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Criminal Law - Wyoming Indecent Liberties Statute - Victim Consent Is Now a Relevant Fact for Jury Deliberation; Did Pierson Put a Bandage on Wyoming's Criminal Code Bullet Wound - Pierson v. State

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CRIMINAL LAW—Wyoming's Indecent Liberties Statute—Victim Consent is Now a "Relevant Fact for Jury Deliberation;" Did *Pierson* Put a Bandage on Wyoming's Criminal Code Bullet Wound? *Pierson v. State*, 956 P.2d 1119 (Wyo. 1998).

INTRODUCTION

Thirty-six year-old Lewis R. Pierson met CG in May of 1992 when she was fifteen.[1] Pierson had gone to visit CG's parents in the hospital after they were injured in a fire.[2] Later, when CG's parents returned to work, Pierson would regularly visit the family auto shop.[3] CG was often present because she was home-schooled and frequently spent her time assisting her father in the family business.[4] During this period a "friendship" developed between CG and Pierson which became more romantic in December of 1992 when Pierson told CG he "thought he was falling in love with her" and kissed her.[5] At that time Pierson was married to his third wife,[6] while CG had never had a boyfriend or been allowed to date.[7] Over the subsequent months the physical relationship between the couple intensified, fueled by the fact that CG's father had moved his business into Pierson's shop in April of 1993.[8] The move coincided with Pierson's marital separation.[9]

CG turned sixteen on May 20, 1993.[10] In June of that year, Pierson accompanied her and her family to a religious meeting in Montana.[11] While on the trip, during a brief moment alone inside a truck parked outside a shopping mall, the physical relationship between Pierson and CG progressed to fondling underneath the clothing[12] and digital penetration.[13] CG and Pierson also began discussing the possibility of marriage.[14] In preparation for marrying, Pierson sent for CG's birth certificate by impersonating her father on

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1. Pierson v. State, 956 P.2d 1119, 1121 (Wyo. 1998).
2. *Id.* Pierson took CG and her younger siblings out for ice cream in an attempt to comfort them. *Id.*
3. *Id.* CG's father and Pierson were both auto mechanics and the families attended the same church. *Id.*
4. *Id.*
5. *Id.*
6. Brief of Appellant at 17, Pierson v. State, 956 P.2d 1119 (Wyo. 1998) (No. 96-91) [hereinafter Brief of Appellant] (on file with *Land and Water Law Review*). Pierson's first two wives had also been sixteen at the time of their marriages. *Id.*
7. *Pierson*, 956 P.2d at 1121.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. Brief of Appellant, *supra* note 6, at 4.
14. *Pierson*, 956 P.2d at 1121.

the telephone.[15]

In July of 1993, CG's mother discovered a note written by her daughter to Pierson referring to him as "lover."[16] Despite actions by CG's parents to forbid further contact between Pierson and CG, the couple continued to meet surreptitiously at various locales, including the home of CG's grandfather.[17] Many of these meetings were initiated by CG.[18]

On July 15, 1993, while CG was visiting a friend in Sheridan, Wyoming, Pierson and CG had sexual intercourse in Pierson's truck.[19] Four other incidents of sexual intercourse occurred over the next two months.[20] The charged misconduct in this case took place on August 29, 1993, on the couch in Pierson's auto shop.[21] After being approached by local law enforcement, CG's parents confronted their daughter and she confessed to being sexually active with Pierson.[22] Within days the minor's family moved out of the state.[23] Having learned from CG her new location, Pierson met her at a motel in Anaconda, Montana on September 11, 1993, and persuaded CG to run away with him.[24] The next day, the pair left on a fourteen-month cross-country sojourn that ended only after a fraudulent marriage in Oregon on CG's seventeenth birthday and Pierson's arrest and extradition back to Wyoming.[25] At trial CG testified that she had been under Pierson's domination throughout their entire association.[26] Pierson, in contrast, presented witnesses who testified that CG had appeared at all times to be a willing, mature participant in the relationship.[27]

On August 4, 1995, Pierson was convicted of one count of taking indecent liberties with a minor in violation of Wyoming Statute section 14-3-105.[28] The verdict came after a three-day jury trial in Johnson County.[29] The

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15. *Id.* at 1122.
16. *Id.*
17. *Id.*
18. Brief of Appellant, *supra* note 6, at 10.
19. *Id.* at 13. No evidence was ever presented that CG's acts were not voluntary.
20. Brief of Appellee at 5, Pierson v. State, 956 P.2d 1119 (Wyo. 1998) (No. 96-91) [hereinafter Brief of Appellee] (on file with *Land and Water Law Review*).
21. *Id.* at 5-6. Pierson was now thirty-seven years old. Brief of Appellant, *supra* note 6, at 6.
22. Brief of Appellee, *supra* note 20, at 6. Appellee's brief asserts that the police became involved after a complaint had been made to the Department of Family Services (it is not mentioned who made the complaint). *Id.* Appellant's brief states that Pierson contacted law enforcement officials after he heard that CG's family was abusing her. Brief of Appellant, *supra* note 6, at 13.
23. Brief of Appellee, *supra* note 20, at 6.
24. *Id.* at 7-8.
25. *Id.* at 8.
26. Pierson v. State, 956 P.2d 1119, 1122 (Wyo. 1998).
27. *Id.*
28. WYO. STAT. ANN. § 14-3-105 (Michie 1997) provides:

> Except under circumstances constituting sexual assault in the first, second or third

defendant appealed his conviction to the Wyoming Supreme Court. He challenged, among other issues,[30] the constitutionality of section 14-3-105, and the district court's jury instruction that "it is not a defense to the charge of taking immodest, immoral, or indecent liberties with a child under the age of eighteen years that the child consented."[31] Pierson's claim was predicated on Wyoming Statute section 6-2-304.[32] He argued that because a sixteen year-old may legally consent to sexual intercourse under section 6-2-304 (the statutory rape statute), CG's consent had a direct bearing on the relative "indecency" of their activity on August 29, 1993.[33] Pierson asserted that he was deprived of his constitutional right to present a defense because the consent factor was specifically precluded from the jury's deliberations by the jury instructions.[34]

Pierson v. State is the first case to directly address this interplay between sections 6-2-304 and 14-3-105 of the Wyoming Code as it pertains to jury deliberation.[35] The Wyoming Supreme Court, in a 3-2 opinion, reversed and remanded the case back to the district court. The court held it was reversible error not to instruct the jury that the alleged consent of the sixteen year-old minor, while not a complete defense to a charge of taking indecent liberties with a minor, may be relevant to a determination that the defendant had not engaged in conduct which the "common sense of society would regard as indecent and improper."[36]

This case note traces the development of the indecent liberties statute.

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degree as defined by W.S. 6-2-302 through 6-2-304, any person knowingly taking immodest, immoral or indecent liberties with any child or knowingly causing or encouraging any child to cause or encourage another child to commit with him any immoral or indecent act is guilty of a felony, and upon conviction shall be fined not less than $100.00 or more than $1,000.00 or imprisoned in the penitentiary not more than ten years, or both.

As used in this section, 'child' means a person under the age of eighteen years. The statute has been amended since the events giving rise to *Pierson*. 1997 Wyo. Sess. Laws ch. 135, § 2. In the principal case, the indecent liberties statute had no proviso giving preference to Title Six. *Pierson*, 956 P.2d at 1123.

29. *Pierson*, 956 P.2d at 1123. Pierson was sentenced to serve two to four years in the Wyoming State Penitentiary. That sentence was suspended and he was placed on probation for a period of five years. Brief of Appellant, *supra* note 6, at 2.

30. *Pierson*, 956 P.2d at 1120. Pierson also raised issues of prosecutorial misconduct and improper admission of evidence. *Id.* at 1121.

31. *Id.* at 1124. The defense failed to raise the constitutional issue at trial, however the jury instruction was given over defense objection. *Id.* at 1123.

32. WYO. STAT. ANN. § 6-2-304 (Michie 1997) provides, in relevant part: "An actor commits sexual assault in the third degree if: (i) The actor is at least four years older than the victim and inflicts sexual intrusion on a victim under the age of sixteen years." The statute was amended in 1997. 1997 Wyo. Sess. Laws ch. 135, § 1. Prior to its amendment (a) contained a proviso indicating preference for Title Fourteen that stated, "[e]xcept under circumstances constituting a violation of W.S. 14-3-105."

33. *Pierson*, 956 P.2d at 1124.

