L. 1920, which adopted the common law of England as the rule of decision in Wyoming when not inconsistent with Wyoming laws. Section 4547 is now found in section 8-1-101.

8. In an unreported juvenile delinquency case involving a charge of cruelty to animals, the court took the position that the absence of any provision in the Criminal Code respecting aiders and abettors in misdemeanor cases reflected a legislative intent that such persons not be subject to punishment. An aider and abettor was therefore acquitted. This, of course, was almost certainly *not* the legislative intent; in all probability the Legislature had no intent whatsoever on the issue.

9. The amendment would be simple enough: “A person who knowingly aids or abets in the commission of a crime, or who counsels, encourages, hires, commands or procures a crime to be committed, is an accessory before the fact.” While arguably this would do violence to the common law, it has the virtue of making the matter entirely clear, when followed by section 6-1-201(b), which expresses that accessories before the fact are to be treated the same as if they were principals.

*B. Venue*

Venue is not dealt with directly in the Wyoming Criminal Code. The notion of venue in criminal cases is governed by Article 1, Section 10 of the Wyoming Constitution, which originally provided in relevant part:

In all criminal prosecutions the accused shall have the right . . . to a speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

In 1976, Wyoming voters approved an amendment to this section, adding this sentence:

When the location of the offense cannot be established with certainty, venue may be placed in the county or district where the corpus delicti is found, or in any county or district in which the victim was transported.<sup>10</sup>

The statute governing venue in criminal cases, section 1-7-102, provides that criminal cases “shall be tried in the county in which the indictment or offense charged is found, except as otherwise provided by law.” This statute further contains language nearly identical to the 1976 constitutional amendment.

Venue has been considered to be a necessary element of every offense, so that the Wyoming pattern jury instructions require the State to prove beyond a reasonable doubt that the crime was committed in the particular county.<sup>11</sup> But what if venue cannot be proved with precision? If venue is an element of every crime, then if it cannot be proved where a crime was committed, will the offender escape punishment? This is a prosecutor’s nightmare. The constitutional provision makes some accommodation for crimes against persons: “Venue may be placed in the county or district where the corpus delicti is found, or in any county or district in which the victim was transported.”<sup>12</sup> But it offers little guidance or assistance in many cases.

Traditionally, persons and property remained fairly static. In the modern world, however, a crime may be committed in several different locales, or may be committed in such a manner that it is impossible to prove just where the crime occurred. Wyoming’s statutes make no provision for how or where such

10. The amendment was adopted on November 2, 1976. See 1975 Wyo. Sess. Laws, Senate Joint Resolution No. 2 at 474.

11. The testimony of the victim, if believed by the jury, is sufficient to establish venue. *McArtor v. State*, 699 P.2d 288, 291-92 (Wyo. 1985).

12. The framers of the constitutional amendment have subjected themselves to a measure of ridicule by their apparent belief that “corpus delicti” refers to the body of the victim, rather than to the body of evidence which proves the crime. See, e.g., BLACK’S LAW DICTIONARY 344 (6th ed. 1990).

crimes are to be prosecuted. When crimes involving the use of telephones or other electronic media are concerned, it is possible to place the venue where the call or other transmission was received.<sup>13</sup> Historically, the Wyoming Supreme Court held that venue was properly laid in the county where a libelous communication was received.<sup>14</sup> And if it cannot be proved where property was stolen, a person may be prosecuted in the county where he is found in unlawful possession of that property.<sup>15</sup> But there are also cases in which it cannot be proved where the crime occurred, as where property has been taken from a vehicle during its travels across the state, or a small child is sexually abused in a vehicle while traveling with an adult.

One other aspect of venue may cause difficulty. In property crimes, where a number of small crimes are committed as a part of a common scheme or within a particular period of time, it is possible to aggregate the value of the property affected in order to reach the level necessary to charge a felony. This is true as to property destruction,<sup>16</sup> larceny and related offenses,<sup>17</sup> and insufficient funds checks.<sup>18</sup> However, it is unclear as to how the aggregation is to occur when the crimes are committed in more than one county.

Some provision needs to be made in the Criminal Code to accommodate cases where it cannot be proved with certainty where the crime occurred, where the crime occurred in several counties, or where an aggregation of offenses were committed in more than one county.

### C. *Merger of Offenses*

A single act may violate more than one criminal statute. If it does, the defendant can be convicted of violation of each statute, so long as each requires an element which the other does not. This is one aspect of the rule of *Blockburger v. United States*:<sup>19</sup>

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

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13. *McCone v. State*, 866 P.2d 740 (Wyo. 1993).

14. *State v. Levand*, 262 P. 24 (Wyo. 1927).

15. See *Hunter v. State*, 704 P.2d 713 (Wyo. 1985). Hunter was apprehended in Albany County, driving a Cadillac which had been stolen in Michigan. When Michigan declined to extradite, Hunter was prosecuted in Wyoming for concealing stolen property, under section 6-3-403.

16. WYO. STAT. ANN. § 6-3-201(c) (Michie 1997).

17. *Id.* § 6-3-410.

18. *Id.* § 6-3-702.

19. 284 U.S. 299, 304 (1932). The *Blockburger* test is recognized in Wyoming. *State v. Keffer*, 860 P.2d 1118, 1130 (Wyo. 1993).



The issue arose pointedly in *Owen v. State*,<sup>20</sup> where Owen was charged with and convicted of three offenses: second degree sexual assault in violation of section 6-2-303; immodest, immoral or indecent liberties in violation of section 14-3-105; and incest in violation of section 6-4-402. The evidence showed a single act: Owen had put his finger into the vagina of his seven year old daughter. The second degree sexual assault was based on the intrusion into the child's vagina; the indecent liberties charge on the fact that Owen "had pulled down his daughter's panties, [and] had touched her in the area of her vagina"; and the incest on the blood relationship of father and daughter. Under the *Blockburger* test, each crime required an element that the others did not, making them separate offenses.

On appeal, Owen challenged the propriety of three convictions for a single act. The Wyoming Supreme Court found that pulling down the panties and touching the girl in the area of her vagina "were a part of, and necessary to, the accomplishment of the second-degree sexual assault. The penetration could not have been otherwise accomplished."<sup>21</sup> Therefore, the indecent liberties conviction merged into the second-degree sexual assault conviction, and Owen could not be sentenced for both. However, the incest charge was found to be separate, in that it did not require intrusion—which second degree sexual assault required—and had to involve a relative—which sexual assault did not. Therefore, the *Blockburger* requirements were satisfied.

The Legislature seems to have given little consideration to whether conduct which violates more than one statute can be used to convict and punish for violation of all of the statutes violated. One approach would be that of the Model Penal Code, which in section 1.07 limits the number of possible convictions where the proscribed conduct was of the same nature, and which in section 7.06(1) limits the sentence to that for the most serious crime committed. Another approach would be to provide that a particular statute applies only when another does not, as is done in third degree sexual assault by excluding indecent liberties.<sup>22</sup> A third approach would be to examine the defendant's acts functionally, to determine whether it is possible to commit them independently of one another. This is the approach used by the Wyoming Supreme Court in *Owen v. State*.

There is a measure of incongruity to the assumption that because a single act offends against two statutes, each of which has an element which the other does not, the Legislature intended that the offender be punished under both statutes. In all likelihood, the Legislature intended nothing one way or the

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20. 902 P.2d 190 (Wyo. 1995).

21. 902 P.2d at 195.

22. WYO. STAT. ANN. § 6-2-304(a).

other, and to ascribe to it the desire to achieve a particular result based on the vagaries of statutory language is irrational. A rational criminal code should be based upon a clear and careful legislative consideration of liability for offending against multiple statutes by a single act, and should contain provisions making the legislative intent evident.

#### *D. Lesser Included Offenses*

When is one offense a lesser included offense within a greater offense, so that a jury may convict the defendant of the lesser offense if it finds that the greater offense has not been proved? Wyoming Rule of Criminal Procedure 31(c) provides that the “defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.” The question is how it is to be determined when an offense is “necessarily included in the offense charged.”

In *State v. Keffer*,<sup>23</sup> decided in 1993, the Wyoming Supreme Court addressed the problem of lesser included offenses in the context of whether the crime of voluntary manslaughter is a lesser included offense of second degree murder. Functionally, the court seems to have seized upon a statutory elements test redolent of the above quotation from *Blockburger v. United States*,<sup>24</sup> requiring a comparison between the elements of the offense charged and the elements of the lesser offense. If the elements of the lesser offense are a subset of the elements of the greater—so that each element of the lesser is found within the greater—then the lesser offense is truly a lesser included offense, for which the defendant can be found guilty. In addition, there must be evidence from which the jury could rationally determine that while the defendant was not guilty of the greater offense, he was guilty of the lesser.

In *Keffer*, Justice Cardine put the matter succinctly in a concurring opinion:

The trial judge must first determine if all the elements of the lesser offense are found within the greater; and, if so, is there some evidence that would rationally permit the jury to find the accused guilty of the lesser and not guilty of the greater offense. If such evidence is present, the instruction should be given.<sup>25</sup>

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23. 860 P.2d 1118 (Wyo. 1993).

24. 284 U.S. 299, 304 (1932). See *supra* note 19 and accompanying text.

25. 860 P.2d at 1140. Justice Cardine’s test is not quite the same as the test which appears to be set forth in Justice Thomas’ lengthy majority opinion. Justice Cardine’s test states that there must be “some evidence that would rationally permit the jury to find the accused guilty of the lesser and not guilty of the greater offense.” This seems to require some evidence that the element constituting the greater of-

While the test may seem simple enough, and be capable of almost mechanical application, in practice it has proved more difficult. Thus in *Jackson v. State*,<sup>26</sup> the Wyoming Supreme Court held that second degree sexual assault is not a lesser included offense of first degree sexual assault.<sup>27</sup> In *Sindelar v. State*,<sup>28</sup> the court held that reckless endangering is not a lesser included offense of aggravated assault and battery, where the information charged the defendant threatened to use a drawn deadly weapon.<sup>29</sup> In both cases, prosecutors and courts had assumed that the lesser offenses were in fact lesser included offenses.

How can the rational criminal code avoid or eliminate confusion regarding lesser included offenses? Where possible, greater and lesser offenses should be drafted with their respective elements in mind, so that the lesser offense is truly a lesser included offense.

### E. Criminal Intent

The Wyoming Criminal Code employs a number of terms to describe the necessary culpable state of mind which a defendant must possess at the time he acted. Thus "purposely," "intentionally," "voluntarily," "knowingly," "recklessly," "with criminal negligence," "believes," and "has reasonable cause to believe" are all found in the Criminal Code. Only "criminal negligence" and "recklessly" are defined.<sup>30</sup>

It is generally understood that there is a hierarchy of states of mind, ranging downward in culpability from purposely or intentionally, through

fense does not exist. The majority opinion, on the other hand, embraces the "jury function theory," which allows the jury to weigh the evidence to determine whether the elements are present. The difference would appear in a case where larceny of property worth over \$500 is charged, theft of property valued at \$500 or more being a felony, and property valued at less than \$500 being a misdemeanor. The only evidence regarding value is the testimony of the owner of the property that it was worth \$550. Under Justice Cardine's test, there is no evidence that would rationally permit the jury to find that the property is worth less than \$500, so no lesser included instruction on misdemeanor larceny would be given. The jury is limited to convicting of felony larceny or acquitting. Under the jury function theory embraced by the majority, on the other hand, the jury is free to believe or disbelieve the testimony of the owner, and therefore could conclude that the property was worth less than \$500. A lesser included instruction on misdemeanor larceny would be given, and the jury would have three choices: felony, misdemeanor or acquittal.

26. 891 P.2d 70 (Wyo. 1995).

27. The court compared the elements of first degree sexual assault in WYO. STAT. ANN. § 6-2-302(a)(i) and the elements of second degree sexual assault in section 6-2-303(a)(i) and (vi), and found that the "elements of second degree sexual assault are not a subset of those found in first degree sexual assault but rather contain separate elements." 891 P.2d at 73.

28. 932 P.2d 730 (Wyo. 1997).

29. The court concluded that reckless endangering embodies the mental element of recklessness, which is not present in the greater offense of aggravated assault and battery by threatening to use a drawn deadly weapon on another. Compare WYO. STAT. ANN. § 6-2-504(a) with § 6-2-505(a)(iii). 932 P.2d at 733.

30. WYO. STAT. ANN. § 6-1-104(a)(iii) and (ix).

knowingly, and down to recklessly and with criminal negligence. Perhaps the best-known model is found in Model Penal Code section 2.02(2): purposely, knowingly, recklessly, negligently. The question then arises whether the lesser states of mind are necessarily included in the more culpable states. Thus, if a defendant is charged with a crime which requires acting purposely, could a lesser crime which requires that the defendant act negligently be a lesser included offense?

The Model Penal Code solves this problem in section 2.02(5):

(5) *Substitutes for Negligence, Recklessness and Knowledge.* When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

Under the Model Penal Code, the principle actually works two ways: If a person is charged with acting with criminal negligence, proof that the person acted purposely will suffice. Or if a defendant is charged with acting purposely, the jury can find that he acted with criminal negligence in order to convict him of a lesser included offense.<sup>31</sup>

In Wyoming, it was long uncertain whether a lesser culpable state such as recklessness or criminal negligence is included within the states of mind imparting higher culpability, such as knowingly or purposely. However, in *Sindelar v. State*, decided in 1997, the Wyoming Supreme Court held that an intentional state of mind “does not encompass an element of ‘recklessly.’”<sup>32</sup> Thus where the crime of aggravated assault and battery required that the defendant intentionally threaten the victim, the crime of reckless endangering which required a person to act recklessly could not be a lesser included offense, because “recklessly” differs from and is not included within “intentionally.”

The result in *Sindelar* would seem to mean that involuntary manslaughter, which requires that the defendant act recklessly,<sup>33</sup> cannot be a lesser included offense within that form of first degree murder which requires

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31. This conclusion is supported both by the language of Model Penal Code § 2.02(5), and by the Comment to Model Penal Code § 1.07(5). 1 MODEL PENAL CODE AND COMMENTARIES, Part I, §§ 1.01 to 2.13, at 133-34 (1985).

32. 932 P.2d 730, 733 (Wyo. 1997).

33. WYO. STAT. ANN. § 6-2-105(a)(ii).

that the defendant act purposely and with premeditated malice.<sup>34</sup> In other words, acting recklessly falls outside of acting purposely. On the other hand, where first degree felony murder is charged, involuntary manslaughter or even criminally negligent homicide may be proper lesser included offenses, since in felony murder the state of mind resulting in death need not be purposeful. This was the result in *Harris v. State*,<sup>35</sup> where the jury found Harris guilty of both felony murder and criminally negligent homicide arising from a single death. On appeal, Harris suggested that the crimes were mutually exclusive, so that the jury could not consistently have found him guilty of both. The Wyoming Supreme Court pointed out that any killing in the perpetration of one of the listed felonies is a sufficient basis for conviction of felony murder—even if the killing is negligent or accidental. Therefore, “[s]ince the same conduct may violate both statutes, the crimes are not mutually exclusive.”<sup>36</sup> *Harris* did not mention the *Sindelar* case.

*Sindelar v. State* may restrict sharply the number of crimes which can be considered as lesser included offenses of other, greater crimes. The Legislature can solve the problem by adopting a statute similar to Model Penal Code § 2.02(5), perhaps in combination with Model Penal Code § 1.07(5).

#### F. Defenses

Wyoming Criminal Code section 6-1-102(b) provides: “Common-law defenses are retained unless otherwise provided in this act.” It is now difficult to reconstruct whether the original impulse which ultimately brought about the Criminal Code of 1982 included codifying criminal defenses, as had been done in the Model Penal Code.<sup>37</sup> While careful consideration was given to the principal substantive crimes, it appears in retrospect that the legislative committees simply ran out of time and energy regarding less serious crimes and criminal defenses. Drafting an entire penal code is an exercise best undertaken by emperors or great states,<sup>38</sup> and our own Legislature strove valiantly and with some measure of success. But the criminal defenses remained for the most part uncodified.

It is correct to say “for the most part uncodified,” because the Wyoming Legislature has historically undertaken to codify the defenses of

34. *Id.* § 6-1-201(a).

35. 933 P.2d 1114 (Wyo. 1997).

36. *Id.* at 1120.

37. See in particular MODEL PENAL CODE §§ 2.08 - 2.13; 3.01 - 3.11; 4.01 - 4.10 (1985).

38. One thinks of Justinian and Napoleon, of New York and California. Yet influential codes have also been crafted substantially by individuals, as with Edward Livingston's Louisiana Penal Code and Thomas Babington Macaulay's Indian Penal Code. Jeremy Bentham was for a time in the penal code drafting business, but I do not know how his codes fared.

intoxication and of mental illness or deficiency.<sup>39</sup> Other defenses are recognized in various sections of the 1982 Criminal Code.<sup>40</sup>

### 1. Battered Woman Syndrome.

It is unclear whether there is now a greater incidence of domestic abuse than existed in the past. Domestic abuse reports have increased greatly in recent years, and it is possible that the conditions of modern life, including the near disappearance of the extended family, frequent marital discord, and the pressures incident to a wage-earning society have produced more abuse. On the other hand, some of the apparent increase in reports of abuse may be attributable to lessened tolerance of physical violence, the development of reporting mechanisms, and the growth of shelters and other support systems which provide an alternative for battered spouses.

