

Liberty Brief

Wyoming Liberty Group

Criminal Law in Wyoming: An Overview and Analysis of Possible Reforms

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Executive Summary

Wyoming law criminalizes inhaling nail polish remover and deodorant.¹ A Peeping Tom, if prosecuted, will be a felon.² It is a misdemeanor offense to ski on a snow slope posted “closed.”³ Charging a person a fee to use the toilet in Wyoming is a crime.⁴ If school administrators fail to conduct a fire drill once a month they are subject to a sentence in county jail for not less than three nor more than six months.⁵

Wyoming criminal laws are broad, sometimes unnecessary, and sporadically placed across seven separate titles. Many criminal laws are buried deep within regulatory titles that are nearly 1,000 pages in length. A comparative analysis of Wyoming laws reveals that the sentences frequently do not build upon one another but are rather incongruous when standing alongside all Wyoming provisions. These disparate sentences represent a disproportionate and illogical sentencing structure in Wyoming that could be improved with significant reform in legislation and sentencing guidelines. The disorganization, as well as the breadth of Wyoming’s criminal laws promotes inconsistent outcomes across jurisdictions and unpredictability of prosecution to unknowing citizens.

To address overcriminalization and sentencing disparity, the Wyoming Legislature should consider:

1. **Placing all of the criminal provisions within one title, as to avoid confusion and unbury the criminal codes currently within lengthy regulatory titles that are unrelated to criminal law.**
2. **Taking Wyoming’s budget into consideration and reforming the sentencing structure** to a system that can be consistent across the state’s jurisdictions and model the successful PRISM program that has proved to decrease recidivism.
3. **Enact a default *mens rea* provision** that requires a showing of intent to be convicted of a crime, unless the legislature explicitly states otherwise.

Introduction

The United States incarcerates individuals at a higher rate than any other industrialized nation in the world.⁶ As of January 1, 2010, Wyoming incarcerated 2,075 adults in prisons, not including inmates in local jails.⁷ Comparatively, North Dakota, with a population greater than Wyoming’s, housed nearly one third of the inmates that Wyoming did in 2010.⁸ Additionally in 2010, Maine and New Hampshire, with respective populations twice the size of

Wyoming, incarcerated only a few more inmates.⁹ These numbers have significant fiscal impacts for Wyoming as the Department of Corrections (DOC) in 2010 had a budget of \$263 million, three percent of the budget for the entire state.¹⁰

Wyoming’s prison population is growing, while the state’s budget is shrinking. Jake Horowitz, state policy director for The

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Pew Charitable Trusts, is leading a study to determine how well Wyoming's corrections system is working.¹¹ Horowitz stated that most states are reducing their prison populations.¹² However, this is not the case in Wyoming. In fact, although crime has fallen 11 percent since 2000, state prison populations have increased by 64 percent.¹³ Horowitz stated, this will "leave a substantial tab for the taxpayers."¹⁴

Steve Lindy, Executive Assistant to the Department of Corrections Director, stated the budget amount could increase unless Wyoming's sentencing trends are reversed.¹⁵ For example, Torrington's Medium Correctional Institute would need 144 additional beds by 2017, prompting a \$13.5 million construction price tag and an additional \$5 million a year to operate and staff.¹⁶ The Wyoming State Penitentiary in Rawlins also faces significant and costly structural problems. In October, 2015 the State Building Commission approved a request from the Department of Corrections to set aside \$25 million to help fix the State Penitentiary as a "low starting point."¹⁷

The funds needed to house inmates is made more significant because the state is facing large budget shortfalls as revenue from oil, natural gas, and coal is projected to be \$600 million less over the next three years.¹⁸ Wyoming's financial experts released their annual report November 2, 2015. This report projected state fund revenues will drop from nearly \$3.5 billion in the biennium, to just under \$3 billion in the following biennium in the fiscal years of 2017-18.¹⁹

The relationship between sentencing reform and over-criminalization is a tense one. Sentencing reform is controversial because it can involve lowering sentences even for violent crimes, while over-criminalization demands that legislatures avoid the enactment of crimes that, arguably, should not be crimes. However, the Wyoming Legislature should consider policy reform in both of these areas. This *Liberty Brief* offers an overview of Wyoming criminal law, quantitatively and qualitatively, and proposes various avenues for reform.