34. *Id.*

35. *Id.*

36. *Id.* at 1129 (quoting Roberts v. State, 912 P.2d 1110, 1112 (Wyo. 1996)).

The note then examines the Wyoming Supreme Court's interpretation of the interplay of sections 6-2-304 and 14-3-105 of the Wyoming Code and the court's decision in *Pierson v. State* to reverse the district court's failure to correctly instruct the jury on the issue of consent. Finally, this case note asserts that the *Pierson* decision, rather than clarifying the law regarding the interrelationship between the two statutes, exacerbates the latter section's ambiguity, making it violative of constitutional due process guarantees.

BACKGROUND

History of the Offense of "Indecent Liberties"

In contrast to laws punishing the rape of adult women, which date as far back as the Code of Hammurabi, laws aimed at curbing sexual contact between adults and minors have a sparse and inconsistent history in Western society.[37] Documentation of sex crimes against children during the first few centuries A.D. is found primarily in religious canons.[38] The first significant discussion of sexual crimes against children occurred during the maturation of canon law in the Middle Ages.[39] Teachers of canon law taught that sexual intercourse with a girl who was under the age of consent to marry was rape even if the girl consented and failed to protest the intercourse.[40] The age of consent has fluctuated greatly throughout history, at times dipping as low as seven.[41] However, by the fourteenth century the age of consent was generally accepted as twelve for girls and fourteen for boys.[42] When an adult's conduct with a child amounted to sexual contact not involving penetration, the child's consent typically served as a defense to prosecution.[43] In 1861, the English created an offense of "indecent liberties" with children under sixteen which specifically prohibited any sexual contact with children regardless of the child's consent.[44] At that time, only a few American jurisdictions chose to adopt the 1861 English statute.[45] The majority of states con-

37. Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 6 (1997).

38. *Id.*

39. *Id.* at 8.

40. *Id.*

41. *Id.*

42. *Id.* at 9. There are anomalous English cases in which the defendant was released based upon the tender years of the victim, but these cases appear to be more a result of the difficulty in interpreting conflicts between statutes than a recognition that the age of consent was less than ten to twelve. *Id.* at 10-11.

43. *Id.* at 11. At that time, if force could not be proven, no other penalty was available. *Id.*

44. *Id.* at 12 (referencing Offences against the Person Act, 1861, 24 & 25 Vict. Ch. 100 §§ 50, 51 (Eng.)).

45. *Id.* at 17, 136 n.77. The states that adopted the statute at that time were Louisiana, Michigan, Minnesota, Colorado, and Illinois. The judiciaries of both Illinois and Louisiana invalidated their statutes because they failed to define the crime. *See* Milne v. People, 79 N.E. 631 (Ill. 1906); State v. Comeaux, 60 So. 620 (La. 1913).

tinued to prosecute sexual contact offenses under assault statutes.[46]

"Indecent liberties" is a now somewhat antiquated term that was commonly used at the beginning of this century in the statutes of many states. Several state judiciaries claimed the phrase "indecent liberties" was self-defining.[47] In contrast, many jurisdictions seemed to follow the reasoning of the Colorado Supreme Court, which stated in 1909:

> [T]he Legislature employed apt words to describe the offense, because it is evident that the acts constituting the offense mean such as the common sense of society would regard as indecent and improper . . . . True, what shall be regarded as "immodest, immoral and indecent liberties" is not specified with particularity, but that is not necessary. The indelicacy of the subject forbids it. The common sense of the community as well as the sense of decency, propriety, and morality which people generally entertain, is sufficient to apply the statute to each particular case and point out unmistakably what particular conduct is rendered criminal by it.[48]

More recently, most legislatures have either moved away from such a broad definition of the crime and instead specify what acts can be considered "indecent liberties," or have done away with the charge all-together, replacing it with a comprehensive code of sexual assault.[49] For example, in contrast to its 1909 Code, Colorado's current statute provides for an offense of *Sexual Assault On a Child*: "[a]ny actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim."[50] Currently, only three states continue the offense of indecent liberties in its traditionally broad sense: Georgia, North Carolina, and Wyoming.[51] However, both Georgia and North Carolina in-

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46. Phipps, *supra* note 37, at 17.

47. *See* State v. Kunz, 97 N.W. 131 (Minn. 1903); State v. Holte, 87 N.W.2d 47 (N.D. 1957); State v. MacMillan, 145 P. 833 (Utah 1915); State v. Stuhr, 96 P.2d 479 (Wash. 1939); State v. Hoffman, 2 N.W.2d 707 (Wis. 1942). None of these states continue to include a statutory crime of "indecent liberties" in their criminal codes. Phipps, *supra* note 37, at 47, 136 n.196.

48. Dekelt v. People, 99 P. 39 (Colo. 1909) (quoted in Sorenson v. State, 604 P.2d 1031, 1035 (Wyo. 1979)). *See also* People v. Healy, 251 N.W. 393 (Mich. 1933); State v. Minns, 454 P.2d 355 (N.M. 1969); Sissom v. State, 360 S.W.2d 227 (Tenn. 1962). Massachusettes has an offense of "indecent assault and battery." MASS. GEN. LAWS ANN. 265 §§ 13B, 13H (West 1998). South Carolina has a statute that provides a penalty for "lewd and lascivious" contact with a child under sixteen. S.C. CODE ANN. § 16-15-140 (Law Co-op. 1997).

49. *See* MINN. STAT. ANN §§ 609.295, 609.296 (West 1998); N.M. STAT. ANN. § 30-9-13 (Michie 1997); UTAH CODE ANN. § 76-5-401.1 (1997).

50. COLO. REV. STAT. ANN. § 18-3-405 (West 1998).

51. Phipps, *supra* note 37, at 136 n.196; GA. CODE ANN. § 16-6-64 (Supp. 1997) (child molestation defined as: "any immoral or indecent act to or in the presence of any child . . . ."); N.C. GEN. STAT. § 14-202.1 (1997); WYO. STAT. ANN. § 14-3-105 (Michie 1997).

clude language within their statutes that provide that the indecent acts must be done with the purpose to sexually gratify either the actor or the child.[52] This language has the effect of making the crime of indecent liberties or child molestation a specific intent crime.[53]

The Interrelationship Between the Sexual Assault Statutes and "Indecent Liberties"

The Wyoming Supreme Court has attempted on several occasions to clarify the relationship between the sexual assault crimes included in Title Six of the Wyoming Code and the crime of indecent liberties included in Title Fourteen.[54] The defendant in *Ketcham v. State* argued that section 14-3-105 (indecent liberties) had been repealed by implication through the enactment of section 6-4-305 (fourth degree sexual assault) and section 6-4-504 (child abuse).[55] Ketcham contended these statutes were more specific than section 14-3-105 with regard to the prohibited acts, and were inconsistent with, and repugnant to, the indecent liberties statute.[56] The case involved a probation violation for sexual intercourse between the defendant, previously convicted of burglary, and a fourteen year-old girl.[57] The defendant was three days short of his eighteenth birthday. Consequently, he was not four years older than the victim as required by section 6-4-305, nor was he defined as an "adult" as required by section 6-4-504.[58] However, Ketcham failed to raise the issue of the conflicts between the statutes in the district court, thus his claim was subject to review under the plain error standard.[59]

The court held that the defendant failed to show that a clear rule of law had been violated at the trial level.[60] The court also noted that the case arose

52. GA. CODE ANN. § 16-6-64 (Supp. 1997); N.C. GEN. STAT. § 14-202.1 (1997).

53. Specific intent crimes have consistently been upheld against void-for-vagueness constitutional challenges. *See* United States v. Gypsum, 438 U.S. 422, (1978); Screws v. United States, 325 U.S. 91 (1945).

54. This issue frequently arose because the penalties for violating section 14-3-105 were much higher than those for third or fourth-degree sexual assault contained within Title Six. The penalty for a violation of sections 6-4-305 or 6-4-306 has ranged from one to five years maximum. The maximum penalty under the indecent liberties statute has remained constant at ten years. The 1997 amendments to Title Six now provide for a fifteen year maximum penalty for third degree sexual assault. Fourth degree sexual assault has been repealed. 1997 Wyo. Sess. Laws ch. 135, § 1.

55. Ketcham v. State, 618 P.2d 1356, 1358 (Wyo. 1980).

56. *Id.* at 1358-59.

57. *Id.* at 1358. The court found it significant that the sexual relationship had been carried out in spite of the girl's parents' disapproval. The court also points out that the girl left school with Ketcham and spent four or five days with him at which time her parents called the sheriff and reported her missing. *Id.*

58. *Id.* at 1359.