One apparently puzzling aspect of domestic violence is that persons who suffer physical and mental abuse sometimes suddenly and without warning kill their abusers. Thus the passive victim, who has been abused over a period of time, will suddenly resort to violence against the abuser in a manner inconsistent with the victim's prior patterns of conduct. Out of the need to explain this conduct, the battered woman syndrome has evolved.

In 1981, in *Buhrle v. State*, Edith Buhrle was convicted of the second degree murder of her estranged husband, Kenneth. The parties separated after an argument in which Mr. Buhrle allegedly beat his wife. A week later, she took a hunting rifle to the motel where he was staying, and after a protracted argument through a partially open door, she shot and killed him. Mrs. Buhrle sought to raise the defense that she suffered from the battered woman syndrome, and called as an expert witness Dr. Lenore Walker, author of *The Battered Woman*.<sup>41</sup> Dr. Walker proposed to testify that Edith Buhrle was a battered woman who suffered from a state of learned helplessness which made her unable to walk away from a situation and caused her to perceive that she

39. Intoxication was recognized in 1869 Wyo. Terr. Sess. Laws ch. 3, tit. 1, § 9. The defense of mental illness (or insanity as it was then known) was also codified in 1869 Wyo. Terr. Sess. Laws ch. 3, §§ 5-6. The language of these sections is noteworthy:

Sec. 5. A lunatic or insane person without lucid intervals, shall not be found guilty of any crime or misdemeanor, with which he may be charged; *Provided*, The act so charged as criminal shall have been committed in the condition of insanity.

Sec. 6. An idiot shall not be found guilty, or punished for any crime or misdemeanor with which he or she may be charged.

The sensitive modern mind may wonder at the choice of sexes: lunatics and insane persons are masculine, but idiots are of either gender.

40. Section 6-2-307 is notable: "The fact that the actor and victim are married to each other is not by itself a defense" to a violation of most forms of first and second degree sexual assault. WYO. STAT. ANN. § 6-2-307 (Michie 1977 & Supp. 1983). The section proved short-lived; in *Shurn v. State*, 742 P.2d 776 (Wyo. 1987), the Wyoming Supreme Court swept aside the marital defense.

41. LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

was in fear of her life and was acting in self-defense when she shot Kenneth Buhrlle. The trial court rejected Dr. Walker's testimony; the supreme court affirmed on the ground that the battered woman syndrome was in its infancy, and lacked a sufficiently established scientific basis.

Later, in *Jahnke v. State*,<sup>42</sup> where Richard Jahnke was charged with murdering his father, the defense sought to raise a battered child defense to explain the shooting as self-defense. The trial court excluded the evidence on the ground that no adequate foundation had been laid for the testimony of the expert. The Wyoming Supreme Court affirmed.

In 1993, the Wyoming Legislature adopted section 6-1-203, which recognized the battered woman syndrome as a subset of post-traumatic stress disorder as defined by the American Psychiatric Association, and provided:

If a person is charged with a crime involving the use of force against another, and the person raises the affirmative defense of self-defense, the person may introduce expert testimony that the person suffered from the syndrome, to establish the necessary requisite belief of an imminent danger of death or great bodily harm as an element of the affirmative defense, to justify the person's use of force.<sup>43</sup>

The battered woman syndrome came before the Wyoming Supreme Court in *Witt v. State*,<sup>44</sup> decided in 1995, where Dawn Rene Witt was convicted of voluntary manslaughter in the killing of Mark Ayers, with whom she had lived for two years. Witt claimed that she had shot the victim in self-defense, and offered expert testimony that she suffered from the battered woman syndrome. The trial court refused to permit the expert to testify as to Witt's state of mind at the time she fired the fatal shot. The Wyoming Supreme Court affirmed the manslaughter conviction, pointing out that section 6-1-203(b) provides only that the expert may testify "that the person suffered from the syndrome," and not what the defendant believed at the time she used force against another. Moreover, the court concluded that testimony as to the defendant's state of mind at the time of the violent act would not be helpful to the jury.<sup>45</sup>

The supreme court made clear in the Witt case that the recognition of battered woman syndrome in section 6-1-203 does not constitute a license for battered women to kill: "WYO. STAT. § 6-1-203 does not create a separate

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42. 682 P.2d 991 (Wyo. 1984).

43. 1993 Wyo. Sess. Laws ch. 66, § 1.

44. 892 P.2d 132 (Wyo. 1995).

45. 892 P.2d at 138.

defense; it permits the introduction of expert testimony on the battered woman syndrome when the affirmative defense of self-defense is raised." Thus, the battered woman syndrome only permits expert testimony to explain the reasonableness of the defendant's perception that he or she is in imminent danger of death or great bodily harm in order to justify the use of force in self-defense.

It is unfortunate that the Legislature chose to characterize this aspect of the post-traumatic stress disorder as the "battered woman syndrome." While many persons who suffer from this mental condition are women, men and children are also within the definition and are not meant to be excluded from whatever benefits the statute might offer.

We can expect to see battered woman syndrome evidence offered frequently by defendants in future Wyoming homicide and assault and battery prosecutions. Many questions remain to be resolved regarding this evidence. For instance, if the battered woman syndrome is a mental disorder, must the defendant give notice under Rule 12.2 of the Wyoming Rules of Criminal Procedure of the intent to rely upon the syndrome as a defense?<sup>46</sup>

## 2. Mental Illness or Deficiency.

Wyoming law regarding mental responsibility for criminal conduct has remained substantially unchanged since 1983, when in response to John Hinckley's acquittal because of mental illness following his attempt to assassinate President Reagan, the Wyoming Legislature amended sections 7-11-304 and 7-11-305 to require that mental illness be a "severely abnormal mental condition" and that the defendant, not the State, has the burden of proving mental illness or deficiency excluding responsibility.<sup>47</sup> The mental illness and deficiency statute in its present form appears to be workable, and to present no major difficulties which might require immediate correction.

Two developments in related areas have occurred since 1983. In *Dean v. State*,<sup>48</sup> the Wyoming Supreme Court rejected the defense of diminished or partial responsibility, which would apply where the defendant was found mentally responsible for his acts, but suffering from diminished mental

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46. Another very real problem is that section 6-1-203(a) refers to the "Post-Traumatic Stress Disorder established in the Diagnostic and Statistical Manual of Mental Disorders III-Revised of the American Psychiatric Association." DSM III-R, as the manual is known, was published in 1987. In 1994, the American Psychiatric Association published the fourth edition of its Diagnostic and Statistical Manual of Mental Disorders, known as DSM-IV. The criteria for Post-Traumatic Stress Disorder in DSM-IV are different from those in DSM-III-R. It seems anachronistic to require experts to testify according to the outdated DSM-III-R criteria when these are no longer the accepted standards of the profession.

47. 1983 Wyo. Sess. Laws ch. 179, § 1.

48. 668 P.2d 639 (Wyo. 1983).



capacity so that he could not formulate willfulness and malice, or some specific intent. The court concluded that the Legislature had codified the law of mental responsibility, and that “[i]f the legislature had intended additional defenses, it would have said so.”

In 1984, in *Polston v. State*,<sup>49</sup> the supreme court applied the defense of traumatic automatism or unconsciousness, where the defendant claims not to be criminally responsible for acts committed while in a state of unconsciousness. The court made clear that automatism or unconsciousness is not a mental illness or deficiency, but results from a brain injury which produces a state of unconsciousness in which the person is not able to control his actions.<sup>50</sup> Further, the defense “is not available if the unconscious condition results primarily from voluntary intoxication.”<sup>51</sup> *Polston* gave rise to Rule 12.3 of the Wyoming Rules of Criminal Procedure, which provides that if the defendant intends to assert a defense of unconsciousness, notice must be given to the State, whereupon the defendant will be examined by an examiner designated by the court.

### 3. Intoxication.

Consumption of alcohol affects the mind, which explains why large quantities are consumed. When a person consumes a substantial amount, perceptions may be dimmed and inhibitions released. We say that the person is “under the influence of alcohol,” meaning that he is acting differently from how he acts when sober. Many acts of a criminal nature are committed when the actor has consumed alcohol and arguably is affected thereby.<sup>52</sup> The criminal justice system has long experienced uncertainty as to how to deal with offenders who were under the influence of alcohol at the time of their acts. Whether to permit a defense of intoxication has proved troublesome. Several alternatives have been suggested, and some of them adopted at various times and places. First, it would be possible to punish the actor more severely for criminal acts committed while intoxicated, increasing the penalty because the actor allowed himself to become intoxicated. Next, the fact of intoxication could simply be disregarded, insofar as it might have affected the actor’s mental state.<sup>53</sup> A third approach would allow the actor to avoid criminal

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49. 685 P.2d 1 (Wyo. 1984). Earlier, in *Fulcher v. State*, 633 P.2d 142 (Wyo. 1981), the supreme court had recognized that the defense of unconsciousness may be asserted in Wyoming, but concluded that it had not been properly raised by the defendant.

50. *Polston*, 685 P.2d at 6.

51. *Id.* at 9.

52. “There rarely could be a conviction for homicide if drunkenness avoided responsibility.” 1 FRANCIS WHARTON, CRIMINAL LAW § 49, at 79 (8th ed. 1880)

53. This was the classical common law treatment of intoxication. 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 32 (1736): “[B]y the laws of *England* such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses.” Glanville Williams has asked, “If a man is punished for doing something when drunk that he

liability where the crime required a specific intent, and the intoxication was sufficient to render him unable to formulate that intent.<sup>54</sup> Finally, intoxication could be recognized as a defense to all crimes, where it so affected the actor's mind as to negate the mental state required for the crime.<sup>55</sup>

Wyoming has followed the majority of American states in providing that intoxication can be a defense where it negates a specific intent which is an element of the crime. Section 6-1-202 provides that self-induced intoxication "is not a defense to a criminal charge except to the extent that in any prosecution evidence of self-induced intoxication may be offered when it is relevant to negate the existence of a specific intent which is an element of the crime."<sup>56</sup> Thus self-induced intoxication can provide a defense only where a specific intent crime is charged. First, it is necessary to know what is a specific intent crime. Generally, where the statute defining a crime requires that an act be performed with the ultimate purpose of achieving some further goal, that statute creates a specific intent crime. This has been called an "ulterior intent." The statutes defining such crimes normally require that an act be performed "with intent to" bring about some further consequence, such as burglary: entering or remaining in a building without authority, "with intent to commit larceny or a felony therein."<sup>57</sup> First degree premeditated malice murder is also a specific intent crime, because it requires proof that the defendant intended to kill the victim, even though the words "with intent to" are not present in the statute.<sup>58</sup>

Wyoming has experienced little difficulty with the application of the intoxication defense. While it requires no evidence beyond the defendant's own testimony to take the issue of intoxication to the jury,<sup>59</sup> Wyoming juries by and large have been reluctant to excuse criminal conduct because of the defendant's consumption of alcohol.<sup>60</sup>

would not have done when sober, is he not in plain truth punished for getting drunk?" CRIMINAL LAW: THE GENERAL PART § 181 at 564 (2d ed. 1961). Williams' objection is too simplistic, and can apply only when alcohol can be said to be the sole cause of the criminal conduct. But alcohol alone cannot commit crimes; criminal conduct must result from some directed human activity. The conduct remains that of the actor, even if he is affected to some degree by the fact of intoxication.

54. This is the approach followed by most jurisdictions at the present time, including Wyoming. See *infra* note 56 and accompanying text.

55. MODEL PENAL CODE § 2.08(1) (1985): "intoxication of the actor is not a defense unless it negates an element of the offense." This blanket application of intoxication is somewhat fudged in section 2.08(2): "When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."

56. WYO. STAT. ANN. § 6-1-202 (Michie 1997).

57. *Id.* § 6-3-301(a).

58. *Id.* § 6-2-101(a).

59. *Goodman v. State*, 573 P.2d 400, 410-12 (Wyo. 1977).

60. See, e.g., *Dice v. State*, 825 P.2d 379 (Wyo. 1992); *Eatherton v. State*, 761 P.2d 91 (Wyo. 1988).

It is difficult to support the limitation of the intoxication defense to specific intent crimes, excluding its application to all crimes of general intent. On the other hand, it may be as difficult to support having a voluntary intoxication defense in any form. The defense seems to provide the jury with an opportunity to acquit an otherwise guilty defendant on the basis of sympathy for the defendant.

The troublesome nature of the intoxication defense, making it possible for a person to become voluntarily intoxicated and commit acts of a criminal nature, and then to use the fact of intoxication to escape full responsibility for those criminal acts, has led to proposals to abolish the defense altogether. While abolition of the intoxication defense has been described by legal scholars as “clearly wrong,”<sup>61</sup> some states have abolished the defense either by judicial decision<sup>62</sup> or by statute.<sup>63</sup>

In 1987, Montana adopted a statute providing that voluntary intoxication “may not be taken into consideration in determining the existence of a mental state which is an element of the offense.”<sup>64</sup> In *State v. Egelhoff*,<sup>65</sup> a prosecution for deliberate homicide, the Montana Supreme Court held the statute unconstitutional under the United States Constitution as a violation of due process, concluding that evidence of intoxication was relevant to whether the defendant acted knowingly and purposely and exclusion of such evidence diminished the state’s burden of proving guilt beyond a reasonable doubt. The United States Supreme Court granted *certiorari* and reversed.<sup>66</sup> Four justices concluded that the intoxication defense is not a “fundamental principle of justice,” so that the Due Process Clause did not prevent Montana from abolishing the defense.<sup>67</sup> Justice Ginsburg concurred on the ground that Montana was free to redefine *mens rea* so as to exclude consideration of intoxication.<sup>68</sup> Four justices dissented on the ground that mental state is an essential element of the crime of deliberate homicide, and the adoption of what the dissenters classified as an “evidentiary rule” excluding consideration of intoxication denied due process.<sup>69</sup>

61. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 4.10(a) at 554 (1986).

62. *See, e.g., State v. Stasio*, 396 A.2d 1129 (N.J. 1979); *State v. Vaughn*, 232 S.E.2d 328 (S.C. 1977).

63. *See, e.g., ARIZ. REV. STAT. ANN.* § 13-503 (Supp. 1997); *DEL. CODE*, tit. 11, § 421 (1995); *GA. CODE ANN.* § 16-3-4 (1996); *HAW. REV. STAT.* § 702-230 (1994); *TEXAS PENAL CODE ANN.* § 8.04 (1994).

64. *MONT. CODE ANN.* § 45-2-203 (1997).

65. 900 P.2d 260 (Mont. 1995).

66. *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996).

67. *Id.* at 2016-24.

68. *Id.* at 2024-26.

69. *Id.* at 2026-35.

Abolition of the defense of intoxication is a rational solution to the problem posed by persons who commit crimes under the lessened inhibitions incidental to voluntary intoxication, then seek to excuse their criminal conduct on the ground that the "influence of alcohol" and not their personal culpability caused that conduct. Consumption of alcohol, while socially sanctioned and productive of gratification, is an activity fraught with danger to others; persons who choose to drink must be held fully accountable for the results of their conduct while in the pleasurable state known as intoxication.

#### IV. INCHOATE OFFENSES

Prior to 1981, Wyoming had no general statute punishing criminal attempts or criminal solicitation. A statute punishing conspiracy to kidnap had been enacted in 1935,<sup>70</sup> and a statute covering any conspiracy to commit a felony was adopted in 1969.<sup>71</sup> In 1981, the Legislature enacted general statutes on criminal attempts, solicitation to commit felonies, and conspiracy,<sup>72</sup> incorporating the language of the Model Penal Code.<sup>73</sup> The punishment for attempt, solicitation and conspiracy was the same as for the most serious crime attempted, solicited or conspired to commit.<sup>74</sup> The provisions for attempt, solicitation and conspiracy were incorporated into the Wyoming Criminal Code of 1982, and have not been amended since 1983.

##### A. Prosecutors Discover Inchoate Offenses

Attempt, solicitation and conspiracy are called "inchoate" or "preparatory" offenses because they consist of steps toward the commission of a substantive offense. These inchoate crimes may be committed even if no substantive offense is actually committed. In fact, if the attempted crime is committed, the attempt merges into the consummated offense; and if the crime solicited is attempted or committed, the crime of solicitation ceases to exist.<sup>75</sup> While a person can be convicted and punished both for conspiracy to commit a crime and for the commission of that crime, the crime of conspiracy does not require anything more than agreement and an overt act to effect the objective

70. 1935 Wyo. Sess. Laws ch. 85, §2.