I. QUANTITATIVE ASSESSMENT

The Wyoming Criminal Code spans 134 pages and contains 258 separate provisions. There are 118 misdemeanors and 118 felonies listed throughout Title 6.²⁰ Wyoming's vast criminal law spreads further and is disorganized across 6 other titles, putting Wyoming residents at risk of unintentionally violating regulatory crimes that are often nearly impossible to find. The vast amount of titles that contain criminal law places citizens in jeopardy of violating unknown laws and creates the risk that prosecutions will differ depending upon the jurisdiction.

Wyoming felonies are crimes with the potential punishment of death or incarceration in state prison for more than one year,²¹ while misdemeanors are potentially punishable by up to one year in county or local jail.²² Wyoming courts have the discretion to determine the punishment for any felony or misdemeanor, whether the punishment consists of imprisonment, fine, or both.²³ The court may impose a fine as part of the punishment for any felony. If the statute does not establish a maximum fine, the fine cannot be not more than \$10,000.00.²⁴ Except where a term of life is required by law, when a person is sentenced for a felony, the court must establish a maximum and minimum term within the limits authorized for the statute violated. The maximum term cannot be greater than provided for by law and the minimum cannot be greater than ninety percent of the maximum allowed term.²⁵

Most states designate crimes by class with a set punishment for each class.²⁶ However, Wyoming sets punishments on a crime-by-crime basis for felonies. Unless otherwise specified in the specific criminal statute, misdemeanors in Wyoming are punishable by up to six months in county or local jail, a fine of up to \$750, or both.²⁷ For purposes of this paper, Wyoming misdemeanors punishable with jail penalties will be a valuable aspect of this overcriminalization analysis.

Title 6 is Wyoming's criminal code and contains most of Wyoming's crimes and offenses. However, Title 31 is the code for motor vehicles and contains some criminal offenses including Driving Under the Influence. Title 7 contains Wyoming's criminal procedure and specific information regarding the structure of parole and probation in Wyoming. Title 14 contains the juvenile code including the Juvenile Justice Act and the accompanying rules of procedure. Title 9 details the administration of the government and spans a massive 800 pages. Title 35 contains regulatory provisions for public health and safety at an outstanding 646 pages of regulations, including crimes. This title also contains provisions relating to possession of a controlled substance and categorizes the various substances. Additionally, Title 35 includes some of the strangest crimes that make overcriminalization in Wyoming apparent. Finally, Title 27 contains labor and employment regulations along with numerous misdemeanors within its regulatory provisions. This act is known as the Wyoming Employment Security Law.²⁸ The most probative of these titles will be discussed below.

Title 9 criminalizes some activities which should not be crimes at all. Wyoming Statute section 9-1-907 outlaws any "weather modification experiment" without a permit finding a misdemeanor subject to \$5,000 in fines and 90 days in jail. "Weather modification" is vaguely defined as "attempting to

change or control any of the weather phenomena by chemical, mechanical or physical methods.²⁹ Also, any state or county employee using a state vehicle without authorization is also guilty of a misdemeanor under Title 9.³⁰

Title 27 contains labor and employment regulations but contains many misdemeanors within its regulatory provisions. This act is known as the Wyoming Employment Security Law.³¹ One major problem with the incorporation of criminal provisions within this regulatory scheme is the ambiguity it causes. For example, many of the misdemeanors buried within the regulations require an element of “willfulness,” but this term is left undefined by the regulations.³² Not only are these crimes unorganized and inaccessible as they are buried within nearly 200 pages of regulatory standards, they lack *mens rea* provisions and are extremely vague. This is increasingly problematic as Title 6, or Wyoming’s Criminal Code, does not provide a definition for “willfully,” either.³³

Title 35 contains some of the strangest crimes in all of Wyoming law. These crimes display the need for reform to decriminalize these acts that should not be considered criminal. For example, you can commit a misdemeanor and go to jail for 6 months if you knowingly spread a contagious disease.³⁴ Allowing sawdust to enter a river is a strict liability offense.³⁵ Not only does this particular law exemplify over-criminalization, it is also buried deep within a lengthy regulatory title and part of a 488 word sentence riddled with other rules. Storing pesticide outside of the standards set forth by the board of certification is a strict liability crime subject to a sentence of one year in prison.³⁶ Wyoming Statute section 35-10-101 uses one 427-word sentence to explain in excruciating detail that dead animal carcasses cannot be disposed of, practically, anywhere.