59. *Id.*

60. Review under the plain error rule requires that three specific criteria be fulfilled. First, the record must be clear as to the incident that occurred at trial which is alleged as error. Second, the proponent of

in the context of a probation revocation. It pointed out that a probationer is not entitled to the "full panoply of rights"[61] that attend a criminal prosecution, such as the reasonable doubt standard.[62] Most interestingly, the court held that the defendant did not have standing to invoke the plain error rule. The court noted that section 6-4-305 required a four-year age differential that did not exist between Ketcham and the minor in question.[63] It reasoned that because Ketcham was not subject to violation of section 6-4-305 he could not challenge its validity.[64] The dissenting justices, Rose and McClintock, did not agree with the defendant's repeal by implication argument because legislative intent was not sufficiently clear as to the enactment of the statutes.[65] However, they asserted that the two statutes had to be harmonized in order to come to any proper resolution of the inherent conflict between the laws.[66] The dissent supported Ketcham's argument that by requiring a four-year age differential to the charge of statutory rape, the legislature had decriminalized the behavior for which he was charged.[67] The dissent noted the obvious contradiction between a sexual assault statute which provided for a maximum of a one-year jail sentence for consensual sexual relations with a minor aged twelve to sixteen when consummated with an actor four years older; and a statute which provided for a maximum sentence of ten years for (under *Sorenson*) consensual touching of the clothed breast of a girl under eighteen.[68] The dissent also pointed out that no exception was provided for cases where the defendant was younger than the victim.[69]

In *McArtor v. State* the majority held that "such child" in the statute prohibiting indecent liberties with a minor referred to an immediately preceding characterization of a child as one under the age of eighteen years,

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the rule must demonstrate a violation of a clear and unequivocal rule of law. Third, the proponent must prove that a substantial right has been violated and that the defendant has been materially prejudiced by that violation. These requirements must be fulfilled even if constitutional rights are involved. *Id.* (quoting Madrid v. State, 592 P.2d 709, 710 (Wyo. 1979)).

61. *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471 (1972)).

62. *Id.*

63. *Id.* at 1361.

64. *Id.*

65. *Id.* at 1363 (Rose, J., dissenting). While section 14-3-105 was enacted first in 1957, it was amended in 1978—following the enactment of sections 6-4-301 to 6-4-313. 1978 Wyo. Sess. Laws ch. 25, § 1.

66. *Ketcham*, 618 P.2d at 1363 (Rose, J., dissenting).

67. *Id.* The dissent pointed out the similarity between Wyoming's statute and the Model Penal Code. The MPC states that the rationale of statutory rape is victimization of immaturity. It claims the most convenient way to give effect to the victimization rationale is to require a substantial age differential in favor of the male. *Id.* (*quoting* MODEL PENAL CODE § 213.3(1) discussion on section (Fourth Tentative Draft 1955)).

68. *Id.* The dissent also made reference to the well-established rule that if it was unclear under Wyoming Statutes that Ketcham's acts were criminal, any doubts should be resolved in favor of leniency. *Id.* at 1366 (quoting Whalen v. United States, 445 U.S. 684 (1980)).

69. *Id.*

therefore the statute could not be said to be inapplicable on the basis that the sixteen year-old victim did not qualify under the age requirement.[70] The facts of the case involved consensual sexual intercourse between a girl five months shy of her seventeenth birthday and her adult supervisor in the police cadet program in which she was a member.[71] The court held that the enactment of section 6-2-304 (statutory rape) did not repeal the indecent liberties statute by implication.[72] The majority pointed to the cross-referencing of section 14-3-105 within section 6-2-304 of the Wyoming Code to reject McArtor's repeal by implication argument.[73]

The court also rejected the defendant's argument that the statutory rape statute should have been applied as a special statute which must govern over the general indecent liberties statute.[74] The court explained that the defendant's urged rule of construction is only appropriate to determine legislative intent.[75] The court noted legislative intent had already been determined by other means, and further, it was not immediately discernible which of the two statutes was more specific.[76]

Justices Rose and Cardine each filed dissenting opinions. Justice Rose held to his position in *Ketcham* that Wyoming did not prohibit the sort of consensual sexual activity involved in the appeal, finding that the sexual assault statutes defined the criminality of sexual activity between persons over the age of fifteen or less than four years apart.[77] Justice Cardine observed that to construe the statute in the manner required by the majority would mean that consensual sexual intercourse between a boy eighteen years-old and a girl one day short of her eighteenth birthday was immoral, immodest, and indecent and may constitute a felony punishable by ten years in prison.[78] He argued that the result from that construction of the statute was clearly contrary to the legislative intent found in the adoption of the

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70. McArtor v. State, 699 P.2d 288, 292 (Wyo. 1985). At that time, the statute did not specifically provide a definition stating that "child" shall be defined as a person under age eighteen. WYO. STAT. ANN. § 14-3-105 (1957).

71. *McArtor*, 699 P.2d at 292 n.2.

72. *Id.* at 293.

73. *Id.* The court pointed to the amendment of section 6-2-304 in 1984, which stated to apply that offense "except under circumstances constituting section 14-3-105." WYO. STAT. ANN. § 6-2-304 (Michie 1985). This language has since been repealed by the 1997 amendments which 1) eliminated the proviso under section 6-2-304, and 2) added to section 14-3-105 the proviso "[e]xcept under circumstances constituting sexual assault in the first, second, or third degree as defined by W.S 6-2-302 through 6-2-304." 1997 Wyo. Sess. Laws. ch. 135, §§ 1-2.

74. *McArtor*, 699 P.2d at 293-94.

75. *Id.*

76. *Id.* The court pointed to the fact that sexual intrusion is an element of sexual assault, while a special onus was placed on parents, guardians and custodians under indecent liberties. That special burden language has since been repealed. 1978 Wyo. Sess. Laws ch. 25, § 1.

77. *McArtor*, 699 P.2d at 295 (Rose, J., dissenting).

78. *Id.* at 296 (Cardine, J., dissenting).

sexual assault statutes.[79]

The court in *Campbell v. State* was forced to revisit the age of the victim as required under section 14-3-105 because the statute had been amended in 1978.[80] The court ruled that based upon various statutes *in pari materia*,[81] the age of the minor victim required by the statute was now under nineteen years.[82] Justice Cardine and Justice Rose filed a specially concurring opinion in which they noted that even if the indecent liberties statute is applied narrowly to cases not covered under a sexual assault statute, its application still creates unfairness.[83]

In *Derksen v. State* the court held that the crime of taking immodest, immoral, or indecent liberties with a minor could not be a lesser-included offense of second degree sexual assault.[84] Derksen was tried for second degree sexual assault for tying the hands of his ten year-old stepdaughter, fondling her, and forcing her to touch and fellate his penis.[85] He was convicted of the lesser-included offense of taking indecent liberties with a minor and sentenced to nine to ten years in the penitentiary.[86] The court said that in Wyoming an offense is "necessarily included" in the charged offense when "the elements of the lesser offense are identical to part of the elements of the greater offense."[87] The court found that indecent liberties cannot be a lesser included offense of second degree sexual assault because the indecent liberties statute covers conduct much broader than the sexual intrusion required by the sexual assault statue.[88]

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79. *Id.*

80. Campbell v. State, 709 P.2d 425, 426 (Wyo. 1985); 1978 Wyo. Sess. Laws. ch. 25, § 1.

81. *In pari materia* means upon the same matter or subject. BLACK'S LAW DICTIONARY 544 (6th ed. abr. 1991). Statutes "in pari materia" are those relating to the same thing or having a common purpose. This rule of statutory construction, that statutes which relate to the same subject matter should be read, construed and applied together so that the legislature's intention can be gathered from the whole of the enactments, applies only when the particular statute is ambiguous. *Id.*

82. *Campbell*, 709 P.2d at 428. Because of the amendment, the court was unable to use the statutory construction it had utilized in *McArtor*. The incidents underlying *McArtor* took place prior to the 1978 amendment. *Id.* at 426.

83. *Id.* at 429 (Cardine, J., specially concurring).

84. Derksen v. State, 845 P.2d 1383, 1388 (Wyo. 1993).

85. *Id.* at 1385.

86. *Id.*

87. *Id.* at 1386 (quoting State v. Selig, 635 P.2d 786, 790 (Wyo. 1981)).