71. 1969 Wyo. Sess. Laws ch. 164, § 1. In 1971, the Wyoming Legislature adopted a comprehensive controlled substances statute, including a section punishing attempts and conspiracies to violate the controlled substances law. 1971 Wyo. Sess. Laws ch. 246, § 42. This section, now codified as WYO. STAT. ANN. § 35-7-1042 (Michie 1997), differs from the general conspiracy section in that it does not require an overt act in addition to the agreement to violate the law. The punishment for such attempts and conspiracies "may not exceed the maximum punishment prescribed for the offense." *Id.*

72. 1981 Wyo. Sess. Laws ch. 11, § 1. Attempt, solicitation and conspiracy are now found in WYO. STAT. ANN. §§ 6-1-301 to -303.

73. MODEL PENAL CODE §§ 5.01, 5.03, 5.03 (1985).

74. 1981 Wyo. Sess. Laws ch. 11, § 1, now codified as WYO. STAT. ANN. § 6-1-304. This section was drawn from MODEL PENAL CODE § 5.05.

75. WYO. STAT. ANN. § 6-1-302(a).

of the agreement.<sup>76</sup>

But although no substantive crime need be committed, and no actual harm need be caused to any victim, the Criminal Code provides that attempt, solicitation and conspiracy can be punished as severely as if the object crime had in fact been committed.<sup>77</sup>

Prosecutors have put the inchoate offenses and their severe punishments to intense use. Where once a person who shot at or severely beat another would have been prosecuted for some form of aggravated assault and battery, today the person is likely to be charged with attempted murder. Thus, prior to 1981, a person who shot and wounded another, intending to kill, was subject to a maximum penalty of imprisonment for 14 years, whether classified as assault and battery with felonious intent,<sup>78</sup> or as aggravated assault and battery with a dangerous weapon.<sup>79</sup> Under the present law, the person would be charged with attempted first degree murder, and would receive a mandatory life sentence if convicted.<sup>80</sup>

Similarly, whenever two persons act in concert to commit a crime, the likelihood is that they have agreed in advance to do so<sup>81</sup>—making them conspirators and subject to punishment not only for the commission of the crime, but to an added equal punishment for conspiracy.<sup>82</sup>

The Model Penal Code, from which Wyoming's inchoate offense statutes are derived, provides a measure of amelioration. First, an attempt, solicitation or conspiracy to commit a felony of the first degree, such as murder, is not itself a felony of the first degree—as would be the case in Wyoming—but a felony of the second degree, bearing a maximum sentence of ten years.<sup>83</sup> Second, where both a conspiracy and the object crime of the conspiracy are

76. *Id.* § 6-1-303(a).

77. The only exception is that “an attempt, solicitation or conspiracy to commit a capital crime is not punishable by the death penalty if the capital crime is not committed.” WYO. STAT. ANN. § 6-1-304. Interestingly, this leaves open the possibility that one who conspires to commit first degree murder is subject to the death penalty for the conspiracy if the murder is committed.

78. WYO. STAT. ANN. § 6-69 (Michie 1957).

79. WYO. STAT. ANN. § 6-70.B (Michie 1957 & Supp. 1975).

80. *See, e.g., Geiger v. State*, 859 P.2d 665 (Wyo. 1993), where Mary Geiger quarreled with Ernest Romero, then went home and returned with a gun, intending to “hurt” Romero, then followed him home and shot him three times. Mary Geiger’s conviction of attempted first degree murder, with its attendant life sentence, was affirmed.

81. *See Rands v. State*, 818 P.2d 44 (Wyo. 1991), where Rands drove his car up behind and then beside another vehicle, and a passenger in Rands’ car then fired a shot into the other vehicle, wounding one of the occupants. Rands was convicted of conspiracy to commit first degree murder, and his conviction was affirmed against the claim that the evidence was insufficient. Rands did not help his cause by admitting to a police officer that he may have said to his passenger, “Blow that motherfucker’s head off.”

82. *See, e.g., Bigelow v. State*, 768 P.2d 558 (Wyo. 1989).

83. MODEL PENAL CODE § 5.05(1) (1985).

charged, the person cannot be convicted of more than one offense if "one offense consists only of a conspiracy or other form of preparation to commit the other."<sup>84</sup>

The underlying question is what punishment is appropriate for inchoate offenses, and whether Wyoming's scheme of imposing the same punishment for attempt, solicitation or conspiracy as could be imposed for the object crime is too severe. In most cases, when sentencing for an inchoate offense the court has discretion to choose a sentence from a possible range of years. Thus, for conspiracy to commit burglary, the trial court has a sentencing range of one to ten years.<sup>85</sup> But for conspiracy to commit first degree murder, the trial court is required to sentence the defendant to life in prison.<sup>86</sup> While in some cases, a life sentence is appropriate for conspiring to commit first degree murder, in other cases such punishment is plainly excessive.<sup>87</sup>

### B. Attempt

Wyoming's attempt statute provides that a person is guilty of attempt to commit a crime if "[w]ith the intent to commit the crime, he does any act which is a substantial step toward commission of the crime."<sup>88</sup> The attempt statute contains an unusual amelioratory provision, that a person is not liable for attempt "if, under circumstances manifesting a voluntary and complete renunciation of his criminal intention, he avoided the commission of the crime attempted by abandoning his criminal effort."<sup>89</sup> In other words, if after the

84. *Id.* § 1.07(1)(b). In addition, a person cannot be convicted of more than one inchoate offense "for conduct designed to commit or culminate in the commission of the same crime." *Id.* § 5.05(3). Thus, one could not be convicted under the Model Penal Code of attempt and conspiracy, or solicitation and conspiracy.

85. Burglary is punishable by imprisonment for not more than ten years. WYO. STAT. ANN. § 6-3-101(b) (Michie 1997). And the court may grant probation following a conviction of burglary—or a conviction for conspiracy to commit burglary. *See, e.g., id.* § 7-13-302, permitting the trial court to place a person on probation following conviction "for any offense, except crimes punishable by death or life imprisonment." *Id.*

86. The punishment for first degree murder is either death or life imprisonment. WYO. STAT. ANN. § 6-2-102(b). A person convicted of conspiracy to commit first degree murder "is not punishable by the death penalty if the capital crime is not committed," *id.* § 6-1-304, leaving life imprisonment as the only possible penalty for conspiring to commit first degree murder where the murder is not committed. And a person convicted of a crime punishable by life in prison cannot be given probation. *Id.* § 7-13-302.

87. Thus, where there is agreement to kill, together with a necessary overt act, but the killing is not attempted or completed, a life sentence may be excessive. A life sentence could be excessive even where the killing is attempted. Consider such cases as *Rands v. State*, 818 P.2d 44 (Wyo. 1991) (Rands was driver of car from which shot was fired); and *Jones v. State*, 777 P.2d 54 (Wyo. 1989) (Knox arranged the planned killing; Jones directed Young to the victim's house, where Young shot but did not kill the victim; Knox and Jones were both convicted of conspiracy and sentenced to life in prison).

88. WYO. STAT. ANN. § 6-1-301(a)(i). The statute further provides that a substantial step "is conduct which is strongly corroborative of the firmness of the person's intention to complete the commission of the crime." *Id.* Alternatively, attempt may be committed when a person "intentionally engages in conduct which would constitute the crime had the attendant circumstances been as the person believes them to be." *Id.* § 6-1-301(a)(ii).

89. *Id.* § 6-1-303(b).

person attempts to commit the crime he voluntarily abandons his criminal effort and does not commit the crime, he cannot be found guilty of attempt.

Understandably, the Wyoming Supreme Court has experienced difficulty in applying the renunciation provision so as to absolve the defendant of all criminal responsibility. In *Haight v. State*,<sup>90</sup> Haight used physical force in an effort to compel the victim to submit to sexual intrusion. The victim resisted, and Haight made no further efforts. Appealing his conviction for attempted sexual assault, Haight argued that he had abandoned his attempt within the meaning of the statute. The State argued that since Haight had already committed the crime of attempted sexual assault before he desisted, there could be no subsequent renunciation. The supreme court pointed out that the attempt statute indeed provided that voluntary and complete renunciation did prevent conviction for an attempt already committed. "The statutes are not analytically sound, but legislatures apparently feel that the illogical result is justified because it encourages people to forego criminal activity."<sup>91</sup> The court concluded, however, that Haight did not voluntarily and completely renounce his criminal intention, but instead ceased his attempt because of the victim's resistance. Therefore, the renunciation provision did not apply.<sup>92</sup>

The abandonment issue arose again in *Ramirez v. State*,<sup>93</sup> where Alonzo Ramirez was convicted of attempted second degree murder when he stabbed Pam Blesi nine times with an ice pick. The evidence showed that after he stabbed her, Ramirez called an ambulance, which took her to the hospital. On appeal, Ramirez argued that he could not be convicted of attempting to kill Pam Blesi because after stabbing her but before killing her, he stopped his attack and called the ambulance. Therefore, he had voluntarily and completely renounced his criminal intention to kill, and abandoned his criminal effort. The Wyoming Supreme Court affirmed Ramirez' conviction. It acknowledged that under the statute renunciation may occur "even after the defendant has taken a substantial step toward commission of the crime. . . . There comes a point, however, when abandonment is no longer possible. In a murder attempt, this

90. 654 P.2d 1232 (Wyo. 1982).

91. *Id.* at 1241-42.

92. The Wyoming Supreme Court, in deciding whether Haight's renunciation was voluntary and complete, referred approvingly to the Colorado attempt statute, which set forth circumstances governing renunciation. COLO. REV. STAT. § 18-2-401 (1978 Repl.). In its 1983 session, the Wyoming Legislature amended section 6-1-301(b) by adding two sentences substantially similar to the Colorado provision:

Within the meaning of this subsection, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the person's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal intention. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

1993 Wyo. Sess. Laws ch. 171, § 1.

93. 739 P.2d 1214 (Wyo. 1987).

point is clearly reached once the actor has injured his victim.”<sup>94</sup>

Abandonment was again asserted in *Apodaca v. State*,<sup>95</sup> a conviction for attempted first degree sexual assault. The evidence showed that on Christmas Eve, Apodaca went to the home of AM, an elderly woman neighbor, and told her “I am going to have you.” He threw AM onto the bed. “AM resisted the attack as soon as it started. Her resistance culminated when AM kned Apodaca between the legs and hit him in the face as he attempted to unbuckle his pants. At that point, Apodaca stopped his aggression.”<sup>96</sup> Affirming the conviction, the Wyoming Supreme Court concluded that Apodaca had not voluntarily and completely renounced his criminal intention. Instead, he only desisted after the victim resisted, supporting “the inference that AM’s resistance made completion of the crime more difficult than Apodaca had anticipated.”<sup>97</sup>

*Harris v. State*<sup>98</sup> was an appeal from a conviction of felony murder, where the predicate felony was either attempted first degree sexual assault or attempted second degree sexual assault. Harris argued that he had renounced his attempt when, after the victim resisted his efforts to have sex with her, he struck her and broke her nose, and then shoved her out of the door of his pickup truck and onto the roadway. Her naked body was found the next day near the road, where she had died from hypothermia. The Wyoming Supreme Court affirmed the felony murder conviction, citing *Haight v. State* for the proposition that the victim’s resistance made consummation of the crime more difficult, and thereby precluded voluntary renunciation, and *Ramirez v. State* for the proposition that renunciation is no longer possible after the actor has injured the victim.<sup>99</sup>

Has the renunciation provision been rendered a nullity, or are there circumstances in which after a criminal attempt has been made, the actor can abandon his attempt to commit the crime and escape liability? Certainly in

94. *Id.* at 1216. The opinion explained further:

[O]nce a defendant has completed his criminal effort, it is too late for abandonment. Appellant’s attempt to commit the crime of second degree murder was complete under the circumstances of this case when he stabbed his victim with the ice pick. That he stabbed her eight more times leaves little doubt but that he had attempted to kill her. If calling an ambulance saved her life, it also saved appellant from being convicted of the crime of murder and perhaps a more severe sentence. But, with respect to the attempt, that crime was complete, as he had passed beyond the point at which abandonment was legally possible.

*Id.* at 1217.

The *Ramirez* decision was criticized in a note in 24 LAND & WATER L. REV. 219 (1989), which concluded that the decision had effectively rendered the abandonment provision a nullity.

95. 796 P.2d 806 (Wyo. 1990).

96. *Id.* at 807.

97. *Id.* at 808.

98. 933 P.2d 1114 (Wyo. 1997).

99. *Id.* at 1123-24.



cases where the actor has gone so far as to injure the intended victim, renunciation is no longer possible. Nor is renunciation possible where there is victim resistance or other circumstances which make commission of the intended crime more difficult. But where the substantial step towards commission of the crime has not resulted in contact with or injury to the victim, there still may be a place for voluntary abandonment. Thus, if the actor, intending to kill the victim, armed himself with a gun and went to the victim's house and rang the doorbell, expecting the intended victim to appear, it could be argued that a substantial step had been taken, and an attempt to kill had been made. If after ringing the doorbell the actor changed his mind and fled before anyone answered, it could be found that renunciation had taken place. But what if the actor did more, something short of injuring the victim, short of the point of no return as adopted in *Ramirez*? What if the actor shot at the victim and missed, and then changed his mind about killing and fired no more shots? If encouraging persons to forgo criminal activity is the guiding principle, then if the actor can be induced to stop without firing more shots, he should be encouraged to do so by allowing renunciation. However, it is unclear whether the Wyoming Supreme Court would accept this.

### C. Conspiracy

The Wyoming conspiracy statute provides in section 6-1-303(a):

A person is guilty of conspiracy to commit a crime if he agrees with one (1) or more persons that they or one (1) or more of them will commit a crime and one (1) or more of them does an overt act to effect the objective of the agreement.<sup>100</sup>

It has long been a truism that it takes more than one person to conspire, and that one cannot conspire with an undercover government agent who does not intend that the object crime be committed.

However, the Model Penal Code, from which the Wyoming conspiracy statute is drawn, departed from the concept of the bilateral or multilateral conspiracy, and introduced the notion of a unilateral conspiracy under which "the actor's liability is measured from the situation as he views it, i.e., it is not a defense that the other party did not have the requisite purpose. It is sufficient, in other words, for the actor to believe that he is agreeing with another for the requisite criminal objective."<sup>101</sup> The important thing is that the actor is unequivocally shown to have "a firm purpose to commit a crime."

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100. WYO. STAT. ANN. § 6-1-303(a) (Michie 1997).

101. 2 MODEL PENAL CODE AND COMMENTARIES, Part I, § 5.03 at 394 (1985). See also *id.* at 398-402.

Because of the traditional understanding that conspiracy required two or more full participants, there was serious question whether the Wyoming Supreme Court would accept the Model Penal Code's doctrine of unilateral conspiracy. In *Miller v. State*,<sup>102</sup> Miller, a prisoner in the penitentiary, began discussions with fellow inmate Ingersoll and by phone with Steven Powell, who was in Sheridan, regarding escaping from prison and kidnapping Miller's former wife. At some point, Powell notified the Wyoming Division of Criminal Investigation, which encouraged further discussion of the plot. Miller, Ingersoll and Powell then agreed to cooperate in the scheme and Miller sent Powell a floor plan of his former wife's house. At trial, the jury was instructed that "there can be no criminal conspiracy involving only the Defendant and a government agent or informer."<sup>103</sup> Miller was convicted. On appeal, the Wyoming Supreme Court observed:

At the federal level, most circuits have adopted the rule that a conspiracy cannot be formed with a government agent. *United States v. Barboa*, 777 F.2d 1420, 1422 (10th Cir. 1985). Wyoming has not considered the question; however, instruction # 9 which instructed there could be no conspiracy with a government agent became the law of the case.<sup>104</sup>

The supreme court reversed Miller's conspiracy conviction because the jury instructions were incomplete and confusing and because of error in *voir dire*.

In Miller's retrial, the district court instructed the jury on the unilateral theory of conspiracy, and Miller was again convicted of conspiring to kidnap his former wife. Miller again appealed, arguing that the bilateral theory which became the law of the case at the first trial was binding upon the district court in the second trial, and that in any event it was error to instruct on unilateral conspiracy. The supreme court affirmed, holding that when a case is reversed and remanded for retrial, the trial court in the new trial is "not inhibited by rulings made during the first trial, and [is] free to try the case as though it had not previously been tried."<sup>105</sup> The court then held that the language of Wyoming's conspiracy statute is consistent with the unilateral theory of conspiracy. "It is our conclusion that we should follow the majority of our sister states, and we hold that valid public policy as well as the language and the legislative history of our conspiracy statute make the unilateral approach to conspiracy the law of Wyoming."<sup>106</sup>

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102. 904 P.2d 344 (Wyo. 1995).

103. *Id.* at 349.

104. *Id.* at 349-50.

105. *Miller v. State*, No. 96-89, 1998 WL 136168, at \* 4 (Wyo. March 27, 1998).

106. *Id.* at \*6.