More specifically, Article 4 of Title 35 contains some particularly ridiculous crimes within its regulatory provisions. For example, it is a strict liability crime to enter a sawmill while intoxicated, subject to a one year jail sentence.³⁷ Additionally, one can serve 90 days in jail for abandoning a refrigerator without first removing its latch.³⁸

Aside from strange laws, some Wyoming sentences display a comparative incongruity when standing alongside other Wyoming provisions. For example, Wyoming statute section 35-11-404 criminalizes the failure to follow coal mining regulations with a penalty of imprisonment in a county jail for not more than ninety days or a fine of not more than \$5,000.00, or both. This is a very harsh, and arguably disproportionate, sentence for a misdemeanor as some felonies buried within the regulatory provisions of Title 9 carry \$5,000.00 fines as well.³⁹

Title 6 contains a short chapter on sentencing on only one page. Chapter 10 of this title briefly addresses the difference between a felony and misdemeanor, imposition of fines, and general rights lost by the conviction of a felony.⁴⁰ However, Title 7 contains the majority of Wyoming’s sentencing provisions and is a vast 262 pages in length.

A. Felonies, Misdemeanors, and Sentencing Provisions:

The Wyoming Legislature could consider modeling a sentencing scheme after the Kansas system. The Kansas approach eliminates broad judicial discretion and offers a consistent approach to sentencing that considers the offender’s criminal history. Kansas uses a grid that takes into account the severity of the crime and the criminal history of the defendant. This grid divides crimes by their severity level on the vertical axis through numeric levels and categorizes the defendant’s prior criminal records on the horizontal axis alphabetically with levels “A” through “I.” Crimes are divided into drug and non-drug offenses. Non-drug offenses are divided into severity levels one through ten, and drug offenses are divided into severity levels of one through five. For criminal history designations, level “A” is the most serious.

Each section of the Kansas grid provides a range of three sentences: an aggravated sentence, a standard sentence, and a mitigated sentence. The standard sentence is generally imposed, although the judge does have discretion to choose the mitigated or aggravated sentence if the facts of the particular case warrant such a result. As an example, rape is a severity level 1 felony. If the defendant has no prior criminal record, the crime is punishable by 147, 155, or 165 months in prison. If the crime was particularly violent, the judge may wish to impose the aggravated sentence of 165 months. Additionally, a defendant with a level “A” criminal history who is convicted of a rape with aggravated circumstances of brutality could face up to 653 months, over 50 years, in prison.

This grid allows for consistency and predictability in sentencing while providing flexibility based on the facts of the case and the past criminality of the defendant. For this model to work, each crime’s severity level should be found in the statute that defines the crime. Additionally, as in Kansas, some crimes carry a potential punishment of the death penalty or life in prison because of their seriousness. These crimes are considered “off-grid felonies” because of their particularly heinous nature. Wyoming could adopt this approach for serious crimes like rape of a child.⁴²

SENTENCING RANGE - NONDRUG OFFENSES

Category →	A			B			C			D			E			F			G			H			I		
Severity Level ↓	3 + Person Felonies			2 Person Felonies			1 Person & 1 Nonperson Felonies			1 Person Felony			3 + Nonperson Felonies			2 Nonperson Felonies			1 Nonperson Felony			2 + Misdemeanors			1 Misdemeanor No Record		
I	653	620	592	618	586	554	285	272	258	267	253	240	246	234	221	226	214	203	203	195	184	186	176	166	165	155	147
II	493	467	442	460	438	416	216	205	194	200	190	181	184	174	165	168	160	152	154	146	138	138	131	123	123	117	109
III	247	233	221	228	216	206	107	102	96	100	94	89	92	88	82	83	79	74	77	72	68	71	66	61	61	59	55
IV	172	162	154	162	154	144	75	71	68	69	66	62	64	60	57	59	56	52	52	50	47	48	45	42	43	41	38
V	136	130	122	128	120	114	60	57	53	55	52	50	51	49	46	47	44	41	43	41	38	38	36	34	34	32	31
VI	46	43	40	41	39	37	38	36	34	36	34	32	32	30	28	29	27	25	26	24	22	21	20	19	19	18	17
VII	34	32	30	31	29	27	29	27	25	26	24	22	23	21	19	19	18	17	17	16	15	14	13	12	13	12	11
VIII	23	21	19	20	19	18	19	18	17	17	16	15	15	14	13	13	12	11	11	10	9	11	10	9	9	8	7
IX	17	16	15	15	14	13	13	12	11	13	12	11	11	10	9	10	9	8	9	8	7	8	7	6	7	6	5
X	13	12	11	12	11	10	11	10	9	10	9	8	9	8	7	8	7	6	7	6	5	7	6	5	7	6	5

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

Source: Kansas Office of Revisor of Statutes 21-6804. Available at http://www.ksrevisor.org/statutes/chapters/ch21/021_068_0004.html.