88. As previously noted, section 14-3-105 has been held to apply to sexual intrusion, sexual contact, and consensual sexual intercourse. *See* McArtor v. State, 699 P.2d 288 (Wyo. 1985); Montoya v. State, 822 P.2d 363 (Wyo. 1981); Sorenson v. State, 604 P.2d 1031 (Wyo. 1979). Perhaps the most extreme interpretation of the statute took place in Roberts v. State, 912 P.2d 1110 (Wyo. 1996). The court held that Roberts had violated his probation by engaging in indecent liberties. His acts constituted jumping into bed with his thirteen year-old daughter and nuzzling her neck and mouth with his nose. *Id.* at 1112.

Void for Vagueness Challenges to Section 14-3-105 of the Wyoming Code

The Wyoming Supreme Court has addressed several challenges to the constitutionality of the indecent liberties statute over the past nineteen years.[89] These challenges were predicated upon the doctrine that a criminal law will violate due process under the Fifth and Fourteenth Amendments if it fails either of two tests. A law may be void-for-vagueness if "it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" *or* "if it encourages arbitrary and erratic arrests and convictions."[90] The first twin essential of due process is violated by a statute which "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[91] The second essential, which discourages arbitrary application of a statute, requires that the standards of enforcement be sufficiently precise in order to avoid "involving so many factors of varying effect that whether the person to decide in advance nor the jury after the fact can safely and certainly judge the result."[92] Implicit within the void-for-vagueness doctrine is also a notion that the separation of powers commands the courts to invalidate improperly framed legislation.[93]

The Wyoming Supreme Court first rejected a facial, void-for-vagueness constitutional challenge to section 14-3-105 in *Sorenson v. State*.[94] The court held that "liberties" are what the common sense of society would regard as indecent or improper.[95] The court also found that a person of ordinary intelligence can weigh his contemplated conduct against a prohibition of taking immodest, immoral, or indecent liberties against a child and know whether or not such contemplated conduct is proscribed by it.[96] The court stated that it agreed with a Kentucky court that had said, "[w]e believe that citizens who desire to obey the statute will have no difficulty in

89. *See* Moore v. State, 912 P.2d 1113 (Wyo. 1996); Ochoa v. State, 848 P.2d 1359 (Wyo. 1993); Britt v. State, 752 P.2d 426 (Wyo. 1988); Griego v. State, 761 P.2d 973 (Wyo. 1988); Sorenson v. State, 604 P.2d 1031 (1979).

90. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (invalidating a Florida vagrancy statute and establishing the current standard for determining whether a given statute is 'void-for-vagueness').

91. Connally v. General Constr. Co., 269 U.S. 385, 391 (1925).

92. Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927).

93. The concept that is operative here is that a vague statute violates the separation of powers by passing the legislature's job to the judiciary. Joseph E. Bauerschmid, *Mother of Mercy-Is This the End of RICO?-Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO 'Pattern D,'* 65 NOTRE DAME L. REV. 1106, 1114 (1990).

94. Sorenson v. State, 604 P.2d 1031 (Wyo. 1979). Sorenson was convicted of one count of indecent liberties for rubbing the breasts of a twelve year-girl through her clothing while also attempting to unbutton her shirt. *Id.* at 1032.

95. *Id.* at 1034 (quoting People v. Healy, 251 N.W. 393 (Mich. 1933)).

96. *Id.* at 1035.

understanding it."[97] The *Sorenson* court, while deciding that the statute gave sufficient notice to be constitutional, completely failed in its opinion to apply the necessary second prong of due process analysis.[98] The court did not determine whether section 14-3-105 encouraged arbitrary arrests and convictions by "failing to give judges and juries precise standards with which to ascertain the offense."[99] Following *Sorenson*, the Wyoming Supreme Court has summarily denied frequent "as applied" void-for-vagueness challenges to section 14-3-105.[100]

PRINCIPAL CASE

The Wyoming Supreme Court identified four issues that Lewis Pierson raised on appeal.[101] After recounting several pages of facts, the court began its analysis by pointing out that because Pierson had not raised his constitutional challenge at the trial level those claims must be reviewed under a "plain error standard."[102] The court rejected Pierson's claim that the indecent liberties statute as applied to the facts of his case was unconstitutionally vague.[103] The court stated that a statute is unconstitutional if it fails to give a person of ordinary sensibility fair notice that the contemplated conduct is forbidden,[104] and the facts of the case demonstrate arbitrary and discrimina-

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97. *Id.* at 1035 (quoting Colton v. Kentucky, 407 U.S. 194, 110 (1972)).

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

99. Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927). The Supreme Court has, from time to time, expressed a preference for one of the prongs over the other. In *Kolender v. Lawson* the Court stated:

> although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine–the requirement that a legislature establish minimal guidelines to govern law enforcement.

Kolender v. Lawson, 461 U.S. 352, 357 (1983). Clearly, Wyoming's indecent liberties statute would fail this prong of the analysis, as it sets no ascertainable standards for adjudication, and no minimal guidelines to govern law enforcement.

100. *See* Moore v. State, 912 P.2d 1113 (Wyo. 1996); Ochoa v. State, 848 P.2d 1359 (Wyo. 1993); Britt v. State, 752 P.2d 426 (Wyo. 1988); Griego v. State, 761 P.2d 973 (Wyo. 1988).

101. Pierson v. State, 956 P.2d 1119, 1121 (Wyo. 1998). This note concentrates on the issues of whether an improper jury instruction deprived Pierson of his constitutional right to present a defense and whether the indecent liberties statute was void-for-vagueness as applied to the facts of the case. The defendant also raised issues of prosecutorial misconduct and improper admission of evidence. *Id.* at 1120.

102. *Id.* at 1123.

> To establish 'plain error' first the record must clearly present the incident alleged to be error. Second, appellant must demonstrate that a clear and unequivocal rule of law was violated in a clear and obvious, not merely arguable way. Last, appellant must prove that he was denied a substantial right resulting in material prejudice against him.

Id. (quoting Brown v. State, 736 P.2d 1110, 1115 (Wyo. 1987)).

103. *Id.* at 1124.

104. *Id.* at 1123 (quoting Britt v. State, 742 P.2d 426, 428 (Wyo.1988)).

tory enforcement of the statute.[105] Pierson argued a person of ordinary intelligence would not know that consensual intercourse with a sixteen year-old was in and of itself proscribed because the age of consent (for statutory rape purposes) is sixteen and because his intentions were not indecent.[106]

The court rejected this argument by stating that Pierson failed to take into account legal precedent and the evidence presented by the State.[107] The court cited multiple cases where an adult was convicted of taking indecent liberties with a minor who was sixteen.[108] The court emphasized the State's evidence that CG was an inexperienced fifteen year-old who lived with her parents and had never had a boyfriend when the relationship began.[109] CG testified that she was overwhelmed by the married, thirty-six year-old Pierson's advances. Pierson had investigated the law and knew that Wyoming did not allow marriage to a person under eighteen without parental consent, and he knew that CG's parents disapproved of their relationship. Pierson had also told the law enforcement officer who interviewed him that he had been warned, "he'd be in trouble."[110] The court held that Pierson had fair notice that a sexual relationship with an inexperienced sixteen year-old, consummated in deliberate disregard of her parents interdiction, and while still legally married to another, is prohibited conduct in Wyoming.[111] The court also noted that there was no evidence of arbitrary or discriminatory enforcement of the statute.[112]

After rejecting Pierson's constitutional challenge, the court held that Pierson had been denied his right to due process through an improper jury instruction.[113] The court compared the indecent liberties statute (section 14-3-105) and the statutory rape statute (section 6-2-304) *in pari materia* and determined that the legislature intended the conduct under "indecent liberties" to be more culpable than that required under the statutory rape statute.[114] The court stated that it "found no logical support for the State's contention that consensual sexual intercourse between an adult and a minor over the age of fifteen, without more, is sufficient to convict a defendant of

105. *Id.* (quoting Griego v. State, 761 P.2d 973, 975 (Wyo. 1988)).
106. *Id.* at 1123-24.
107. *Id.* at 1124.
108. Moore v. State, 912 P.2d 1113 (Wyo. 1996); Ochoa v. State, 848 P.2d 1359 (Wyo. 1993); Scadden v. State, 732 P.2d 1036 (Wyo. 1987); McArtor v. State, 699 P.2d 288 (Wyo. 1985).
109. *Pierson*, 956 P.2d at 1124.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 1125.
114. *Id.* At that time section 6-2-304 provided for a maximum sentence of five years while section 14-3-105 provided for a maximum sentence of ten years. WYO. STAT. ANN. §§ 6-2-304, 14-3-105 (Michie 1996). Section 6-2-304 has since been amended to provide for a maximum sentence of fifteen years. 1997 Wyo. Sess. Laws ch. 135, § 1.