## V. HOMICIDE

A. *Murder in the First Degree*

First degree murder under Wyoming Statute section 6-2-101(a) can be committed in two ways: by killing purposely and with premeditated malice, or by killing in the perpetration of, or attempt to perpetrate, certain designated crimes.<sup>107</sup> Traditionally, those crimes were felonies which involved particular danger to others: rape, arson, robbery or burglary.<sup>108</sup> Thus, murder of this kind was commonly called felony murder. It is not necessary that the defendant intend to kill the victim in felony murder; it is enough that the death is caused in the commission of or attempt to commit the listed felony.<sup>109</sup> Wyoming's present list of crimes in the perpetration of which a killing becomes first degree murder includes both felonies and misdemeanors: sexual assault, arson, robbery, burglary, escape, resisting arrest, kidnapping or abuse of a child under the age of sixteen years.<sup>110</sup>

In 1994, the Legislature added the predicate crime of abuse of a child under the age of sixteen years.<sup>111</sup> The addition of child abuse follows a national trend to impose more severe penalties for child abuse resulting in death.<sup>112</sup> Making child abuse resulting in death first degree murder has two flaws, one conceptual and the other based on the structure of the Wyoming child abuse statute.

Conceptually, the predicate crime or felony for felony murder has not traditionally been a crime of assault and battery. The reason for this is that an assault and battery which results in death is first degree murder only if the actor intended to kill the victim, e.g., did so purposely and with premeditated malice. An assault and battery which is not intended to kill, but results in death, is homicide, but of a lesser degree than first degree murder. To make assault and battery a predicate crime for felony murder would destroy the structure of the homicide crimes, whereby an unintended killing resulting from an intentional assault has been treated as second degree murder or manslaughter. Much child abuse is of an assaultive nature. If such child abuse

107. WYO. STAT. ANN. § 6-2-101(a) (Michie 1997).

108. See, e.g., WYO. STAT. ANN. § 6-54 (Michie 1957).

109. *Harris v. State*, 933 P.2d 1114, 1124-25 (Wyo. 1997).

110. The misdemeanors are fourth degree arson under WYO. STAT. ANN. § 6-3-104 (Michie 1997), which is punishable by imprisonment for not more than one year and fine of \$750, and resisting arrest under section 6-5-204(a), which is punishable by imprisonment for one year and fine of \$1,000.

111. 1994 Wyo. Sess. Laws ch. 22.

112. See, e.g., *Lewis v. United States*, 118 S. Ct. 1135 (1998), involving a Louisiana statute defining first degree murder as including a killing "When the offender has the specific intent to kill or inflict great bodily harm upon a victim under the age of twelve." The specific holding of *Lewis* was that the Assimilative Crimes Act, 18 U.S.C. § 13(a) (1994), does not make the Louisiana statute applicable on an army base, since the death of the child was punishable under the federal second degree murder statute.

is undertaken with premeditated intent to kill, then first degree murder is appropriate. But if it is not so undertaken, so that the death of the child is an unintended result, conviction for first degree murder may be inappropriate and excessive. There is a parallel between assaultive child abuse which results in unintended death, and assault and battery which results in unintended death. An unintended death resulting from either should not be elevated to first degree murder.<sup>113</sup> Elevating all child abuse resulting in death to first degree murder, to the exclusion of possible guilt of second degree murder or manslaughter, distorts the structure of homicide.

The second problem lies in the definition of the crime of child abuse in the Criminal Code section 6-2-503(a):

Except under circumstances constituting a violation of W.S. 6-2-502, a person is guilty of child abuse, a felony punishable by imprisonment for not more than five (5) years, if:

(i) The actor is an adult or is at least six (6) years older than the victim; and

(ii) The actor intentionally or recklessly inflicts upon a child under the age of sixteen (16) years:

(A) Physical injury as defined in W.S. 14-3-202(a)(ii)(B); or

(B) Mental injury as defined in W.S. 14-3-202(a)(ii)(A).

Thus, where the circumstances constitute a violation of section 6-2-502, the resulting offense cannot be child abuse. Section 6-2-502 defines the crime of aggravated assault and battery, and includes causing serious bodily injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, and also includes intentionally causing bodily injury with a deadly weapon.

Consequently, the most severe forms of assaultive injury to children inflicted without intent to kill cannot be classified as child abuse, but fall under aggravated assault and battery. Where there is an aggravated assault and battery without purpose to kill, but death results, the crime is not first degree murder, but second degree murder or manslaughter. On the other hand, where

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113. At this point, a distinction must be made between death resulting from an assault and battery, and killing which occurs in the perpetration of felonies such as arson, robbery and sexual assault. The latter killing falls within traditional felony murder; the first does not.

there is the less severe assaultive child abuse without intent to kill, but death results, the crime will be first degree murder. The consequences can be bizarre. Aggravated assault and battery resulting in death occurs where a person assaults a child with a deadly weapon, without intent to kill, but the child dies. The crime is punishable as second degree murder or manslaughter. But if a person slaps a child, without intent to kill or even to harm, and the child suffers physical injury and dies, the result will be first degree murder.

A second problem is that the definition of "physical injury" in Wyoming Statute section 14-3-202(a)(ii)(B), as incorporated in the child abuse statute, section 6-2-503, includes "death." If the death of the child is used as the basis for making the act child abuse, is it proper to use the death a second time to elevate the crime to first degree murder? Has the formulation become: intentionally or recklessly causing the death of a child resulting in death of a child is first degree murder?<sup>114</sup>

Third, given the broad definition of child abuse in section 6-2-503, does it encompass physical injury to a child resulting from reckless operation of a motor vehicle? If a person recklessly operates a vehicle and causes the death of another person, the resulting crime is aggravated vehicular manslaughter under section 6-2-106(b),<sup>115</sup> with a maximum punishment of 20 years. But if reckless injury to a child is child abuse, and death of a child results from the reckless operation of a motor vehicle, can first degree murder now be charged?

One serious and perhaps unintended consequence of the amendment to section 6-2-101(a) incorporating death in the perpetration of child abuse as first degree murder is that many injuries to children can be characterized as child abuse, and death from all such injuries is now first degree murder.

Doubtless when the Legislature amended section 6-2-101(a) to include child abuse, the legislators envisioned that the statute would apply to instances of intentional physical abuse of children where the intent to kill the child or do serious bodily harm to the child was present. But sadly the amendment applies to much more. It seems to have been enacted without much thought or analysis; after all, how could anyone oppose an act punishing child abuse? It is not too late to reexamine this amendment, and to make appropriate changes to the relevant statutes.

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114. Consider the case where the parent leaves the very young child unattended in the bathtub while the parent answers the telephone and engages in a long conversation with a friend. The child drowns. The only physical injury suffered by the child is its death. Therefore, the fact of death is a necessary element in the crime of child abuse. Can the child's death be used a second time to enhance the child abuse to first degree murder? Or would we not say that there is no death in the perpetration of child abuse when the child abuse itself is based on the child's death?

115. WYO. STAT. ANN. § 6-2-106(b) (Michie 1997).

### B. *Murder in the Second Degree*

Murder in the second degree is defined in section 6-2-104: "Whoever purposely and maliciously, but without premeditation, kills any human being, is guilty of murder in the second degree . . ." <sup>116</sup> Murder in the second degree is to be contrasted with murder in the first degree, which requires that the killing be "purposely and with premeditated malice." <sup>117</sup>

The difference between first and second degree murder, then, appears to be the absence of premeditation in second degree murder. At least a literal reading of the statutes would seem to lead to this conclusion. Since first degree murder requires that the actor intend to kill the victim—in other words, first degree murder is intent-to-kill murder requiring the specific intent to kill <sup>118</sup>—it would thus follow that second degree murder also requires that the actor intend to kill the victim. This construction would make second degree murder a specific intent crime as well: an act of violence done toward another person with the intent to kill that person.

In *Crozier v. State*, <sup>119</sup> decided in 1986, the Wyoming Supreme Court held that second degree murder is not a specific intent crime, and therefore is not simply first degree murder without premeditation. *Crozier* may be an example of the adage that hard cases make bad law. *Crozier* was convicted of second degree murder for killing a six year old child he was babysitting, by strangling the child. On appeal, *Crozier* argued that the trial court should have instructed the jury on the defense of intoxication, since second degree murder was a specific intent crime and there was evidence that *Crozier* was intoxicated at the time of the killing. <sup>120</sup> The Wyoming Supreme Court affirmed *Crozier*'s conviction, holding that second degree murder is not a specific intent crime and therefore intoxication is not a defense to second degree murder. Neither the word "maliciously" nor "purposely" embodies the intent to kill. <sup>121</sup>

The holding in *Crozier* is that second degree murder is a general intent

116. *Id.* § 6-2-104. Murder in the second degree has remained nearly unchanged since 1869, when the First Territorial Legislature provided in ch. 3, tit. III, § 16: "Any person who shall purposely and maliciously, but without deliberation and premeditation, kill another, such person shall be deemed guilty of murder in the second degree, and on conviction thereof, shall be imprisoned in the penitentiary, or territorial prison, and kept at hard labor during life."

117. WYO. STAT. ANN. § 6-2-101(a). In addition to killings committed purposely and with premeditated malice, first degree murder includes killings in the perpetration of or attempt to perpetrate sexual assault, arson, robbery, burglary, escape, resisting arrest, kidnapping or abuse of a child under the age of 16.

118. *See, e.g.,* *Bouwkamp v. State*, 833 P.2d 486, 493 (Wyo. 1992).

119. 723 P.2d 42 (Wyo. 1986).

120. WYO. STAT. ANN. § 6-1-202(a) provides that self-induced intoxication is a defense only to specific intent crimes, and "evidence of self-induced intoxication of the defendant may be offered when it is relevant to negate the existence of a specific intent which is an element of the crime." *Id.*

121. *Crozier*, 723 P.2d at 51-56.

crime, which does not require that the defendant intended to kill the victim, but only that the defendant intended to perform the act which caused the victim's death. As the supreme court stated in a later decision, "second degree murder is a general intent crime, requiring only proof of the element of voluntariness."<sup>122</sup>

Therefore, unless "purposely" or "maliciously" are deemed to have radically different meanings when used in the first and second degree murder statutes, the intent-to-kill distinction between first and second degree murder must be found in the word "premeditated." The supreme court agreed with this in *Bouwkamp v. State*: "We conclude premeditation is the specific intent element which distinguishes the two types of murder."<sup>123</sup>

The result is that any act done maliciously and willfully which causes the death of another person is second degree murder. Thus, striking or shoving another intentionally and with malice but without intent to kill, will be second degree murder if the victim dies from the consequences of the blow or shove.

What is the crime if, without premeditation but on the spur of the moment, the actor strikes or shoots the victim, intending to kill him, and the victim dies as the result? The absence of premeditation means that this cannot be first degree murder. Does the presence of intent to kill mean that the death cannot be second degree murder? Hardly. While the intent to kill is not a necessary element of second degree murder, its presence does not prevent the killing from being second degree murder. All the elements of second degree murder are present: a purposeful and malicious act and resulting death.

The question remains whether after *Crozier* there can be attempted second degree murder. The crime of attempt is itself a specific intent crime: "With intent to commit the crime, he does any act which is a substantial step towards commission of the crime."<sup>124</sup> As second degree murder requires that the victim die as the result of the purposeful and malicious act, to attempt second degree murder it must be intended that the victim die. But intent to kill is not a required element of second degree murder. Therefore, it can be argued that there can be no attempted second degree murder, since the fact of the death is fortuitous rather than intended.

However, as pointed out above, the existence of intent to kill does not

122. 833 P.2d 486, 493 (Wyo. 1992).

123. *Id.* But it must be kept in mind that there can be intent to kill without premeditation, unless premeditation is to be given a radically different meaning from its traditional definition. "The word 'premeditated' when used in reference to first-degree murder, implies an interval, however brief, between the formation of the intent or design and the commission of the act." *Collins v. State*, 589 P.2d 1283, 1292 (Wyo. 1979).

124. WYO. STAT. ANN. § 6-1-301(a).

mean that an act which results in death cannot be second degree murder. Where an act is done purposely and maliciously, intending to kill, but without premeditation, and death results, the crime is second degree murder; and where the actor, intending to kill, and acting purposely and with malice but without premeditation, does an act which is a substantial step toward the intended killing, a punishable attempt to commit second degree murder arises. On the other hand, where without intending to kill, the actor attempts but fails to do a purposeful and malicious act which if completed might result in death, this is not attempted second degree murder since the actor did not intend murder.

If there can be no attempted second degree murder when the actor intends, without premeditation, to kill and takes a substantial step to do so but fails to accomplish his purpose, then a substantial gap exists in the law of homicide. There would be no punishment for acts which society justifiably considers seriously harmful.

*Crozier* requires rethinking of Wyoming's law of homicide. By doing away with the intent to kill in second degree murder, the Wyoming Supreme Court may have in fact enlarged the reach of second degree murder, transferring some killings from the category of manslaughter to that of second degree murder.

### C. *Manslaughter and Criminally Negligent Homicide*

The 1982 Criminal Code provided in section 6-2-105 that involuntary manslaughter might be committed by killing, without malice, either recklessly or in the commission of some unlawful act. Subsequently in 1985, the provision that the killing might be in the commission of some unlawful act was deleted, leaving involuntary manslaughter as a reckless killing.<sup>125</sup> At the same time, the crime of criminally negligent homicide was enacted, and codified as section 6-2-107.<sup>126</sup> The result was rational, and made involuntary manslaughter and criminally negligent homicide parallel to aggravated vehicular homicide and vehicular homicide, in that recklessness is a required element of the first and criminal negligence a required element of the second.

### D. *Vehicular Homicide*

Homicide by vehicle is embodied in section 6-2-106 of the Criminal Code. Under section 6-2-106(a), a person commits homicide by vehicle where he operates a vehicle in a criminally negligent manner and thereby causes the death of another. Homicide by vehicle is a misdemeanor with a maximum penalty of imprisonment for a year and a fine of \$2,000. Under section 6-2-

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125. 1985 Wyo. Sess. Laws ch. 215, § 2.

126. *Id.* § 1.



106(b), a person commits aggravated homicide by vehicle where he operates a vehicle under the influence of alcohol or controlled substances, or recklessly, and thereby causes the death of another person. Aggravated homicide by vehicle is a felony with maximum imprisonment of twenty years.

Section 6-2-106 has provided a workable definition of vehicular homicide. After more than a half-century of confusion, the Wyoming Legislature has gotten it right.<sup>127</sup>

### *E. Drug-Induced Homicide*

In 1995, the Wyoming Legislature enacted section 6-2-108, punishing as drug-induced homicide a death resulting from the delivery of a controlled substance to a minor by an adult or a person four years older than the minor.<sup>128</sup> The impetus behind the statute was the public outrage experienced following drug-related deaths of children, accompanied by the desire to punish severely persons who furnished drugs to children.

The statute appears to have been drafted and enacted largely on impulse and without careful consideration of its coverage and implications. First, the incorporation of the four year age differential shibboleth<sup>129</sup> may cause irrational results. It means that if a person on his seventeenth birthday furnishes a controlled substance to a child twelve years and 364 days old and the child dies from using the substance, drug-induced homicide has been committed. But if the same seventeen-year-old furnishes a controlled substance to a child thirteen years and one day old with the same result, there is no crime apart from delivery of the substance itself. Other age combinations may be hypothesized.<sup>130</sup> It is doubtful whether there is any empirical basis for the four year differential in age.

127. The half-century of confusion included duplicative statutes, as well as statutes struck down as unconstitutionally vague. *State v. Sodergren*, 686 P.2d 521 (Wyo. 1984). The "criminally negligent" and "reckless" terms in the present section 6-2-106 are rationally distinguishable, and have provided a sound basis for prosecuting deaths resulting from operation of vehicles.

128. 1995 Wyo. Sess. Laws ch. 119, § 1.

129. For reasons unknown, the Wyoming Legislature has become convinced that in crimes against children it is highly significant whether the actor is or is not four years older than the victim. This distinction did not originate in the drug-induced homicide statute. In sexual offenses, in WYO. STAT. ANN. §§ 6-2-303(a)(v) and 6-2-304(a)(i) and (ii), a four year difference in age is the test of criminality. If a child 16 years of age inflicts sexual intrusion on another child one day before the victim's 12th birthday, so that there is a four-year differential in ages, second degree sexual assault has been committed, with a potential sentence of 20 years if the actor is tried as an adult. But in the same case if the actor is only 15 and not four years older than the victim, it is no offense at all. *See also id.* §§ 6-2-306(d)(iii), and 14-3-105(b)(i) and (ii)(C). In child abuse, the differential is six years. *Id.* § 6-2-503. In either case, it is doubtful whether there is any empirical evidence that the trauma to the child victim is nonexistent when the actor is less than four, or six, years older.

130. Thus if an adult one day past his 18th birthday furnishes a controlled substance to a minor one day short of his 18th birthday and death results, the statute applies.

Second, if the purpose of the statute is to punish drug dealers and distributors, then it must be noted that it punishes only those who deal directly with the minor child who dies. If an adult delivers a controlled substance to a child of twelve, who then gives it to another even younger child, and death of the younger child results, the adult supplier will not be guilty of drug induced homicide.