Under the Kansas system, in addition to the prison term, the court may also impose a fine as part of the felony conviction. The court may impose a fine of up to \$500,000 against defendants convicted of an off-grid felony or a severity level 1 or 2 drug crime. Up to \$300,000 may be fined upon a level 1-5 non-drug crime defendant and level 3-4 drug crime defendant. For all of other felonies, the court may impose a fine of up to \$100,000.⁴³ Kansas also categorizes its misdemeanors by class. The most serious misdemeanors are punishable by up to one year in county jail.

Congress adopted a similar system for federal felony offenses. In the federal system, each felony is assigned to one of 43 offense levels. Defendants are placed in one of six criminal history categories. The point at which these assignments intersect is the offender's sentencing range, contained within the federal sentencing guidelines.

Grid systems, used by the Federal system and states including Kansas, allow for judicial discretion while eliminating the arbitrary nature of certain courts in which someone convicted of a crime in one judge's court could face

a much shorter or longer prison sentence than one convicted of the same crime in another judge's court. This system would be a valuable reform for Wyoming because it would ensure that crimes committed under similar circumstances would be punished more uniformly. Most importantly, judges still retain discretion because use of the federal sentencing guidelines is not mandatory.⁴⁴ However, judges are still incentivized to use them because if they sentence the defendant in accord with the federal sentencing guidelines, they are presumed to have ruled reasonably making their sentences more difficult to be overturned on appeal.

Judges may deviate from the sentences in listed in the guidelines, but they must adhere to the requirements of the zone designations. The sentencing table lists sentences in four different zones of "A" – "D." Defendants who fall into zone "A" can be given probation without having to serve time in prison. Zone "B" defendants must serve at least one month in prison while serving the remainder in alternative confines, such as house arrest. Zone "C" requires service of at least half the total prison sentence but allows service of the other half in alternative confines. Judges may also take into account

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

(Source: <http://www.federalcharges.com/what-are-federal-sentencing-guidelines>)

mitigating and aggravating circumstances in their deviation from the table.

B. Statute of Limitations

Wyoming's statutes of limitation should be a potential area of reform as Wyoming is one of only two states that has

no criminal statutes of limitation.⁴⁵ Thus, the state may begin criminal prosecution at any time after a crime is committed no matter how much time has lapsed since the criminal offense occurred. Statutes of limitation are legislative devices to protect a defendant from the risk of erroneous conviction due to stale evidence, protect society from crime by promoting accurate results at trial and efficient use of the prosecutor's resources, and a lengthy passage of time after the commitment of a crime makes punishment unfair to the perpetrator and unproductive for society.⁴⁶ Wyoming should consider legislative reform in this area because it is a particularly archaic and illogical view of modern criminal law. For example, imagine the idiocy of being convicted of entering a sawmill while intoxicated, years after the event occurred.⁴⁷

Kansas could serve as a model for their statutes of limitation. In Kansas, the statute of limitations begins to run when the crime is committed. However, the most serious crimes in Kansas, including murder and terrorism, have no statute of limitations. Another potential avenue for enacting Wyoming's statute of limitations is to model the systems established in Arizona and Nevada. Arizona's limitations periods begin with the state's actual or due diligence discovery of the offense.⁴⁸ Nevada also begins the running of the limitations period with "discovery" of the offense, but only if the crime is committed "in a secret manner."⁴⁹ Federal law and most states recognize statutes of limitation in criminal offenses and the U.S. Supreme Court has praised both criminal and civil statutes of limitations.⁵⁰

Additionally, the Wyoming Legislature could set forth a statute of limitations for a variety of crimes while excluding the most serious. For example, Mississippi excludes murder, manslaughter, arson, burglary, forgery, counterfeiting, robbery, larceny, rape, embezzlement, false pretenses, and abuse offenses against children from limitations.⁵¹ Wyoming

should consider a reform similar to the system established by the federal government and states such as Kansas.