taking indecent liberties with a minor."[115]

The court further noted that the legal age of consent designated by section 6-2-304 does not resolve the question of whether the victim, in fact, gave an informed consent to the charged conduct.[116] Nor does it resolve the question as to whether the conduct, even if consensual, was indecent or immoral.[117] Specifically the court announced that because the term "indecent liberties" relies on the common sense of society, and members of the jury will exercise that common sense, they must be allowed to consider the totality of the circumstances relating to the culpability of the defendant's conduct.[118] The "consent" must also be considered in light of the facts relevant to the victim's ability to give informed consent.[119] These facts include the victim's relative maturity, age, experience, the extent of the minor's parental involvement, and any evidence of the defendant's manipulation or coercion of the minor.[120] The court concluded that the minor's consent is relevant, and it is up to the jury to determine whether the minor's consent made a defendant's conduct indecent and improper as the common sense of society would regard it.[121]

The dissent argued that Pierson's conviction should be upheld under the doctrine of *stare decisis*.[122] The dissent asserted that precedent demonstrated without any equivocation that the offenses proscribed in the two statutes are distinct from one another, and that the majority erred in blurring that distinction by suggesting that a defense under the statutory rape statute (consent) could be a partial defense under the indecent liberties statute.[123] Justice Taylor, with whom Justice Golden joined, stated that it was apparent that a clear rule of law emanating from *McArtor* had been undercut to such a degree as to overrule *McArtor*.[124] He argued that sexual intercourse with a child is a violation of the indecent liberties statute and stated that particular societal position is not affected by the defense of consent under the sexual assault statutes.[125] However, because the three-member majority of the court found reversible error, the case was remanded back to the district court for further adjudication.

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115. *Pierson*, 956 P.2d at 1125.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 1126.
120. *Id.*
121. *Id.* at 1128.
122. *Id.* at 1129 (Taylor, J., dissenting). "*Stare decisis:* to abide by or adhere to, decided cases." BLACK'S LAW DICTIONARY 978 (6th ed. abr. 1991).
123. *Pierson*, 956 P.2d. at 1130.
124. *Id.*
125. *Id.*

ANALYSIS

By adopting Wyoming Statute section 14-3-105 as part of the "Child Protective Act of 1957," the Wyoming Legislature recognized the traumatic, corrosive, and continuing harm that befalls both individuals and a society when its children are sexually molested.[126] The indecent liberties statute is an admirable attempt to protect the children of Wyoming from sexual abuse and exploitation. Since its adoption, the statute has been used extensively in every county in Wyoming.[127] Raw statistics outline the extent of the statute's application throughout the state.[128]

Considering the statute's broad usage, the court's decision in *Pierson* will undoubtedly have especially far-reaching impact upon the state's criminal adjudications. *Pierson v. State* was a long overdue attempt by a supreme court majority to read Wyoming's statutes which cover sexual conduct with minors *in pari materia.* However, while the court did finally seek to harmonize the relevant statutes, its decision may serve to further exacerbate the very real due process issues already associated with any application of section 14-3-105.

The court decided that the jurors in *Pierson* had not been properly instructed as to the state of the law when they were told through Jury Instruction nine that, "it is not a defense to the charge of taking immodest, immoral, or indecent liberties with a child under the age of eighteen years that the child consented."[129] Ironically, this instruction is actually taken from the Wyoming Pattern Jury Instructions.[130] Nevertheless, the court was correct in

126. Many studies have indicated that sexually abused children suffer from psychological symptoms ranging from anxiety, nightmares, aggression, depression, sexually inappropriate behavior, and self-injurious behavior. Phipps, *supra* note 37, at 83-84. Adult survivors of sexual abuse suffer from sexual dysfunction, anxiety, fear, depression, and revictimization. Phipps, *supra* note 37, at 90-92. The physical effects on children can also be devastating, ranging from permanent bodily injury to pregnancy and sexually transmitted diseases. Phipps, *supra* note 37, at 87.

127. At least 1,639 charges of "indecent liberties with a child" have been adjudicated in Wyoming since the State of Wyoming Department of Criminal Investigations has begun keeping its database—some ten years after the adoption of the statute. This number is comprised only of those charges in which the party was arrested for "indecent liberties" regardless of the ultimate outcome of the charge. This number does not include arrests for other acts which at some point in pre-adjudication were changed to charges of "indecent liberties." Adding those numbers would no doubt greatly enlarge the total. This raw information was acquired and tabulated from data gathered from fingerprints on file. Interview with Dawn Kelly, Records Analyst, Wyoming Department of Criminal Investigations, in Cheyenne, Wyo. (August 27, 1998).

128. *Id.* The effectiveness of the statute as a prosecutorial tool is undisputed and obviously that factor must be considered relevant in making a determination as to section 14-3-105's overall validity within Wyoming's Criminal Code. However, other guiding principles of law must also be given due consideration in making a definitive assessment of a statute's legitimacy.

129. Pierson v. State, 956 P.2d 1119, 1124 (Wyo. 1998).

130. Wyoming Pattern Jury Instructions no. 23.07 (1997). Furthermore, whether the statement correctly reflects the law it is *semantically* accurate. A minor cannot consent to an "indecent" act any more than an adult can consent to being battered. Rather it is the consent of the victim that negates the offense

determining that when a minor is old enough to give consent under the sexual assault statutes, that fact is material in determining whether the defendant's acts were, in fact, "indecent." The doctrine of reading ambiguous statutes *in pari materia* requires that those statutes that relate to the same subject matter should be read, construed, and applied together so that the legislature's intention can be gathered from the whole of the enactments.[131] Clearly, third degree sexual assault (statutory rape) relates to indecent liberties in that both statutes provide penalties for sexual intercourse with minors.[132] In most states, where criminal codes on the subject are comprised only of comprehensive sexual assault statutes, sexual intercourse with a minor over the age of consent is not a crime.[133] The act is certainly not "indecent" *per se.* This is the interpretation that Justices Cardine and Rose attempted to give to section 14-3-105 in *Ketcham v. State, McArtor v. State,* and *Campbell v. State.*[134] These justices took the view that the legislature had essentially decriminalized sex with minors over sixteen, or sex between parties closer than four years apart in age, by its adoption of section 6-2-304.[135] This position is logical given the plain language contained within the statutory rape statute that establishes both an age differential and a victim age of under sixteen.[136] A reading of section 14-3-105 that would have applied the statute only when the conduct was not contemplated by the sexual assault statutes would appear to have been rational.[137]

However, for years the legislature continued to amend the indecent liberties statute without substantially changing its content, which would indicate a continued approval of the section.[138] Further, as a practical matter, a large portion of culpable sexual conduct that occurred with a minor over the age of sixteen could not be prosecuted under any other statute. If the acts did not rise to the level of sexual assault in the second degree,[139] or did not

itself.

131. BLACK'S LAW DICTIONARY 544 (6th ed. abr. 1991).

132. WYO. STAT. ANN. §§ 6-2-304, 14-3-105 (Michie 1997).

133. Phipps, *supra* note 37, at 60-61, 136 n.242.

134. Ketcham v. State, 618 P.2d 1356, 1362-66 (Wyo. 1989) (Rose, J., dissenting); Campbell v. State, 709 P.2d 425, 427-29 (Wyo. 1985) (Rose, J., specially concurring); McArtor v. State, 699 P.2d 288, 294-99 (Wyo. 1985) (Rose, J., dissenting), (Cardine, J., dissenting).

135. *See supra* note 132.

136. WYO. STAT. ANN. § 6-2-304 (Michie 1997) provides in part, that if a person more than four years older than a minor, who is fifteen years old or younger, engages in sexual intercourse with the minor, the actor commits third degree sexual assault. *Id.*

137. This reading has, in fact, finally occurred through the 1997 amendment to the statute. 1997 Wyo. Sess. Laws ch. 135, § 2. Now, it would appear that indecent liberties can only be applied under circumstances which do not constitute first, second, or third degree sexual assault. However, this interpretation of the amendments may not be shared by Wyoming prosecutors. In the recent case of *State v. Robinson* adjudicated in Albany County in September of 1998, the defendant was convicted of indecent liberties for acts, which if proven, constituted third degree sexual assault. The defendant was over four years older than the minor who was under age sixteen. Robinson v. State, CR-62-77 (Sept. 9, 1998).