## VI. KIDNAPPING

Kidnapping is committed when the actor “unlawfully removes another from his place of residence or business or from the vicinity where he was at the time of removal, or if he unlawfully confines another.” The removal or confinement must be with intent to hold for ransom or reward, or as a shield or hostage; or to facilitate the commission of a felony; or to inflict bodily injury on or terrorize the victim or another.<sup>131</sup> Punishment for kidnapping is severe: up to twenty years if the victim is voluntarily released substantially unharmed and in a safe place prior to trial, and twenty years to life if the victim is not so released.<sup>132</sup>

The Wyoming Supreme Court has construed the statute literally, upholding convictions based on relatively short periods of confinement.<sup>133</sup> Where the victim was seized and removed a substantial distance in order to perpetrate a sexual assault, the commission of the sexual assault authorized the enhanced penalty in excess of twenty years, “because, once the sexual assault is inflicted, the victim has been harmed and cannot be released ‘substantially unharmed.’”<sup>134</sup> On the other hand, the evidence must satisfy the allegations of the criminal charge, so that where removal from the vicinity was charged, the act of forcing the victims from one room to another within their place of business during an armed robbery was insufficient: “removal from the vicinity cannot refer to locational changes *within* a victim’s residence or a business.”<sup>135</sup>

131. WYO. STAT. ANN. § 6-2-201(a) (Michie 1997).

132. *Id.* § 6-2-201(c) and (d). All four of the conditions must be met in order for the defendant to qualify for the lesser punishment: (1) voluntary release of the victim, (2) substantially unharmed, (3) in a safe place, (4) prior to trial. *Loomer v. State*, 768 P.2d 1042 (Wyo. 1989).

133. In *Darrow v. State*, 824 P.2d 1269 (Wyo. 1992), in the course of committing an armed burglary, to facilitate his getaway, Darrow ordered the victim to stay in the bedroom. Although it lasted only a short time, this was a sufficient confinement to satisfy the statute. In *Doud v. State*, 845 P.2d 402 (Wyo. 1993), Doud forced his estranged wife from her vehicle and took her to his house. During the confinement, Doud threatened his wife with a gun and beat her, until she got possession of the gun and shot him in the leg. *Id.* at 405. The supreme court held that the evidence was sufficient to support a conviction of kidnapping and a sentence in excess of 20 years: Doud confined his wife with intent to inflict bodily injury upon her or terrify her; the confinement was not required to be for a substantial period or in a place of isolation; and he had not released her voluntarily. *Id.* at 408.

134. *McDermott v. State*, 870 P.2d 339, 347 (Wyo. 1994).

135. *Keene v. State*, 812 P.2d 147, 150 (Wyo. 1991). Had the criminal information charged confinement, rather than removal, it is not clear whether the evidence would have been sufficient. The court

While kidnapping is a serious offense, in that removal or confinement may subject the victim to substantial added risk of harm, it is also an offense which requires careful definition and limitation in order to avoid excessive punishment. Confinement or removal may be an incidental part of many crimes, ranging from sexual assault to robbery. In the absence of statutory language requiring that the confinement be for a substantial time or the removal be a substantial distance, a charge of kidnapping could be added to a charge of many other crimes against the person, with the possibility of a life sentence for kidnapping added to the punishment for the other crime. It is true that the Wyoming Supreme Court in *Keene v. State* recognized that forcing robbery victims from one place to another within the business premises "must be regarded as incidental to the conduct of the robbery."<sup>136</sup> However, there is no bright line test to identify when a confinement or removal will be considered "incidental." Initially, the matter is left largely to prosecutorial discretion, with the result that sharply differing punishments may result. Thus, in the original *Harvey* and *Phillips* cases, the defendants were convicted of kidnapping and first degree sexual assault when they seized the victim from a Rock Springs street and conveyed her in their pickup truck to the outskirts of the city, during which the victim was sexually assaulted.<sup>137</sup> On the other hand, in other cases of sexual assault involving removal<sup>138</sup> or confinement,<sup>139</sup> no kidnapping has been charged.

This is not to assert that Harvey and Phillips should not have been charged with both sexual assault and kidnapping. But consideration should be given to clarifying the kidnapping statute to avoid charges and convictions for kidnapping where the removal or confinement is relatively minor and closely connected to another crime.<sup>140</sup> This can be accomplished through an amendment to provide more precise definition. One solution would be to adopt the language of the Model Penal Code, requiring that removal be a substantial distance from the vicinity, and that the confinement be for a substantial period

concluded that "[t]he movement of Tucker and Hendricks from the office to the pharmacy area must be regarded as incidental to the conduct of the robbery." *Id.* at 151.

136. *Keene*, 812 P.2d at 151.

137. *Harvey v. State*, 774 P.2d 87 (Wyo. 1989); *Phillips v. State*, 774 P.2d 118 (Wyo. 1989). Both convictions were reversed for violation of the constitutional right to speedy trial. However, Phillips was subsequently convicted of conspiracy to commit kidnapping and conspiracy to commit sexual assault, (*Phillips v. State*, 835 P.2d 1062 (Wyo. 1992)), and Harvey was convicted of conspiracy to commit kidnapping, (*Harvey v. State*, 835 P.2d 1074 (Wyo. 1992)), and the convictions were affirmed. *See also* *Driskill v. State*, 761 P.2d 980 (Wyo. 1988); *Smith v. State*, 715 P.2d 1164 (Wyo. 1986). In *Smith*, a retail store was robbed and the clerk "was ordered into a back room, placed in a prone position, personally robbed, and left bound by duct tape."

138. *See, e.g., Rathbun v. State*, 802 P.2d 881 (Wyo. 1990); *Gonzales v. State*, 516 P.2d 592 (Wyo. 1973).

139. *See, e.g., Righter v. State*, 752 P.2d 416 (Wyo. 1988).

140. *People v. Chessman*, 238 P.2d 1001 (Cal. 1951), comes to mind, where Caryl Chessman was sentenced to death and executed for kidnapping when he forced the victim from her vehicle to his own—a distance estimated at 20 feet—and sexually assaulted her.

in a place of isolation.<sup>141</sup> While such an amendment would not remove all doubt, it would help to focus the crime of kidnapping upon the evils it is intended to cover.

## VII. SEXUAL OFFENSES

The greatest problem in the area of sexual offenses has probably been the overlapping and confusion between the sexual assault statutes found at sections 6-2-301 through 6-2-312, and the immodest, immoral or indecent liberties statute, section 14-3-105. Whether this problem has been at least partially solved by the 1997 legislation, or has been exacerbated by the recent decision of the Wyoming Supreme Court in *Pierson v. State*,<sup>142</sup> remains to be seen.

### A. Statutory Revision Since 1983

Wyoming's current sexual assault article was first enacted in 1977.<sup>143</sup> Four degrees of sexual assault were created, and other provisions were adopted providing penalties, creating a marital defense, providing for medical examination of the victim, directing that names not be released prior to filing of an information or indictment, abolishing the need for corroboration, and limiting the introduction at trial of evidence of the victim's prior sexual conduct.

Few changes were made in the sexual assault article from 1977 until 1983. The principal modification was made in sexual assault in the third and fourth degree. In the original act, sexual assault in the third degree consisted of sexual contact without serious bodily injury, and was punishable by imprisonment for up to five years.<sup>144</sup> Sexual assault in the fourth degree consisted of sexual intrusion on a child under sixteen years of age by a person at least four years older, and was punishable as a misdemeanor.<sup>145</sup> By 1983, a reversal had taken place, and sexual intrusion on a child under sixteen had become sexual assault in the third degree, punishable by imprisonment for not more than five years, while sexual contact was now a misdemeanor.<sup>146</sup>

In 1983 as in 1977, sexual assault in the first degree included sexual

141. MODEL PENAL CODE § 212.1 (1985).

142. No. 96-91, 1998 WL 127888 (Wyo. Mar. 19, 1998).

143. 1977 Wyo. Sess. Laws ch. 70, § 1. This act is now codified as WYO. STAT. ANN. §§ 6-2-301 to -6-3-312 (Michie 1997).

144. WYO. STAT. ANN. § 6-4-304.

145. *Id.* § 6-4-305.

146. Sexual assault in the third degree was codified at WYO. STAT. ANN. § 6-2-304 (Michie 1977 & Supp. 1983), and sexual assault in the fourth degree at § 6-2-305. Both sexual assault in the third degree and sexual assault in the fourth degree provided for enhanced punishment for multiple convictions. *Id.* § 6-2-306(a)(iii) and (iv), (b) and (c).

intrusion by force or threats of immediate harm, or sexual intrusion of persons physically helpless or mentally ill or deficient.<sup>147</sup> Sexual assault in the first degree was punishable by imprisonment for five to fifty years, with enhanced punishment for multiple convictions.<sup>148</sup> Sexual assault in the second degree included sexual intrusion achieved by remote threats, by drugging the victim, when the victim was under twelve and the actor at least four years older, by the actor being in a position of authority, in improper course of medical treatment, or by any means that would prevent resistance by a victim of ordinary resolution.<sup>149</sup> Sexual assault in the second degree also included sexual contact resulting in serious bodily injury,<sup>150</sup> and was punishable by imprisonment for not more than twenty years, with enhanced punishment for multiple convictions.<sup>151</sup>

Sexual assault in the first degree and sexual assault in the second degree have remained substantially unchanged since 1983. The only change has been in sexual assault in the second degree: subsection (c) of section 6-2-303, covering sexual contact of children between twelve and fifteen which resulted in serious bodily injury, was repealed in 1997.<sup>152</sup>

In 1984, in an attempt to resolve the confusion between sexual assault and immodest, immoral and indecent liberties under section 14-3-105, the Legislature amended third degree sexual assault and fourth degree sexual assault by adding the prefatory phrase, “[e]xcept under circumstances constituting a violation of W.S. 14-3-105.”<sup>153</sup> Thus, if acts fell under section 14-3-105, they were excluded from third or fourth degree sexual assault. Preference was thereby given to prosecution of many sexual acts against

147. *Id.* § 6-2-302.

148. *Id.* § 6-2-306(a)(i),(b),(c). The provisions for enhanced punishment present a problem in construction. Section 6-2-306(a) provides that sexual assault in the first degree is punishable by imprisonment for five to 50 years, and second degree is punishable by imprisonment not more than 20 years. Section 6-2-306(b)(i) and (c)(i) provide that a person who is being sentenced for two or more separate acts of sexual assault in the first or second degree shall be punished by imprisonment for not less than five years or for life. It is not clear whether the sentence of five years to life is to be imposed as a single sentence for all convictions, or whether a sentence of five years to life is to be imposed for each of the sexual acts committed. If the latter is true, a separate sentence for each sexual act, then a problem in the nature of *ex post facto* arises, since the effect of the conviction for the second act of sexual assault is to enhance the punishment for the first act. Assume that the defendant commits two separate acts of second degree sexual assault. He is then charged, tried and convicted of both. While enhancement of the penalty for the second act may be proper, enhancement of the penalty for the first is not. The maximum penalty for the first act became determined at the time the act was committed. It should not be subject to enhancement by later legislative change, or by later acts committed by the defendant.

149. *Id.* § 6-2-303.

150. *Id.*

151. *Id.* § 6-2-306(a)(ii),(b),(c).

152. 1997 Wyo. Sess. Laws ch. 135, § 2.

153. 1984 Wyo. Sess. Laws ch. 44, § 2. This legislation also added subsection (a)(ii) to section 6-2-304, providing that sexual contact of a child under twelve, where no serious bodily injury was caused, constituted sexual assault in the third degree.

children as indecent liberties rather than sexual intrusion or sexual contact.

In 1997, the Legislature made significant changes in sexual assault in the third degree and sexual assault in the fourth degree. Sexual assault in the fourth degree was repealed. Sexual assault in the third degree was enlarged to include any sexual contact with children under fourteen without serious bodily injury, and other sexual contact under circumstances set forth in sections 6-2-302 and 6-2-303. Third degree sexual assault gained precedence over indecent liberties, as the limiting language requiring prosecution under the indecent liberties statute was deleted and language was added to the indecent liberties statute requiring prosecution under the third degree sexual assault statute. In addition, the penalty for sexual assault in the third degree was increased from imprisonment for a maximum of five years to a maximum of fifteen years.<sup>154</sup>

The penalty section, section 6-2-306, has been amended twice since 1983, once in 1996 when subsection (d) was added providing for life imprisonment without parole for third convictions,<sup>155</sup> and once in 1997 when the Legislature deleted penalties for the repealed fourth degree sexual assault and increased penalties for third degree sexual assault.<sup>156</sup>

Thus in the fifteen years since 1983, the principal change in Wyoming's sexual assault law has been to increase the penalties for sexual assault in the third degree, to give sexual assault precedence over indecent liberties, and to provide for life imprisonment without parole for three-time offenders. Courts now have authority to impose substantially greater punishments on sexual offenders.

Since 1983, the Wyoming Supreme Court has decided several significant sexual assault cases. In *Jackson v. State*,<sup>157</sup> the court held that second degree sexual assault is not a lesser included offense within first degree sexual assault; in *Craney v. State*,<sup>158</sup> it held that third degree sexual assault is not a lesser included offense within first degree sexual assault. In *Scadden v. State*,<sup>159</sup> the court applied the "position of authority" subsection of second degree sexual assault, section 6-2-303(a)(vi), to affirm the conviction of a high school girls' volleyball coach who had sexual intercourse with a seventeen-year-old member of the team. In *Story v. State*,<sup>160</sup> the conviction of a physician who inflicted sexual intrusion upon female patients while purporting to examine them medically, was affirmed under the second degree sexual assault provision

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154. 1997 Wyo. Sess. Laws ch. 135, §§ 1-2.

155. 1996 Wyo. Sess. Laws ch. 73, § 2.

156. 1997 Wyo. Sess. Laws ch. 135, § 2.

157. 891 P.2d 70 (Wyo. 1995).

158. 798 P.2d 1202 (Wyo. 1990).

159. 732 P.2d 1036 (Wyo. 1987).

160. 721 P.2d 1020 (Wyo. 1986).

of section 6-2-303(a)(vii), "sexual intrusion in treatment or examination of a victim for purposes or in a manner substantially inconsistent with reasonable medical practices."

Wyoming's sexual assault statutes, which substantially expanded prior rape law, are functioning with reasonable clarity and efficiency. The statute has been the subject of a significant number of decisions by the Wyoming Supreme Court, resulting in the resolution of ambiguities and uncertainties, and providing a rational interpretation of the statute.

### *B. Immodest, Immoral or Indecent Liberties: Section 14-3-105*

In 1957, the Wyoming Legislature enacted the Child Protection Act, which provided in part that any person who knowingly took "immodest, immoral or indecent liberties with any . . . child" was guilty of a felony punishable by imprisonment for ten years.<sup>161</sup> Under the act, a "child" is a person under the age of eighteen years. However, from 1978 until 1993, "child" was defined as a person under the age of nineteen.<sup>162</sup>

The statute, now section 14-3-105, has been repeatedly attacked on the ground that "immodest, immoral or indecent liberties:" is unconstitutionally vague, and does not give fair notice of what acts are covered. The attack was rejected in *Sorenson v. State*,<sup>163</sup> where the defendant had rubbed the breasts of a twelve-year-old girl through her clothing and tried to put his hand inside her shirt. The supreme court observed that "a person of ordinary intelligence can weigh his contemplated conduct against a prohibition of taking immodest, immoral or indecent liberties or assault against a child and know whether or not such contemplated conduct is prohibited by it."<sup>164</sup> A further vagueness

161. 1957 Wyo. Sess. Laws ch. 22, § 8. The act, as amended, is now codified as WYO. STAT. ANN. § 14-3-105 (Michie 1997). This section of the act further made it unlawful for any person "knowingly to cause or encourage any such child to cause or encourage another child to commit with him or her any immoral or indecent act." This provision is wondrously ambiguous, since it is not at all clear whether the forbidden act is for the actor to encourage a child to encourage another child to commit an immoral or indecent act with the actor, or for the actor to encourage a child to encourage another child to commit an immoral or indecent act with the first child. The ambiguous language has been retained in section 14-3-105.

162. *McArtor v. State*, 699 P.2d 288, 290 (Wyo. 1985), held that under the 1957 act, "child" meant a person under 18. 1978 Wyo. Sess. Laws ch. 25, § 1, provided that the age of majority should be 19. This was construed to make any person under 19 a "child," within the meaning of the indecent liberties statute. *Campbell v. State*, 709 P.2d 425, 427 (Wyo. 1985). The age of 18 was restored by 1993 Wyo. Sess. Laws ch. 1, § 1, which added subsection (b) to section 14-3-105: "As used in this section, 'child' means a person under the age of eighteen (18) years."

163. 604 P.2d 1031, 1035 (Wyo. 1979).

164. In *Britt v. State*, 752 P.2d 426, 428 (Wyo. 1988), where the male defendant had rubbed the crotch of two teenage boys, the court declined to overrule *Sorenson*, observing that "a person of ordinary intelligence would know that the rubbing and grabbing of the penises of thirteen and fourteen year-old boys is clearly conduct which is forbidden as 'immodest, immoral or indecent liberties.'"

challenge was rejected in *Ochoa v. State*,<sup>165</sup> where the supreme court stated:

Our indecent liberties statute clearly proscribes the conduct, sexual intercourse with a minor, engaged in by Ochoa. We have repeatedly interpreted this statute to apply where an adult engaged in sexual intercourse with a minor . . . . As we said in *Griego v. State*, 761 P.2d 973, 976 (Wyo. 1988)], “[t]hese decisions demonstrate that § 14-3-105 applies, without question to certain activities.” . . . One of those activities is sexual intercourse with a minor.