138. WYO. STAT. ANN. § 14-3-105 has been amended in 1977, 1978, 1984, 1996 and 1997.

139. WYO. STAT. ANN. § 6-2-303 (Michie 1997).

include incest,[140] indecent liberties was the only offense that a prosecutor could charge. Most significantly, the 1984 amendment to the third degree sexual assault statute specifically conditioned its application to circumstances *other than* those constituting a violation of section 14-3-105.[141] This, in all practicality, had the effect of writing third degree sexual assault out of existence.[142] After all, indecent liberties has been applied to behavior ranging from sexual contact through clothing, to sexual intrusion, to consensual sexual intercourse with victims up to the age of eighteen.[143] The statute has also been applied to sexual intercourse between two minors who were less than four years apart in age.[144]

In *Roberts v. State,* a probation revocation case, the statute had even been applied by the district court to a defendant who jumped on his thirteen year old daughter's bed in the morning, rubbed her side and nuzzled her neck and mouth with his nose.[145] The supreme court concluded that the evidence supported the factual conclusion that Roberts' acts were indecent as contemplated by the statute.[146] The court went on to say, "[i]t is not necessary that the minor's private parts be subjected to the misconduct and some acts which may not be indecent in themselves may be made so by words and circumstances."[147] This language emphasizes that the analysis for a conviction under section 14-3-105 is a very fact specific one. Ironically, the proper question might be: are there any acts that the Wyoming Supreme Court is prepared to say are absolutely not contemplated as indecent by the statute?

The majority in *Pierson* stated that it "finds no logical support for the State's contention that consensual sexual intercourse between an adult and a minor over the age of fifteen, *without more,* is sufficient to convict a defendant of taking indecent liberties with a minor."[148] Perhaps the pertinent question is what circumstance would the supreme court consider "more" for

140. WYO. STAT. ANN. § 6-4-402 (Michie 1997).

141. 1984 Wyo. Sess. Laws ch. 44, § 2 (emphasis added).

142. Greg Phillips, State Senator from Evanston, used this expression when discussing his reasons for sponsoring the 1997 amendments to both sections 6-2-304 and 14-3-105. Telephone Interview with Greg Phillips, state senator (August 28, 1998). The amendments condition the application of indecent liberties only under circumstances *not* constituting third degree sexual assault rather than vise-versa, finally recognizing the position urged by Justices Rose, Cardine, and McClintock. (It is also a condition that the circumstances not constitute first or second degree sexual assault).

143. *See supra* note 88.

144. Ketcham v. State, 618 P.2d 1356 (Wyo. 1989).

145. Roberts v. State, 912 P.2d 1110 (Wyo. 1996).

146. *Id.* at 1112. The standard the court was applying was the high one of "abuse of discretion" on the part of the trial court. Further, Roberts was on probation after being convicted of indecent liberties with a minor. *Id.*

147. *Id.*

148. Pierson v. State, 956 P.2d 1119, 1125 (Wyo. 1998) (emphasis added). As the dissent points out, defendants have been convicted of indecent liberties under just those very circumstances. *Id.* at 1129.

purposes of determining whether section 14-3-105 has been violated. Following *Pierson*, "more" would seem to include a large age gap between the defendant and the minor, the fact that the conduct began while the defendant was still married, and the fact that the defendant was aware that the minor's parents disapproved of the relationship. This last factor appears to be especially significant to the court and is often prominently mentioned in other decisions applying the statute.[149]

The dissent asserted that the majority's opinion in *Pierson* overruled precedent.[150] This would appear to be true. However, while the *Pierson* dissent asserted that *McArtor* was the overruled case, one might argue that the facts in *McArtor* were substantially different than those of *Pierson*. In *McArtor* the older male was in a supervisory position over the minor cadet in his command, and the sexual intercourse took place while the pair were actually on patrol.[151] Further, at that time section 14-3-105 placed a special onus on those who supervised minors.[152] However, the facts in *Moore v. State*, a 1996 case, are very similar to those in *Pierson*.[153] In *Moore*, the thirty year-old defendant and the sixteen year-old minor (KJ) had run away in an attempt to marry.[154] Unable to find a state where this was possible, the pair returned to Wyoming.[155] The relationship ended and the minor soon discovered she was pregnant.[156] The State charged Moore with two counts of indecent liberties, one with KJ and one with her seventeen year-old successor.[157] The defendant pleaded *nolo contendere* to one charge and the other was dismissed.[158] The supreme court rejected Moore's appeal by stating, "we have already eliminated marriage as a plenary defense to a violation of section 14-3-105 and note that the consent of KJ was vitiated by her minority and consequent lack of capacity to consent."[159] Certainly that language ap-

149. Perhaps the court sees the defendant's interference with the parent-child relationship as an aggravating circumstance to the charged sexual misconduct. The Supreme Court has recognized "the importance of the parental role in child-rearing." Belotti v. Baird, 443 U.S. 622 (1979). Some circuits have describe a parents' right as a fundamental protected privacy and liberty interest in family and child rearing. *See* McCollester v. Keene, 668 F.2d 617 (1st Cir. 1982).

150. McArtor v. State, 699 P.2d 288 (Wyo. 1985).

151. *Id.*

152. WYO. STAT. ANN. § 14-3-105 (Michie 1977). The language that imposed a special burden on adults in authority has since been repealed. 1978 Wyo. Sess. Laws. ch. 25, § 1.

153. Moore v. State, 912 P.2d 1113, 1114 (Wyo. 1996).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1116. Moore had argued that the statute was vague as applied to his conduct because had he and the sixteen year-old victim been married, no prosecution would have occurred. *Id.* at 1115. The court rejected this argument by emphasizing section 6-2-307 of the Wyoming Code which eliminates marriage as a complete defense to sexual assault. The court held, *a fortiari*, that the fact of marriage is also unavailing as a defense to the crime of indecent liberties. *Id.* This reasoning seems superficial. Section 6-2-307 was enacted with the purpose of eliminating marriage as an absolute common law

pears to be overruled by *Pierson*.[160]

The dissent's dispute with the majority's position in *Pierson* appears to turn less on whether consent *is* a defense to the charge of indecent liberties and more on whether it *should* be. The dissent seems to indicate that they would be more comfortable with a black letter *per se* rule:[161]

> Sexual intercourse with a child is a violation of the indecent liberties statute. That societal opinion is not affected by the defense of consent under the sexual assault statutes, and there is no valid purpose to be accomplished in this case, other than attempting to rescue Pierson from the consequences of his conduct proscribed by the indecent liberties statute.[162]

In contrast, the majority held that the conflicting language of section 6-2-304 could not be ignored in an application of section 14-3-105 to determine whether the legislature actually intended the law to cover the defendant's conduct.[163] The dissenting Justices in *Pierson* erred by failing to admit that a sixteen year-old's voluntary participation in sexual intercourse is expressly recognized by Wyoming statutes and therefore must be relevant in determining whether an adult's behavior with that minor was "indecent" or "immoral" and thus, criminal.

Pierson v. State is an example of a case that demonstrates the vagueness and ambiguity inherent within the poorly written indecent liberties statute. While the supreme court has said that "[the Wyoming Constitution] will not tolerate a criminal law so lacking in definition that each defendant is left to the vagaries of individual judges and juries,"[164] that appears to be

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defense to forcible sexual assault. No longer would the fact of marriage serve as a type of perpetual consent on the part of one spouse to acquit the other of any charge of rape. With regard to indecent liberties, marriage would seem to abrogate some part of the indecency or immorality of the conduct. The differing purposes of the two statutes in question would appear to make an *a fortiari* application of one to the other inappropriate.

160. Interestingly, the court says that marriage is not a defense to the charge. *Id.* at 1116. However, one could argue that consensual sexual intercourse between a married couple, though comprised of an adult and a minor over age sixteen, is not contemplated as indecent by the statute. When 1) the minor's parents have given written consent to marry as allowed by section 20-1-102, and 2) the relationship was formalized by sectarian or legal authorities. Alternatively, the statute as applied in that case may not survive the strict scrutiny that would be required if its application would impinge on the fundamental right of marital privacy suggested in *Griswold v. Connecticut*, 381 U.S. 479 (1965). This scenario does, however, lend support to an equal protection argument. A minor with parents who will consent to marriage give a complete defense to their child's adult partner, while a minor whose parents refuse to consent to marriage leave their child's adult partner open to criminal penalties of up to ten years in prison.