Subsequently in 1996, in *Moore v. State*,<sup>166</sup> the supreme court reaffirmed that the indecent liberties statute applies when an adult engages in sexual intercourse with a minor.

During this period, the supreme court was also called upon to determine the interrelationship between the indecent liberties statute, section 14-3-105, which proscribed indecent liberties with children under eighteen (or nineteen), and the sexual assault statute, which provided in section 6-2-304 that sexual intercourse with a child under sixteen by a person four years older was unlawful. The defendant argued that the unlawfulness of sexual intercourse with children is governed by the sexual assault statute, so that sexual intercourse with a child sixteen or older was not unlawful, and could not be prosecuted as indecent liberties under section 14-3-105. The supreme court emphatically rejected this argument, holding in *McArtor v. State*<sup>167</sup> that the sexual assault statute neither repealed nor took precedence over section 14-3-105 in regard to acts of sexual intercourse, so that an act of sexual intercourse with a girl of sixteen could be prosecuted under the indecent liberties statute.<sup>168</sup>

In 1984, the Wyoming Legislature affirmed the precedence of the indecent liberties statute by prefacing both section 6-2-304, proscribing sexual intercourse with children under sixteen, and section 6-2-305, proscribing

165. 848 P.2d 1359, 1363 (Wyo. 1993).

166. 912 P.2d 1113, 1115-16 (Wyo. 1996). See also *Roberts v. State*, 912 P.2d 1110 (Wyo. 1996). *Roberts* was a probation revocation case where the district court concluded that Roberts had violated his probation by engaging in indecent liberties with his 13 year old daughter in violation of section 14-3-105, by jumping into her bed in the morning and rubbing her side and nuzzling her neck and mouth with his nose. The supreme court concluded that the evidence supported the “factual conclusion that Roberts’ acts were indecent as contemplated by the statute.” *Id.* at 1112.

167. 699 P.2d 288 (Wyo. 1985). Justices Rose and Cardine dissented, pointing out the incongruity that under section 6-2-304 at the time of the act in question, a person four years older than a child under 16 could only be punished by imprisonment for one year for an act of consensual sexual intercourse with the child, while under section 14-3-105 any person could be imprisoned for “ten years for sexual intercourse with, or even for touching the breast, of a child under eighteen.” Justices Rose and Cardine concluded that sexual intercourse with children should be prosecuted only under the sexual assault statutes.

168. The argument that prosecutions for sexual intercourse with children could only be brought under the sexual assault statutes was also rejected in *Ketcham v. State*, 618 P.2d 1356 (Wyo. 1980), and *Campbell v. State*, 709 P.2d 425 (Wyo. 1985).



sexual contact, with the phrase “[e]xcept under circumstances constituting a violation of W.S. 14-3-105.”<sup>169</sup> Thus, only where sexual intercourse with a child under sixteen was *not* an indecent liberty could there be a prosecution under section 6-2-304(a)(i). The Legislature had signaled its intention that sexual intercourse with children would be subject to the ten year penalty of section 14-3-105. Given the holdings of the Wyoming Supreme Court, it seemed it would be difficult if not impossible to hypothesize a situation where section 6-2-304(a)(i) could provide the basis for prosecution.

However, when the Wyoming Legislature in 1997 increased the penalties for sexual intercourse with children under sixteen and for sexual contact, it also directed that prosecutions should be brought under section 6-2-304 rather than section 14-3-105. It is now section 14-3-105 which is prefaced by “[e]xcept under circumstance [sic] constituting sexual assault in the first, second or third degree as defined by W.S. 6-2-302 through 6-2-304.”<sup>170</sup>

Given the Wyoming Supreme Court’s repeated declarations that sexual intercourse by an adult with a minor constitutes indecent liberties, the court’s decision in *Pierson v. State*,<sup>171</sup> announced March 19, 1998, came as a surprise to many. *Pierson* was convicted of indecent liberties, upon evidence showing that while he was thirty-six years old and married, he had sexual intercourse with a sixteen-year-old girl. On appeal, Pierson claimed that the evidence showed that the girl had consented to sexual intercourse, and that he was entitled to defend on the ground that her consent, while not a complete defense, was nevertheless a factor to be considered by the jury in its determination that the act of sexual intercourse was immodest, immoral or indecent. The trial court rejected this defense and instructed the jury that it is not a defense to indecent liberties that the child consented.

The Wyoming Supreme Court reversed, over the dissent of two justices. The majority sought to make sense of the pre-1997 law, pointing out that the Legislature had determined that sexual intercourse with a child under sixteen should bear a maximum imprisonment of five years, and that immodest, immoral or indecent liberties (which might include sexual intercourse with a child under eighteen) could be punished by imprisonment for ten years. Therefore, it concluded that the Legislature intended that indecent liberties under section 14-3-105 must “entail conduct which is more culpable than the conduct which constitutes guilt under Wyo. Stat. § 6-2-304.” To satisfy section 14-3-105, a prosecutor must show not only sexual intercourse with a child (which might satisfy section 6-2-304), but also that the sexual intercourse was

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169. 1984 Wyo. Sess. Laws ch. 44, § 2.

170. 1997 Wyo. Sess. Laws ch. 135, § 1.

171. No. 96-91, 1998 WL 127888 (Wyo. Mar. 19, 1998).

“immodest, immoral or indecent.” Therefore, in every prosecution under section 14-3-105, the jury must find that the conduct was in fact immodest, immoral or indecent, and in doing so the jury is entitled to consider the totality of the circumstances, including whether the conduct was consensual in those cases where the child was over sixteen.<sup>172</sup>

The upshot of *Pierson* seems to be that it is no longer possible to instruct the jury that particular conduct such as sexual intercourse with a child constitutes indecent liberties *per se*. The jury must now find that the accused engaged in conduct which the “common sense of society would regard as indecent and improper.” Sexual intercourse with a consenting child over the age of sixteen might or might not qualify. “We recognize that in many cases sexual intercourse between a minor and an adult will constitute a violation of that standard, but it is up to the jury to make that determination in light of all the material facts.”<sup>173</sup>

The facts in *Pierson* arose before the 1997 amendments to the sexual assault and indecent liberties statutes. The punishment structure and the provisions giving indecent liberties precedence have now been radically changed. Does this mean that *Pierson* is limited to acts which took place under the law as it existed before 1997? Further analysis is needed. But it is clear that many older complaints regarding the interplay between sexual assault and indecent liberties have been swept away by the 1997 amendments.

### C. *The Marital Defense*

When the Wyoming sexual assault statute was adopted in 1977, section 6-63.7 created a marital defense: “A person does not violate any provision of this act if the actor and the victim are legally married, unless a decree of judicial separation or restraining order has been granted.”<sup>174</sup> In the 1983 codification, this section was amended in a somewhat opaque manner, stripping away much of the defense: “§ 6-2-307. Evidence of marriage as

172. The court had indicated in *Moore v. State*, 912 P.2d 1113, 1116 (Wyo. 1996), that a girl of 16 lacked capacity to consent to sexual intercourse. *Pierson* would appear to hold that only a child of less than 16 lacks capacity to consent.

173. *Pierson*, No. 96-91, 1998 WL 127888, at \*9. What once appeared to be a rule of law—sexual intercourse with a child constituted an indecent liberty—is now a question for the jury—was this act of sexual intercourse with a child an immodest, immoral or indecent liberty? The *Pierson* decision seems to contradict Oliver Wendell Holmes Jr.’s doctrine of specification by which legal standards become rules of law. Under Holmes’ theory, the courts begin by asking the jury such questions as “if you find that the defendant drove on the left side of the roadway, was he negligent in doing so?”—but with the passage of time through the process of specification the question becomes simply “did the defendant drive on the left side of the roadway?” The court has concluded from jury determinations that driving on the left side constitutes negligence, which has become a rule of law. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 110-15, 120-25 (1881). *Pierson* has taken what was believed to be a settled rule and made it a jury question.

174. 1977 Wyo. Sess. Laws ch. 70, § 1.

defense. The fact that the actor and the victim are married to each other is not by itself a defense to a violation of W.S. 6-2-302(a)(i), (ii) or (iii) or 6-2-303(a)(i), (ii), (iii) or (vi).<sup>175</sup> If marriage “by itself” was not a defense, the question remained as to what in addition to marriage would be a defense?

The question was never to be answered. In *Shunn v. State*,<sup>175</sup> where a separated husband subject to a mutual restraining order sexually assaulted his wife, the Wyoming Supreme Court held that the sexual assault legislation had repealed the common law marital defense, and that the court would not reinstate it. The court declared that “no rational basis exists for distinguishing between marital and nonmarital rape. The degree of violence is no less when the victim of a rape is the spouse of the actor.”<sup>176</sup>

At most, section 6-2-307 has become a nullity under the *Shunn* ruling. At worst, its continued presence in the Criminal Code could be seriously misleading.<sup>177</sup> The Legislature should respond to *Shunn* by repealing section 6-2-307, or by amending it to conform to *Shunn*.

### VIII. ASSAULT AND BATTERY

#### A. *Simple Assault: An Anachronism*

In Wyoming, simple assault is the crime of attempting to commit one form of battery. Section 6-2-501(a) provides: “A person is guilty of simple assault if, having the present ability to do so, he unlawfully attempts to cause bodily injury to another.”<sup>178</sup> The punishment for simple assault is a fine of not more than \$750; there is no provision for imprisonment. Wyoming’s simple assault statute restates the common law, and is significantly narrower than the great number of American assault statutes, which also include intentionally placing another in apprehension of an immediate battery.<sup>179</sup>

The advent of the general inchoate crime of attempt has rendered Wyoming’s simple assault law a useless nullity. Now it is possible to charge attempted battery rather than simple assault. Attempted battery is broader than

175. 742 P.2d 775 (Wyo. 1987).

176. *Id.* at 778.

177. This is not to suggest that persons who sexually assault their spouses are likely to consult the Criminal Code before embarking. But the presence in our statute books of provisions which have been judicially abnegated cannot be consistent with the Rule of Law.

178. The genesis of section 6-2-501(a) is found in 1869 Wyo. Terr. Sess. Laws ch. 3, tit. III, § 30: “An assault is an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another.”

179. 2 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 7.16 at 213 (1986). New Mexico’s assault statute includes a third category in addition to attempted battery and putting a person in apprehension of immediate battery. N.M. ANN. STAT. § 30-3-1(C) (1994) provides: “Assault consists of either [sic]: . . . C. the use of insulting language toward another impugning his honor, delicacy or reputation.”

simple assault, in that battery is committed when the actor “unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another.”<sup>180</sup> Thus it is a crime to attempt to touch another unlawfully in a rude, insolent or angry manner, or to attempt to cause bodily injury to another. To prove attempted battery, it is not necessary to show that the actor had the present ability to cause injury, and the possibilities for punishment are broader than for simple assault: imprisonment for not more than six months, a fine not to exceed \$750, or both.<sup>181</sup>

The Legislature should either repeal the simple assault statute or, preferably, broaden it to include not only attempts to commit a battery but also threats to commit an immediate battery. Any amendment of the statute should also expand the possible punishment to include imprisonment. Such an amendment would not only bring Wyoming into line with the law of other states, but could contribute to keeping the peace by providing sanctions against threats of immediate violence.<sup>182</sup>

#### *B. Domestic Violence Enhancement*

In 1996, the Wyoming Legislature amended the assault and battery statutes to provide enhanced punishment for second or subsequent acts of simple assault or battery by one “household member” against another. A second simple assault conviction carries the enhanced possibility of imprisonment for six months; a second battery conviction is a high misdemeanor with maximum imprisonment for one year and fine of \$1,000; a third or subsequent battery conviction is a felony with maximum imprisonment of two years and a fine of \$2,000.<sup>183</sup>

“Household member” is defined in section 35-21-102(a)(iv), and means:

- (A) Persons married to each other;
- (B) Persons living with each other as if married;
- (C) Persons formerly married to each other;
- (D) Persons formerly living with each other as if married;

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180. WYO. STAT. ANN. § 6-2-501(b) (Michie 1997).

181. *Id.* § 6-2-501(d).

182. Threats are now covered in the stalking statute, WYO. STAT. ANN. § 6-2-506(a)(ii), but the stalking statute does not cover a single isolated threat but instead requires that the actor engage in a course of conduct.

183. 1996 Wyo. Sess. Laws ch. 75, § 1; ch. 91, § 1. The enactment has been codified at WYO. STAT. ANN. § 6-2-501(e) and (f). The battery enhancement applies only where the second battery conviction is within five years of the first, or where the third conviction is within 10 years of the first.

- (E) Parents and their adult children;
- (F) Other adults sharing common living quarters; and
- (G) Persons who are the parents of a child but who are not living with each other.

This definition may leave a bit to be desired. For example, what does “living with each other as if married” mean? Does it require that the persons hold themselves out as married—or only that they have sexual relations with one another? Next, certain classes of persons likely to engage in domestic violence have been excluded, particularly minors and persons who commit battery upon them. Thus, the definition only includes parents and adult children, and adults sharing common living quarters. A minor who successively commits battery against a parent or another minor or another adult with whom the minor is sharing living quarters is not a “household member.” Likewise, repeated battery of a minor over sixteen but under eighteen years of age is not included.<sup>184</sup> The reason for not including minors is not clear. The answer may lie in the fact that the Legislature unwisely made use of a definition created for another purpose.<sup>185</sup>

A second problem with enhancement under section 6-2-501(e) or (f) is a practical one, which will fade with the passage of time. In the past, some judges have declined to appoint counsel for some indigent persons accused of simple assault and battery, evidently on the ground that conviction would bring only a fine and not imprisonment.<sup>186</sup> Under the Wyoming Public Defender Act, the court need only appoint counsel when the defendant is indigent and is charged with a “serious crime”—being a crime “for which incarceration as a punishment is a practical possibility.”<sup>187</sup> In *Brisson v. State*,<sup>188</sup> decided on March 18, 1998, the Wyoming Supreme Court held that an uncounseled prior conviction—i.e., one where an indigent person had been

184. Child abuse under WYO. STAT. ANN. § 6-2-503, as amended by 1998 Wyo. Sess. Laws ch. 93, § 1, includes only children under 16 years except when committed by a person who is responsible for the child’s welfare, in which case children under 18 are included. Thus, repeated battery upon a person between 16 and 18 by someone with whom the child is sharing living quarters (other than parent, step-parent or guardian) does not qualify for enhanced punishment under section 6-2-501(e) or (f). The definition of a person responsible for a child’s welfare is found in section 14-3-202(a)(i).

185. Other conceptual shortcomings are evident. There is no provision for enhancement when a conviction for battery follows one for simple assault—or simple assault follows battery. Nor does attempted battery provide a predicate for enhancement; there must be an actual rude, insolent or angry touching, or an actual bodily injury.

186. The question arose only when the defendant expressed that he was indigent and wished to have counsel appointed for him. A person who was not indigent and who appeared without counsel, or an indigent person who knowingly and voluntarily waived counsel, could not claim denial of the right to counsel.

187. WYO. STAT. ANN. §§ 7-6-104(a)(i) and 7-6-102(a)(v).

188. No. 97-67, 1998 WL 117918 (Wyo. Mar. 18, 1998).

denied counsel—could not be used to enhance the penalty for a subsequent conviction of battery.<sup>189</sup> The supreme court held that “practical possibility” meant “something that is capable of occurring,” thereby affirming a right to court-appointed counsel in every misdemeanor case in which the statute permits incarceration. The result of *Brisson* is likely to be salutary for indigent persons accused of any misdemeanor for which imprisonment may be imposed, including simple battery, as well as for such persons convicted earlier of battery after being denied counsel. The result is less beneficial for the State Public Defender, whose budget must now extend to providing counsel for virtually all indigent persons charged with a misdemeanor.<sup>190</sup>

### C. Child Abuse

Wyoming’s child abuse statute, section 6-2-503, originally applied to persons who intentionally or recklessly inflicted physical or mental injury upon a child under sixteen years of age.<sup>191</sup> The 1998 Legislature amended the child abuse statute by enacting a new subsection (b) providing that a person responsible for a child’s welfare who intentionally or recklessly inflicts physical or mental injury on a child under eighteen, is guilty of child abuse.<sup>192</sup>

It is not clear that the incidence of child abuse by parents and others in a similar position upon children between sixteen and eighteen years of age constitutes a serious problem. While the new statute does contain an exemption for physical injury resulting from “reasonable corporal punishment,” the application of the new subsection may lack parity. Thus, where mother and seventeen-year-old daughter quarrel and daughter slaps mother, inflicting bruises, daughter has committed battery, a misdemeanor. If mother slaps back, not in self-defense, and inflicts similar bruises, mother is guilty of a felony punishable by a maximum of five years in prison. While concern for the well-being of children is commendable, excessive legislative zeal and its unintended consequences is not.