161. A *per se* rule, such as that found within the statutory rape statute, would certainly eliminate many of the problems currently associated with the application of the indecent liberties statute.

162. Pierson v. State, 956 P.2d 1119, 1130 (Wyo. 1998) (Taylor, J., dissenting).

163. *Id.* at 1125.

164. Sorenson v. State, 604 P.2d 1031, 1033 (Wyo. 1979) (quoting State v. Gallegos, 384 P.2d 967,

precisely what section 14-3-105 requires, perhaps even more so after the *Pierson* decision. Each prosecutor, then judge or jury decides on an *ad hoc* basis whether the defendant has engaged in conduct that "the common sense of society would regard as indecent and improper."[165] No guidance is given to these officials by the legislature to help them determine even the outer parameters of the contemplated offense.

A stark illustration of this lack of guidance occurs in *Pierson*. Many of the objections at the trial level involved whether individual witnesses should be able to testify regarding their beliefs and the beliefs of their community about much older men marrying minor girls.[166] The supreme court said in *Pierson* that the district court committed error when (in ruling on an objection of this type) it stated, "the problem is we're not talking about a societal standard here. We're talking about one particular incident and it constitutes a violation of our statutes, so the objection is sustained on that point."[167] First, the Wyoming supreme court found that the trial court's statement misstated the law.[168] The very definition of the offense of indecent liberties incorporates a societal standard.[169] Secondly, the reviewing court also found that the judge's remarks might have inadvertently indicated that the trial court believed the prosecution had proven its case.[170]

There is a more disturbing truth revealed by the district court's statement that illuminates the shortcomings of an incorporation of a societal standard within a criminal code. The judge may have believed that the statute was violated, but the jurors were free to return an acquittal. While that is essentially true in any criminal adjudication; in a case interpreting a societal standard the jury would in essence have determined that the acts were not "indecent" or "improper," in Johnson County. So, would a county attorney then be unable to bring a similar charge against the next "Lewis Pierson?" After all, the people of Johnson County would have spoken, in effect finding that those particular acts are not indecent by their societal standard. Alternatively, are we to believe that society's standard shifts from jury to jury, or case by case? If so, what happens to the principles of continuity, clarity, certainty and constructive notice hoped for within the state's criminal justice system?

In delineating its new "consent as a partial defense" parameters, the *Pi-*

968 (Wyo. 1963)).
165. *Id.* at 1035.
166. Brief of Appellant, *supra* note 6, at 32.
167. *Pierson*, 956 P.2d at 1127.
168. *Id.*
169. *Id.*
170. *Id.*

erson court stated that in determining whether a minor gave meaningful consent, a jury may look at several factors.[171] They include: the victim's relative maturity, experience,[172] emancipation status, extent of parental involvement in the minor's decisions, and evidence of the defendant's manipulation or coercion of the minor.[173] These factors are simply more ambiguities that exacerbate the jury's attempt to determine "indecency."

If the minor were promiscuous, but the parents were very involved in the minor's life, and the adult defendant was aware that the parents disapproved of the relationship, would that make the conduct indecent? If the minor were a virgin but emancipated, and the adult was only three years and eleven months older than the minor, would that be indecent conduct? If the parties were nine years apart but the evidence showed the minor was unquestionably the sexual aggressor would that mean that the defendant had violated the indecent liberties statute? The factors that the *Pierson* court articulates can be incessantly analyzed in various combinations. Moreover, the hypotheticals illustrate certain due process problems arising from the court's decision. In a borderline case, because there is no definitive prior notice, the court's disregarded *ad hoc* after-analysis by a jury[174] is the only way one could know *with absolute certainty* whether one's contemplated conduct is a violation of section 14-3-105.

Conceivably, two seventeen year-olds who engaged in heavy petting after the prom could both be charged with, and convicted for, taking "indecent liberties with a minor." If a prosecutor and subsequently a jury determined that those acts were indecent and immoral by the standards of their society, the minors could each be sentenced to a maximum sentence of ten years in prison. Of course, one might say, how ludicrous—no prosecutor would bring that charge. However, as extreme as the example is, it illustrates the fact that the Wyoming legislature has left the determination of the parameters of the offense of "indecent liberties" solely up to the other branches of government.

After *Pierson,* in defending a case of indecent liberties through "consent as a partial defense" it appears that a defendant must now show three things. First, that the minor had capacity to give consent to the sexual contact based upon the *Pierson* factors. Second, that the minor did actually con-

171. *Id.*

172. Does this mean prior sexual experience? Wyoming's rape shield statute at section 6-2-312 only specifically mentions the sexual assault statutes, and any "lesser included offenses." The court has determined that term does not include the indecent liberties statute. Derksen v. State, 845 P.2d 1383 (Wyo. 1993). However, amending section 6-2-312 to include section 14-3-105 would fulfill the goals and purpose of the rape shield law, if this factor begins to be used as a defense to the charge.

173. *Pierson,* 956 P.2d at 1126.

174. *See supra* note 164.

sent to the sexual contact. And last, that the conduct between the defendant and the minor was not "indecent" or "immoral" as defined by their society's standard. It is an arguable point whether the *Pierson* decision will actually benefit criminal defendants.

The 1997 Amendments to the Criminal Code

Perhaps some of the problems associated with the application of the indecent liberties statute may have been eliminated by the legislature's 1997 amendments. Both Wyoming Code sections 14-3-105 and 6-2-304 were altered.[175] It remains to be seen whether these 1997 amendments will have any substantive effect, in practice, on the application of the statutes. The amendments did two things, 1) provide that the indecent liberties statute can only be applied in circumstances not constituting first, second, or third degree sexual assault,[176] and 2) remove the provision that third degree sexual assault can only be applied in circumstances not constituting indecent liberties.[177] These enactments would seem to go a long way toward rationalizing Wyoming's criminal code on sex crimes. The legislative changes attempt to reverse the swallowing effect that section 14-3-105 previously had on section 6-2-304 when the statutes were applied as written.[178] One can now infer that indecent liberties is not comprised of those acts which make up the sexual assault statutes. However, prosecutors still appear to prefer to pursue charges under the indecent liberties statute even though the penalty for third degree sexual assault has been greatly increased from a maximum sentence of five to fifteen years.[179]

Unfortunately, the amendments still don't define the crime and thus leave available prosecution under section 14-3-105 for all of the most borderline cases; those types of cases that *cannot* be brought under Title Six. For example, cases where 1) the parties are less than four years apart, 2) the minor is above age sixteen, or 3) the actor and victim are both minors.[180] These "hard cases" illustrate the dire need for greater guidance and speci-

175. 1997 Wyo. Sess. Laws ch. 135, § 1-2.

176. WYO. STAT. ANN. § 14-3-105 (Michie 1997).

177. WYO. STAT. ANN. § 6-2-304 (Michie 1997).

178. *See supra* note 88 and accompanying text.

179. *See supra* note 137. As mentioned previously, this appears to have been the case in *Robinson v. State*. Robinson v. State, CR-6277 (Albany County, Sept. 9, 1998). Perhaps this is because indecent liberties, comprised mainly of a societal standard, rather than elements that must be proven, is much easier to argue to a jury.

180. Even following the amendments, there are cases still being prosecuted where the actor is not four years older than the minor in question. In one such case a defendant was first arrested for third degree sexual assault, but the charge was deliberately changed to one of indecent liberties when it was found that because of his youth, his conduct did not fit within the parameters required by section 6-2-304. The defendant eventually pled guilty to a charge of "child endangerment." Telephone Interview with Scott "Mitch" Guthrie, Assistant Public Defender, Cheyenne, Wyo. (November 25, 1998).

ficity from the state's legislature. The United States Supreme Court recognized the critical nature of a judicial check on legislative authority transference in the area of criminal offenses in *Dunn v. United States.* The Court announced, "thus to ensure that a legislature speaks with special clarity when making the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed."[181] If criminal acts are not explicitly proscribed, states risk prosecutions based not upon the act in question but upon the identity or status of the actor who committed it. The Wyoming Supreme Court, perhaps in recognition of this danger, stated in a *Sorenson* footnote that, "although legislation must of necessity often use words of a general nature and need not be unduly precise, the questions of vagueness in the area in which we are here concerned could be reduced by more specificity in the language of the enactment."[182] Unfortunately, this nineteen-year-old footnote proclamation has failed to prod Wyoming lawmakers into enacting material changes to the language of section 14-3-105.