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189. The certified question in *Brisson* was limited to a prior uncounseled battery conviction. Whether the supreme court’s reasoning would extend to a prior uncounseled simple assault conviction, for which there was no possibility of incarceration and therefore no right to appointment of counsel for an indigent defendant, must await an answer in another case.

190. *Brisson* is based on the Wyoming Supreme Court’s interpretation of Wyoming law, namely the public defender statute. The *Brisson* decision declined to follow *Nichols v. United States*, 511 U.S. 738 (1994), where it was held that a prior uncounseled misdemeanor conviction could provide the basis for enhancing the sentence for a subsequent conviction. Other states have chosen to follow *Nichols*, declining to extend the constitutional right to counsel. See, e.g., *State v. Woodruff*, 951 P.2d 605 (N.M. 1997).

191. WYO. STAT. ANN. § 6-2-503 (Michie 1977).

192. 1998 Wyo. Sess. Laws ch. 93, § 1. “Person responsible for a child’s welfare” is defined in WYO. STAT. ANN. § 14-3-202(a)(i) to include “the child’s parent, noncustodial parent, guardian, stepparent, foster parent or other person, institution or agency having the physical custody or control of the child.”

#### D. Stalking

When personal relationships are terminated at the instigation of one of the parties, it is not unusual for the other party to seek to reinstate the relationship, and failing, to harass the person who terminated the relationship. Continued acts of harassment can cause irritation, alarm and fear in the party harassed, and can also lead to violence.<sup>193</sup> To deal with harassment of this nature, the Wyoming Legislature in 1993 created the crime of stalking, which punishes a person who engages in a course of conduct intended to harass or threaten another.<sup>194</sup> A "course of conduct" is "a pattern of conduct composed of a series of acts over any period of time evidencing a continuity of purpose."<sup>195</sup> To "harass" is to engage in a course of conduct involving verbal or written threats, vandalism, or nonconsensual physical contact which the actor knows or should know will cause substantial emotional distress, and which does cause alarm.<sup>196</sup> Acts of harassment include communication "in a manner that harasses," and following or placing a person under surveillance.<sup>197</sup> Stalking is a misdemeanor unless the defendant had a prior conviction within the preceding five years, or caused serious bodily injury, or acted in violation of a condition of probation, parole or bail, or in violation of a court order of protection—in which case stalking is a felony punishable by imprisonment for not more than ten years.<sup>198</sup>

The constitutionality of the stalking statutes has been upheld by the Wyoming Supreme Court against contentions that the statutes are vague and overbroad.<sup>199</sup> In addition, the constitutionality of the enhancement to a felony when the act of stalking is committed in violation of a condition of probation, parole or bail, has been upheld.<sup>200</sup> In *Vit v. State*,<sup>201</sup> a felony stalking conviction was affirmed. Vit continued to harass his former woman friend in violation of a probation condition denying him any contact with her.

While the stalking statute is cumbersome, requiring the State to prove

193. See, e.g., *Christian v. State*, 883 P.2d 376 (Wyo. 1994). In that case, Lauree Betty Christian engaged in a series of acts of property destruction and arson against vehicles owned by her former husband and his new female companion.

194. 1993 Wyo. Sess. Laws ch. 92, § 1 (codified at WYO. STAT. ANN. § 6-2-506). The 1993 act also included what are now sections 7-3-506 through 7-3-511, which provide that any victim of stalking may apply to a court for an order of protection directing a person to refrain from further acts of stalking. Section 7-3-510(c) provides that willful violation of an order of protection is punishable as a misdemeanor. However, section 6-2-506(e) provides that if a person who is subject to a protective order is convicted of the crime of stalking in violation of that order, the stalking is a felony punishable by imprisonment for up to 10 years.

195. WYO. STAT. ANN. § 6-2-506(a)(i).

196. *Id.* § 6-2-506(a)(ii).

197. *Id.* § 6-2-506(b).

198. *Id.* § 6-2-506(d),(e).

199. *Luplow v. State*, 897 P.2d 463 (Wyo. 1995).

200. *Garton v. State*, 910 P.2d 1348 (Wyo. 1996).

201. 909 P.2d 953 (Wyo. 1996).

specific intent to harass, and that the defendant knew or should have known that his conduct “would cause a reasonable person to suffer substantial emotional distress,” as well as that the victim was in fact seriously alarmed by the conduct, no serious problems in interpretation or enforcement appear to have arisen. Only time will tell whether changes are desirable or necessary.

## IX. PROPERTY CRIMES

Wyoming’s property crimes largely follow traditional patterns, little different from the statutes in force at the beginning of the century. The most significant questions are whether the existing statutes are adequate to deal with the increasing sophistication and variety of commercial and other frauds, and whether crimes involving electronic technology are covered.

### A. Arson

The arson statutes have been amended to create the crime of aggravated arson where the actor maliciously starts a fire or causes an explosion with intent to destroy an occupied structure under circumstances evidencing reckless disregard for human life, and another person is killed or suffers serious bodily injury at the scene or in emergency response to the incident.<sup>202</sup> Aggravated arson is punishable by a maximum sentence of thirty years.<sup>203</sup> The amendment was not necessary to deal with cases where in the perpetration or attempt to perpetrate arson the actor kills another person, since that has long constituted felony murder.<sup>204</sup> Rather, the amendment is directed to injury to persons at the scene, and to death or injury to firemen responding to the fire or explosion. The amendment poses two possible problems. While in the first degree arson statute the intent is “to destroy or damage an occupied structure,”<sup>205</sup> aggravated arson is limited to “intent to destroy.” An intent merely to damage the structure is not sufficient. Further, it is unclear what will qualify as “circumstances evidencing reckless disregard for human life.” Arguably, any act of starting a fire or causing an explosion with intent to destroy an occupied structure would qualify—thereby rendering the reckless disregard element unnecessary.

In 1993, the Legislature added section 6-3-111, creating the felony crime of manufacturing, possessing or delivering explosives and explosive devices with intent to injure another person or to damage property. The statute applies to conduct which would fall short of arson or attempted arson. Also in 1993,

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202. WYO. STAT. ANN. § 6-3-101(c). The statute was amended in 1993. 1993 Wyo. Sess. Laws ch. 166, § 2.

203. WYO. STAT. ANN. § 6-3-101(d).

204. *Id.* § 6-2-101(a).

205. *Id.* § 6-3-101(a).



the Legislature enacted section 6-3-112, providing penalties for willfully destroying or interfering with the use of firefighting equipment, or hindering or interfering with firefighters. These crimes are high misdemeanors, bearing a maximum penalty of a year in jail and a fine of \$1,000. The prohibited conduct is serious enough to justify felony punishment in many cases. It is unclear why the Legislature limited the crimes to misdemeanor status.

### B. *Cruelty to Animals*

Under section 6-3-203(a)(i), a person who knowingly "deprives an animal of necessary sustenance" commits cruelty to animals. The crime is a misdemeanor.<sup>206</sup> In *Amrein v. State*, decided in 1992, the defendant was convicted of eight counts of cruelty to animals. Amrein failed to provide food and water to eight horses and cattle, and was sentenced to eight consecutive terms of six months' imprisonment in the county jail and eight fines of \$750 each. On appeal, the Wyoming Supreme Court held that the statute was ambiguous, because it was not clear whether mistreating eight animals was a single crime or eight separate crimes, one for each animal.<sup>207</sup> Ruling in favor of lenity, the court held that mistreating multiple animals was a single offense.

The Wyoming Legislature responded in 1994 by adding a new subsection (k) to section 6-3-203: "Each animal affected by the defendant's conduct may constitute a separate count for the purposes of prosecution, conviction, sentencing and penalties under this section."<sup>208</sup> The Legislature recognized that the offense of cruelty to animals is based upon the fact that animals are sentient beings, and that each suffers personal pain when mistreated.

### C. *Burglary*

At the common law, burglary was the breaking and entering of the dwelling house of another in the night time with intent to commit a felony therein. Particularly over the last two centuries, the scope of the crime of burglary has been greatly extended, so that Wyoming's burglary statute, section 6-3-301, now encompasses any unauthorized entry or remaining in any building, occupied structure or vehicle, with intent to steal or commit a felony therein.

Under the 1982 Criminal Code, the Wyoming Supreme Court has been called upon several times to construe the applicability of the burglary statute.

206. *Id.* § 6-2-203(a)(i),(e).

207. 836 P.2d 862 (Wyo. 1992). This resolution of the case avoided having to decide whether a justice of the peace, whose jurisdiction was limited to misdemeanors with maximum penalties of imprisonment for six months and a fine of \$750, had power to impose a sentence which cumulated the penalties for eight misdemeanors and resulted in four years in jail and a fine of \$6,000.

208. 1994 Wyo. Sess. Laws ch. 23, § 1.

In *Longstreth v. State*,<sup>209</sup> the court held that the State was required to prove the fact of unauthorized entry, which would not be inferred. In *Smith v. State*,<sup>210</sup> the court applied a functional test to hold that a semi-trailer without wheels or doors, used to store property, was a building. The court was willing to consider that the structure was used to contain and shelter property, and its existence gave notice of the owner's claim to privacy and exclusivity, even though the interior was not entirely enclosed.<sup>211</sup>

Wyoming's burglary statute was examined at length in a *Land and Water Law Review* article which this author wrote a year ago, and the reader is referred to the article for fuller commentary.<sup>212</sup>

#### D. Larceny

The 1982 Criminal Code took steps toward creation of a unified statute embracing the various forms of stealing, but got no further than combining larceny, larceny by bailee and embezzlement in a single statute.<sup>213</sup> There remain a number of other separate statutes which cover forms of stealing, such as shoplifting, defrauding an innkeeper, theft of services and theft of telecommunications services. To avoid problems of creating cracks into which acts depriving persons of their property may fall, the Legislature should consider further consolidation of property crimes. Gaps in coverage both encourage the nefarious and frustrate those seeking to enforce the law.

"Property" is defined in the Criminal Code to mean "anything of value whether tangible or intangible, real or personal, public or private."<sup>214</sup> The Wyoming Supreme Court held in *Dreiman v. State*<sup>215</sup> that information is property, so that when Dreiman entered his former woman friend's home without authority, with intent to obtain her unlisted phone number, he committed burglary—the unauthorized entry of an occupied structure with intent to commit larceny therein.

#### E. Fraud Crimes

Fraud exists in Wyoming, as elsewhere in this world. The existence of criminal statutes punishing frauds ranging from false pretenses to defrauding creditors demonstrates that the Wyoming Legislature intends that persons

209. 832 P.2d 960 (Wyo. 1992).

210. 902 P.2d 712 (Wyo. 1995).

211. Some intriguing questions remain unanswered. Thus is it possible to enter a vehicle and steal it without committing burglary?

212. Theodore E. Lauer, *Burglary in Wyoming*, 32 LAND & WATER L. REV. 721 (1997).

213. WYO. STAT. ANN. § 6-3-402 (Michie 1997).

214. *Id.* § 6-1-104(a)(viii).

215. 825 P.2d 758 (Wyo. 1992).

defrauding others should be subjected to criminal prosecution and punishment. Unfortunately, Wyoming prosecutors and courts have often failed to handle criminal fraud cases in a manner consistent with the underlying legislative intent. For one thing, the courts have tended to relegate fraud to being merely a "civil matter," which should be dealt with in the civil courts and not through criminal punishment.<sup>216</sup> For another, prosecutors have sometimes insufficiently analyzed the facts of their cases in light of the statutory elements of fraud crimes.

Two examples will suffice. In *Miller v. State*,<sup>217</sup> John G. Miller was convicted of two counts of obtaining property under false pretenses.<sup>218</sup> Miller, a lawyer turned home builder, executed two false lien affidavits in the sale of two homes. The affidavits falsely stated that all persons who furnished services, labor or materials had been paid, so that no liens could attach to the homes. Miller thereby obtained \$92,950 from one buyer and \$100,000 from the other. The statements were false, in that debts were owed to subcontractors. The subcontractors then filed liens against the two properties, and Miller went into bankruptcy. However, the liens were never perfected, since suit was not filed upon the liens within the required statutory period. Therefore, the buyers of the properties never suffered an actual loss by being required to pay the subcontractors in order to discharge the liens.

The Wyoming Supreme Court reversed Miller's convictions, holding that there was insufficient evidence that Miller had intended to defraud anyone. In an opinion by Justice Urbigkit, the court found that since Miller had paid off liens in the past, and that there was title insurance to protect the buyers against loss, there was no "requisite intent to defraud to sustain the conviction under the false-pretense statute."<sup>219</sup>

With all due respect, the Wyoming Supreme Court simply got it wrong. The fact that the buyers were not shown to have suffered an actual monetary loss from Miller's false affidavits does not absolve Miller from having made false pretenses within the meaning of the statute. The fact was that Miller made a false statement and thereby induced the buyers to part with the full purchase money for the homes. Had Miller told the truth, the buyers would not

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216. The underlying sentiment may be that while robbers and burglars are true criminals, the "slick" dealer is only an entrepreneur who has somehow slipped across the line, and is really a respectable citizen at heart. We seem to admire persons with wealth, no matter how they acquired it.

217. 732 P.2d 1054 (Wyo. 1987).

218. Because Miller's acts occurred in 1982, prior to the effective date of the Wyoming Criminal Code, the prosecutions were brought under the former false pretenses statute, WYO. STAT. ANN. § 6-3-106, which provided punishment for persons who "knowingly and designedly, by false pretense 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 of the same." *Id.*

219. *Miller*, 732 P.2d at 1064.

have paid the money. To get the money, Miller lied in his affidavit. Miller's false statement exposed the buyers to the risk that the subcontractors would assert and enforce their liens. The fact that they never filed suit on the liens does not relieve Miller from having obtained the purchase money under the false pretense that no liens could be filed.

In concluding that there was no intent to defraud, the court cited decisions from other states involving cases where persons contracted to paint barns or build houses, accepted down payments, and then failed to perform, and no criminal conduct was found.<sup>220</sup> However, these were cases where no misrepresentation of a presently existing fact was made; the representations went to performance of future acts. In *Miller*, on the other hand, a presently existing fact was misrepresented: that all persons who had furnished labor, services or material *had been paid*. John Miller did not make a promise that all subcontractors would be paid in the future; he made the statement that they had already been paid. This was a false pretense. The Wyoming Supreme Court's attitude seemed to be that Miller knowingly lied but, after all, he was a respectable businessman who really intended to pay the subcontractors, and therefore could not possibly be a criminal.<sup>221</sup>

In *Lahr v. State*,<sup>222</sup> Joseph Lahr was convicted of larceny by bailee when he taught courses in basic life trauma support, and then collected twice for his services, once from the hospital which sponsored the courses, and once from the mining companies at whose mine sites the courses were taught. The theory of prosecution was that when moneys were paid by the mining companies to Lahr, he became a bailee of such moneys for the hospital, and when he did not account to the hospital for the moneys, he was guilty of larceny by bailee. The Wyoming Supreme Court reversed Lahr's conviction, holding that the evidence did not support the element of the crime that Lahr was a bailee of or had been entrusted with the hospital's money. Thus, the mining companies were not shown to have believed they were paying the hospital through Lahr, nor did Lahr represent to the mining companies that he was collecting for the hospital. As far as the mining companies were concerned, they were paying Lahr for his services.

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220. *Miller*, 732 P.2d at 1064 (citing, *inter alia*, *State v. Basham*, 568 S.W.2d 518 (Mo. App. 1978), and *Commonwealth v. True*, 455 N.E. 2d 453 (Mass. App. Ct. 1983)).

221. There was also an undertone that since there was title insurance which protected against such liens, everything was all right, "since the insurance provided the assurance against liens which would foreclose harm," and the insurer "continued its profit expectancy for premium fee as consideration for the lien payment risk." *Miller*, 732 P.2d at 1064. But again, with all respect, if the insurance company had to pay because of the false affidavits, a loss would have been suffered. The fact that the insurer consented to the risk does not justify the conclusion that thereby it assented to Miller making false statements which required it to pay the loss.

222. 840 P.2d 930 (Wyo. 1992).

The court stressed that when the State charged a crime, the elements of that crime must be proved. "The law of theft and larceny has been recodified and its language has been simplified, but proof of the specific crime charged must still be made and tested against the beyond-a-reasonable-doubt standard."<sup>223</sup> So far, the court had it right. The State had charged a crime it could not prove. But the court then went on to expose its underlying feelings regarding fraud crimes:

In so holding, we do not condone the appellant's actions or propose to suggest that no remedy at law exists. This matter had, from its inception, the markings of a civil problem between the appellant and Memorial Hospital. The appellee failed in its effort to establish the existence of a crime or of an intent to deceive or defraud. In its brief, the appellee used such terms as "bilk," "over billed," and "double billed," and a great deal of the testimony at trial was along those same lines. Wyoming law does not necessarily define such behavior as being criminal, even though it might be readily subject to a remedy in the civil courts.<sup>224</sup>

And here the court again got it wrong. Double-billing, whereby an actor intentionally and knowingly collects a claimed debt from one person after he has already collected that same debt from another person, or collects twice from the same person, necessarily involves a false pretense: 1) that you owe the money, and 2) the money has not been paid. The intent to defraud is present because the actor falsely asserts that the debt remains due after it has already been paid.<sup>225</sup>

On the other hand, the Wyoming Supreme Court most assuredly got it right in *Craver v. State*,<sup>226</sup> when it held that false pretenses may be committed when a person accepts money or property in exchange for making a promise which he knows he cannot keep or which he does not intend to keep. Fraud involves knowing misrepresentation of a past or existing fact. Fraud is not committed when a person makes a promise as to doing some act in the future and then fails to keep it—unless at the time of making the promise the person knows that he cannot keep it or that he does not intend to keep it. As Lord

223. *Id.* at 933.

224. *Id.* at 933.

225. It is possible that the creditor could innocently collect twice, either from different persons, or from the same person. Retention of the second payment, with intent to deprive the person who had made the second payment, could constitute larceny by bailee. Note the distinction: One who intentionally double bills, intending that the debt be paid twice (or one who bills once for a debt which he knows is non-existent) and thereby to obtain moneys to which he is not entitled, is guilty of false pretenses. One who merely is paid money to which he is not entitled has made no false pretense, but has become a bailee of the money, and can be guilty of larceny by converting it to his own use. Compare WYO. STAT. ANN. §§ 6-3-401 and 6-3-407 (Michie 1997).

226. 942 P.2d 1110 (Wyo. 1997).

Bowen observed in *Edgington v. Fitzmaurice*<sup>227</sup> in 1884, “[t]he state of a man’s mind is as much fact as the state of his digestion.” Bobby Charles Craver had entered into contracts to install siding, windows and doors, and accepted money, promising performance by stated dates, when he knew that his promises were false because he could not or would not perform. His conviction for false pretenses was affirmed.

Wyoming’s fraud crimes need to be examined with utmost care, to determine whether they constitute a sufficient arsenal to deal with present or anticipated criminal schemes to separate Wyoming residents from their money and other property. Consideration should also be given to those fraud crimes found outside the Criminal Code, such as the various forms of fraud in obtaining welfare benefits<sup>228</sup> and medical assistance,<sup>229</sup> and in regard to unemployment compensation<sup>230</sup> and worker’s compensation.<sup>231</sup> Significant frauds affecting substantial numbers of Wyoming citizens have been perpetrated in recent years, and larger and more sophisticated fraudulent schemes are inevitable. Wyoming’s existing statutes on mislabeling merchandise and false advertising are pitifully inadequate.<sup>232</sup> The Legislature should examine federal statutes and the statutes of other states, including other western states such as Colorado. This is not to advocate the adoption of Colorado’s criminal fraud statutes, which present their own set of problems, but simply to suggest that the experience of other states can be instructive.

## X. OTHER CRIMES

Chapters 4 through 9 of the Wyoming Criminal Code deal with a variety of crimes ranging from offenses against morals, to offenses against public administration and the public peace, to gambling, weapons and miscellany. For the most part, these provisions have remained little changed since 1983, and do not provide a high volume of criminal prosecutions or criminal appeals.

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227. 29 L.R. Ch. Div. 459, 483 (1884).

228. WYO. STAT. ANN. § 42-2-112 (Michie 1997).

229. *Id.* § 42-4-111.

230. *Id.* § 27-3-702.

231. *Id.* § 27-14-510.

232. Mislabeling merchandise is covered by WYO. STAT. ANN. § 6-3-610, and false advertising by § 6-3-611. Both provide a maximum fine of \$750, and no imprisonment. Given the greatly increased scale of modern marketing, combined with the unfortunate tendency to offer for sale goods known to be defective or which are misrepresented in some material aspect, the sanctions for merchandise fraud should be increased by providing for suitable fines and imprisonment, and aggregation of values should be allowed when the fraudulent scheme affects numerous persons. These statutes which provide mild punishment for persons marketing goods should be contrasted with section 6-3-404(b), which subjects to possible felony punishment, including imprisonment for ten years, any person “who alters, defaces, changes or removes a price tag or marker on or about property offered for sale by a wholesale or retail store with intent to obtain the property at less than the marked or listed price,” if the person attempts to reduce the price by \$500 or more. This offense is subject to aggregation of values in order to increase the punishment to a felony. *Id.* § 6-3-410.

Chapter 4, titled "Offenses Against Morals, Decency and Family," contains provisions on prostitution,<sup>233</sup> public indecency,<sup>234</sup> obscenity,<sup>235</sup> and desecrating graves and bodies,<sup>236</sup> all of which state a public policy on moral issues which in the whole is consistent with the beliefs of most Wyoming citizens. While these sections are often vague, taken together they express minimal standards of behavior in a manner which can provide a sound basis for prosecution, particularly in egregious cases. The fact that few prosecutions are brought under these sections is evidence that the public moral consensus prevails. Chapter 4 also contains sections on bigamy,<sup>237</sup> incest<sup>238</sup> and child abandonment,<sup>239</sup> which again express publicly accepted standards of behavior. Nevertheless, even though these statutes appear to be consistent with behavioral standards, they should be subjected to periodic plenary review to determine their continued adherence to public expectation and their adequacy to fulfill that expectation.

Chapter 5 contains a wide variety of sections dealing with offenses by public officials, interference with governmental functions, and perjury and related crimes of falsehood. These provisions, too, need periodic review to assure that they are adequate to deal with the abuses which threaten the effective operation of government. Do the provisions on bribery and misuse of official power and governmental property provide the necessary tools to deal with occasional governmental corruption when it arises? Can viable prosecutions be brought under these sections in light of modern governmental fiscal practices? Are the penalties sufficient to provide adequate sanctions against violators? In particular, are the possible fines unrealistically small?

Often, prosecutions will bring to light the shortcomings in these statutes. For example, in *Smith v. State*,<sup>240</sup> relatives of a convicted armed robber conspired to have the chief witness against the robber beaten up. Section 6-5-305(a) is directed to the use of force or threats "to influence, intimidate or impede a juror, witness or officer in the discharge of his duty." On appeal, Smith claimed that since the victim had given his testimony before he was attacked, the victim's duty had been fully discharged and he could no longer be described as a witness, nor could he any longer be influenced, intimidated or impeded in the discharge of his duty. The Wyoming Supreme Court held

233. WYO. STAT. ANN. §§ 6-4-101 to -103.

234. *Id.* § 6-4-201.

235. *Id.* §§ 6-4-301 to-302.

236. *Id.* §§ 6-4-501 to-502.

237. *Id.* § 6-4-401.

238. *Id.* § 6-4-402. Wyoming's incest statute is substantially broader than the common law, and follows the "modern" trend to include a number of sexually related activities—such as sexual contact—which have not traditionally been considered incestuous.

239. *Id.* § 6-4-403.

240. 902 P.2d 1271 (Wyo. 1995).

that until the case was finally terminated, either by affirmance on appeal or through not taking an appeal within the time required, the trial witness potentially could be called upon to testify again in the cause, and therefore his duties had not terminated. As long as "the case has a possibility for further proceedings in the trial court," a person retains his or her status as a witness.<sup>241</sup> Thus Smith's conviction was affirmed. But section 6-5-305(a) provides no protection to a person after there is no possibility of further proceedings in the trial court; a subsequent retributive attack upon a person who gave testimony does not fall within the statute. Consideration should be given to expanding the protection given by the Wyoming statute to persons who have served as witnesses.

The definitions in section 6-7-101 of what constitutes gambling have been amended four times since 1983. This illustrates the somewhat schizophrenic attitude Wyoming citizens have regarding gambling: some forms such as Calcutta wagering, bingo and raffles are tolerated so long as they are conducted for charitable or nonprofit purposes. The statutes also allow pari-mutuel wagering on horse races, including wagering at licensed premises on televised races held outside Wyoming.<sup>242</sup>

Regarding other sections in these chapters of the Criminal Code, many of the observations this author made fourteen years ago remain applicable today.<sup>243</sup> Ambiguities and omissions which were present in the 1982 Criminal Code have remained unchanged; whether law enforcement or criminal prosecutions have been hindered by those shortcomings in the Criminal Code is problematic. It is likely that change will come only after it is perceived that the present statutes are inadequate, and the barn door will be closed only when some of the horses have escaped.

## XI. SENTENCING

### A. *The Ninety Percent Solution: Section 7-13-201*

In 1909, the Wyoming Legislature provided that each sentence to the penitentiary, other than a life sentence, should consist of a minimum and a maximum term: "[T]he court imposing the sentence shall not fix a definite term of imprisonment, but shall establish a maximum and minimum term for which said convict shall be held in prison."<sup>244</sup> Prisoners could be paroled after

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241. *Id.* at 1280.

242. WYO. STAT. ANN. §§ 11-25-101 to -113.

243. See Theodore E. Lauer, *Goodbye, 3-Card Monte: The Wyoming Criminal Code of 1982*, 19 LAND & WATER L. REV. 107, 509 (1984).

244. 1909 Wyo. Sess. Laws ch. 84, § 1. The requirement that maximum and minimum terms be imposed is now found in WYO. STAT. ANN. § 7-13-201.



serving the minimum term.<sup>245</sup> The shortcoming with this statute was that it permitted sentencing courts to render early parole impossible by making the minimum and maximum terms almost identical; thus sentences of nineteen years and 364 days to twenty years could be and were imposed. In 1987, the Legislature provided a partial corrective by specifying that the minimum term could not be longer than ninety percent of the maximum term.<sup>246</sup> Thus, where the statute permits a twenty year maximum term, the minimum can be no more than eighteen years. The amendment has proved workable, except where the mathematics has stumped the sentencing court.<sup>247</sup>

### B. *Life Imprisonment Without Parole*

Article 4, Section 5 of the Wyoming Constitution gives the governor “power to remit fines and forfeitures, to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment.” While persons sentenced to life imprisonment were not eligible for parole,<sup>248</sup> the governor could commute a life sentence to a term of years, from which parole could be granted.

Concern arose that because there was no guarantee that a person sentenced to life imprisonment could not be released from prison following a commutation of his sentence, juries in capital cases might impose the death penalty rather than a life sentence in order to assure that a defendant convicted of first degree murder would never be released. Perhaps there was also worry that the Governor, in exercising the power to commute life sentences, could frustrate the public desire that serious offenders not be released. In 1994, Wyoming voters amended the Wyoming Constitution by adding Article 3, Section 53, which authorizes the Legislature to “create the penalty of life imprisonment without parole for specified crimes which sentence shall not be subject to commutation by the governor.”

The intention of the public in amending the constitution was almost certainly that there should be a mechanism guaranteeing that heinous murderers, sentenced to life in prison, could never be released. However, the Wyoming Legislature has not responded to this public expectation. No statute

245. 1909 Wyo. Sess. Laws ch. 84, § 3. Permitting parole only after the minimum sentence has been served remains the law of Wyoming. WYO. STAT. ANN. § 7-13-402(a).

246. 1987 Wyo. Sess. Laws ch. 157, § 3 (codified at WYO. STAT. ANN. § 7-13-201).

247. The author has seen a sentence of 20 to 22 years.

248. 1947 Wyo. Sess. Laws ch. 20, § 2, authorized the board of pardons to “grant a parole, that is, he may be permitted to leave the confines of the Institution in which he is confined, to any person imprisoned in any institution under sentence ordered by any District Court of this State, other than a life sentence.” The present version of this act is found in WYO. STAT. ANN. § 7-13-402(a), which places the power in the board of parole, which may grant parole to any person who has served the minimum term, “except a sentence of life imprisonment without parole or a life sentence.” *Id.*

has been enacted authorizing life sentences without parole in murder cases. The Legislature has, however, provided that a person convicted of sexual assault<sup>249</sup> or of indecent liberties with a child under sixteen by a person at least four years older,<sup>250</sup> shall be sentenced to life without parole if the offender has two previous convictions on charges separately brought for sexual assault or indecent liberties on a child under sixteen by a person at least four years older.

The task before the Legislature is clear: it must satisfy public expectation by specifying those forms of first degree murder for which there should be life imprisonment without parole. The Legislature may be understandably reluctant to provide that in all convictions for first degree murder, except where the death penalty is imposed, the defendant shall be sentenced to life without parole. But it should be possible to specify certain particularly heinous kinds of first degree murder as punishable by life sentence without parole.

### C. *Fines as Criminal Sanctions*

The use of fines as an alternative to imprisonment may both accomplish the punitive ends of criminal justice and save the costs of incarceration. Wyoming courts appear to be increasing the creative use of money fines as sanctions in criminal cases involving both misdemeanors and felonies. Statutes defining crimes often authorize fines as well as imprisonment as punishment.<sup>251</sup> Where a statute creating a felony makes no provision for a fine, section 6-10-102 permits the court to impose a fine of not more than \$10,000. Prior to 1982, a fine of up to \$1,000 could be imposed in felony cases.<sup>252</sup>

Punishment for most misdemeanors is confined to the criminal jurisdictional limits of justice of the peace courts: imprisonment for not more than six months and a fine of not more than \$750.<sup>253</sup> Misdemeanors with a six month, \$750 maximum are often termed "petty misdemeanors," while misdemeanors with greater penalties, such as imprisonment for not more than a year, or a fine of up to \$1,000 or even \$2,000, are called "high misdemeanors," and in counties with justice of the peace courts must be

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249. WYO. STAT. ANN. § 6-2-306(d).

250. *Id.* § 14-3-105(b).

251. In felonies, other than crimes against persons, the practice of the 1982 Criminal Code seems to be to authorize a fine of not more than \$1,000 for each year for which imprisonment could be imposed. Thus burglary, with maximum imprisonment of 10 years, has a maximum fine of \$10,000. WYO. STAT. ANN. § 6-3-301(b). Third degree arson, with maximum imprisonment of five years, has a maximum fine of \$5,000. *Id.* § 6-3-103. Where the maximum imprisonment for promoting prostitution is three years, the maximum fine is \$3,000. *Id.* § 6-4-103(b). There are some exceptions; aggravated burglary with maximum imprisonment of 25 years, authorizes a maximum fine of \$50,000. *Id.* § 6-3-301(c).

252. *See, e.g.*, WYO. STAT. ANN. § 6-6 (Michie 1957).

253. WYO. STAT. ANN. § 5-4-116 (Michie 1997) states the jurisdictional limits of justice of the peace courts in criminal cases. Section 6-10-103 provides that unless a different penalty is prescribed by law, misdemeanors are punishable by a maximum of six months' imprisonment and a \$750 fine.

prosecuted in the district court. Prior to 1982, maximum fines in misdemeanors were generally \$100, which was then the jurisdictional limit of justice of the peace courts.<sup>254</sup> The 1982 Wyoming Criminal Code increased the maximum fines for most misdemeanors from \$100 to \$750.

It is important that the maximum amount of fines be adjusted from time to time to compensate for inflation. More significantly, the Wyoming Legislature needs to be aware of the national trend toward authorization of substantial fines in felony cases. Large fines are particularly appropriate when individuals and other enterprises engage in fraudulent schemes resulting in significant loss to large numbers of persons. In general, conviction of federal crimes which are felonies will carry fines up to \$250,000 for individuals and \$500,000 for organizations.<sup>255</sup> Some federal crimes authorize greater fines. Thus, federal mail or wire and radio or television fraud which affects a financial institution may be punished by a fine of \$1,000,000.<sup>256</sup> Colorado authorizes fines in felony cases ranging from \$100,000 to \$1,000,000.<sup>257</sup>

The structure of fines authorized in criminal cases needs to be reexamined from time to time, to keep fines consistent with the added harms incident to modern crime and with the ever-shrinking value of money. Fines are a useful sanction in many criminal cases, and the courts should be armed with the power to impose adequate and meaningful fines. At the same time, recognition must be given to the finite financial capacity of many convicted persons in light of the fiercely competitive demands for fines, victim restitution and costs.

## XII. CONCLUSION

The Wyoming Criminal Code of 1982 has served Wyoming reasonably well over the past fifteen years. Like all legislation, it needs to be systematically and periodically reviewed to determine whether it continues to serve its purpose. Some provisions are flawed; others could be expanded or improved upon. A number are of questionable relevance to conditions in Wyoming at the close of the twentieth century. New statutes are needed in some areas to deal with the new complexities of the technological age. It is appropriate at this time that the Wyoming Legislature undertake a study of the Criminal Code, with the goal of making the Code a more effective instrumentality to protect the lives and property of the people of Wyoming.

254. See, e.g., WYO. STAT. ANN. § 7-409 (Michie 1957), giving justices of the peace jurisdiction in all cases less than felony where the punishment did not exceed six months imprisonment and a fine of \$100. The \$100 limit for fines was first enacted in 1876. 1876 Wyo. Terr. Sess. Laws ch. 71, pt. 2, § 1.

255. 18 U.S.C. § 3571(b),(c) (1994).

256. *Id.* §§ 1341, 1343.

257. COLO. REV. STAT. § 18-1-105(1)(a)(III)(A) (1997).