Wyoming's Age of Consent

In Wyoming, in contrast to several states, the legislature has seen fit to keep the age of consent applicable to the sexual assault statutes at sixteen.[183] In fact, during the 1997 legislative session a bill was sponsored that would have raised the age of consent under section 6-2-304 to eighteen. The bill failed.[184] The Wyoming legislature obviously intends to indicate that a sixteen year old minor has the capacity to consent to sexual intercourse. Setting the appropriate age of consent, even arguably incorrectly, is a legislative function, not a judicial one and the majority in *Pierson* appeared cognizant of that fact.[185]

However, the dissent's position in *Pierson,* which indicated a preference for a *per se* rule where sexual intercourse with a minor is considered a criminal violation, is a legitimate one. Consistency within areas of the law, if nothing else, means a minor under the age of eighteen should not be considered capable of giving informed consent to sexual intercourse, any more than he is considered to have the capacity to contract to buy a used Volkswagen.[186] Society is well-served by equalizing the age of consent and the age

181. Dunn v. United States, 442 U.S. 100, 113 (1979). This may be particularly crucial when legislators have, for the most part, little or no formal training in law. However, a legally educated judiciary has the expertise to interpret, and the power to invalidate, any law created in violation of well-established legal and constitutional principles.

182. Sorenson v. State, 604 P.2d 1031, 1033 n.1 (Wyo. 1979).

183. WYO. STAT ANN. § 6-2-304 (Michie 1998).

184. Telephone Interview with Greg Phillips, state senator (August 27, 1998).

185. Pierson v. State, 956 P.2d 1119, 1125 (Wyo. 1998).

186. Many states include an age differential within their sexual conduct statutes. Phipps, *supra* note

of emancipation to recognize a lack of awareness of consequences that habitually defines the adolescent, especially the adolescent in the grip of burgeoning sexuality.

Several states, including California, have recently raised their ages of consent to eighteen.[187] The rationale behind this action is that it more adequately protects the state's children from adults who prey on minors by establishing a stiffer criminal penalty for the conduct.[188] Proponents also argue it protects the state's taxpayers from paying the full costs for care of the children born of these unions.[189] The California legislature, in enacting its "Teenage Pregnancy Prevention Act of 1995" found and declared that:

> Illicit sexual activity between adult males and teenage or younger girls in this state is resulting in the nation's highest teenage pregnancy and birth rate. In California females under the age of 18 gave birth to 28,065 children in 1994. Sixty-six percent of the fathers of those children were adult males, and 10,786 of those fathers were between the ages of 20 and 29 years . . . . In the United States, one in every sixteen girls between the ages of 15 and 19 has a child . . . . California spent $3.08 billion in 1985 to assist families headed by teenagers. If those births had been delayed until the mothers were at least 20 years old, the state would have saved $1.23 billion in welfare and health care expenses . . . . The laws prohibiting adults from having sexual relations with a person under the age of 18 years must be more vigorously enforced. Adult males who prey upon mi-

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37, at 62. The purpose of the differential is to recognize the difference between a situation in which a minor's youth, naiveté, and inexperience are being taken advantage of for the sexual gratification of one older and more sophisticated, and a situation comprised of sexual experimentation between contemporaries—those whom most would see as appropriate companions. The Model Penal Code commentators consider it "harsh and unreasonable" to punish a person for engaging in sexual activity with a willing partner "whom society regards as a fit associate in a common educational or social endeavor." Model Penal Code § 213.3 cmt. 2 at 386. The drafters of the MPC chose the four year age differential to reflect the "prevailing pattern of secondary education." *Id.* A Wyoming Supreme Court majority found this view illogical in relation to Wyoming's statutory rape statute. The court stated that the inability to give consent was a substitute for force in the elements of the crime, and the age of the actor is not relevant to the victim's capacity to give consent. The court stated, "in this respect the statute is internally inconsistent and irrational. It cannot be said to set forth a usable criminal violation more specific than does the indecent liberties statute." McArtor v. State, 699 P.2d 288, 294 (Wyo. 1985).

187. Twelve states currently set their ages of consent at eighteen. Phipps, *supra* note 37, at 62. However, sixteen is still the most common age of consent. *Id.*

188. There may be some logic in allowing the age of consent to marry with parental consent to remain at sixteen. Arguably an adult willing to marry the minor is not "preying" on him/her and the State will probably not be supporting the couple to the same extent it would had the adult chosen to leave. Further, requiring the consent of the minor's parents would probably act as a sufficient check to the system.

189. CAL. PENAL CODE § 261.5 (West 1998). California's *Unlawful Sexual Intercourse with Person Under 18* statute provides for civil penalties of up to $25,000 to be deposited into the state's Underage Pregnancy Prevention Fund, if an adult over the age of twenty-one engages in unlawful sexual intercourse with a minor under age sixteen. The civil penalties are not as great if the age differential between the parties is more narrow.

> nor girls must be held accountable for their conduct and accept responsibility for their actions. It is the intent of the Legislature that district attorneys vigorously investigate and prosecute adults guilty of unlawful sexual intercourse with a minor, particularly where that unlawful sexual intercourse results in pregnancy.[190]

If one follows the reasoning of the California Legislature, raising the age of consent in Wyoming to eighteen would be beneficial.

Nevertheless, no matter which alternative the state's lawmakers choose, whether it be 1) raising the age of consent under section 6-2-304 to eighteen, or 2) lowering the age listed in the indecent liberties statute to sixteen with a four year differential, the goal is simply to enact a more coherent and workable code of sex crimes statutes. This single legislative act would virtually eliminate the anomalous results encapsulated in many Wyoming cases.

The legislature could also easily abolish the constitutional due process issues raised by the vagueness of section 14-3-105 by repealing it and replacing it with a statute that specifically describes the proscribed conduct. For instance, adopting a crime of child sexual abuse. Which would provide that an actor is guilty of child sexual abuse if the actor knowingly (i) engages in sexual contact, as defined by section 6-2-301(a)(vi) with any child, or (ii) inflicts sexual intrusion as defined by section 6-2-301(a)(vii)(A) and (B) on any child. "Child" should be defined consistently with section 6-2-304, and the age differential should also be included within the statute.[191]

CONCLUSION

Pierson's first impression issue of whether the consent of a sixteen year-old victim is a defense to a charge of indecent liberties was decided correctly by the Wyoming supreme court. The majority did an admirable job in attempting to clarify the legislature's schizophrenic approach to offenses which proscribe sexual contact with minors. By applying the conflicting statutes *in pari materia* and attempting to harmonize them the court came to the proper result on that issue. However, the *Pierson* decision failed to alleviate the fundamental underlying due process problems associated with the application of section 14-3-105. Further, in some respects the deci-

190. *Id.* It is, of course, debatable whether the state's legislation can actually alter the conduct it outlines so vigorously. Further, some commentators think the statute is merely an attempt to legislate morality and enforce stereotypical views of women as passive participants in their own sexuality. *See* Alice Susan Andre-Clark, *Whither Statutory Rape Laws: Of Michael M., The Fourteenth Amendment, and Protecting Women From Sexual Aggression*, 65 S. CAL. L. REV. 1933 (1992).

191. *See supra* note 186.

sion may even have exacerbated those constitutional issues. Since the enactment of section 14-3-105 in 1957, the Wyoming Supreme Court appears to have given in to the very understandable temptation to affirm punishment for conduct which is consistently repugnant and reprehensible, rather than invalidate a statute which is violative of the Fourteenth Amendment and the separation of powers.[192] This abdication of judicial responsibility, while succeeding in ensuring that defendants convicted of abominable acts are punished, has failed to uphold the spirit and principles of constitutional law.[193] If the legislature fails in its mandated duty to enact a more explicit statute, the Wyoming Supreme Court must recognize its judicial responsibility and refuse to continue to apply a statute that allows individual Wyoming prosecutors, judges, and juries to define criminal sexual offenses on an *ad hoc* basis.

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192. It is indisputable that most of the acts to which the statute has been applied are anything less than heinous. Many of the state's indecent liberties cases, which do not address issues specifically covered within this case note, include sex acts with children of such lurid and graphic detail that they are at times disturbing even to read.

193. The U.S. Supreme Court recently stated, "[t]he basis of the terms of the provision [decency and respect] are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns." National Endowment of the Arts v. Finley, 118 S. Ct. 2168, 2179 (1998) (validating a law requiring that artistic grants be made by taking into account general standards of "decency" and "respect"). The court held "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Id.*