C. Habitual Offenders:

Wyoming's version of a "three strikes law" is the habitual criminal penalty. Pursuant to Title 6, a person is a habitual criminal if he is convicted of a violent felony and he has been convicted of a felony on at least two previous charges, separately brought and tried, which arose out of separate occurrences.⁵² A habitual criminal will be imprisoned for ten to fifty years if he has two previous convictions, and life if he has three or more previous convictions.⁵³

The Wyoming Supreme Court has ruled that habitual offender punishments do not violate the Eighth Amendment to the U.S. Constitution, which prohibits cruel and unusual punishments.⁵⁴ *Rich v. State* upheld the trial court's decision to impose three consecutive life sentences for first degree sexual assaults constituting distinct crimes.⁵⁵ However, this decision cited a plurality opinion from the United States Supreme Court as its rationale. In *Ewing v. California*, the U.S. Supreme Court reviewed California's "three strikes law," a statutory scheme that was "designed to increase the prison terms of repeat felons."⁵⁶ Ewing had been convicted of felony grand theft in excess of \$400 for stealing three golf clubs; however, because he had previously been convicted of three burglaries and a robbery, all considered serious or violent felonies, the three strikes law applied and Ewing was sentenced to 25 years to life.⁵⁷

Ewing resulted in a majority decision that California's three strikes law constitutionally addresses recidivism without violating the Eighth Amendment's ban of cruel and unusual punishment.⁵⁸ However, the Court's analysis for arriving at that conclusion received only plurality support and has not been applied in other cases.⁵⁹ On top of this shaky foundation, the three strikes law established in Wyoming can extend sentences for conduct that should simply not be subject to such lengthy prison terms. Additionally, a strong case can be made under Wyoming's Constitution that the habitual offender statute is arguably in violation of article 3, section 53 which explicitly states that a sentence of life imprisonment without parole is created for specified crimes designated in the Wyoming Criminal Code.⁶⁰

II. QUALITATIVE ASSESSMENT

The Criminal Code's provisions give rise to a number of problems of definition and construction.⁶¹ Many crimes in Wyoming are illogical, arbitrary, and should not be crimes at all. Additionally, when looking at all Wyoming criminal laws

comparatively, the sentences do not reflect the crime's severity. Instead, the sentences for each crime are arbitrary, promoting the result that some crimes which should be harshly punished are not, while crimes that should not be a crime at all have harsh punishments. Additionally, Wyoming criminalizes some actions which already have a remedy in the civil realm.⁶² Some crimes are sporadically placed, buried in a lengthy regulatory title, or in the entirely wrong place.⁶³

A. Lesser-Included Offenses

While researching this brief, the author had many discussions with attorneys and scholars across the state of Wyoming. Most expressed some concern that Wyoming prosecutors are allowed to utilize lesser-included offenses almost as a matter of right despite the fact that the rules of criminal procedure demand a probable cause showing. The case law in Wyoming is inconsistent and confusing on this topic.

The Wyoming Rules of Criminal Procedure demand a probable cause finding for each offense charged in a case.⁶⁴ If from the evidence it appears that there is probable cause to believe that the charged offense or lesser included offense has been committed and that the defendant committed it, the case must be transferred to the district court for further proceedings. The finding of probable cause may be based in whole or in part upon hearsay evidence.⁶⁵ Additionally, 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."⁶⁶ The question is how it is to be determined when an offense is "necessarily included in the offense charged."

Functionally, courts seem to require 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, then the lesser offense is truly a lesser included offense chargeable to the defendant. In addition, there must be evidence from which the jury could rationally determine that the defendant was guilty of the lesser-included offense. For example, false imprisonment is obviously the lesser-included offense of kidnapping because the statutory elements show that the act of confining a person, as necessary to support a kidnapping charge, incorporates the act of restraining a person that is required for false imprisonment.⁶⁷

While the test may seem simple enough and capable of almost mechanical application, in practice it has proved more difficult. Thus in *Jackson v. State*⁶⁸ the Wyoming Supreme Court held that second degree sexual assault is not a lesser included offense of first degree sexual assault.⁶⁹ In *Sindelar v. State*⁷⁰ the court held

that reckless endangerment is not a lesser included offense of aggravated assault and battery.⁷¹ In both cases, prosecutors and courts had assumed that the lesser offenses were in fact lesser included offenses. In *State v. Keffer*, 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.⁷²

Wyoming's lesser-included offense structure also presents problems in regard to *mens rea*. In its simplest form, *mens rea* is the state of mind that the perpetrator must have in order to commit the illegal act. In Wyoming, it was long uncertain whether a lesser culpable mental state, such as recklessness or criminal negligence, is included within the higher culpability states of mind, such as knowingly or purposely. However, in *Sindelar* the Wyoming Supreme Court held that an intentional state of mind "does not encompass an element of 'recklessly'.⁷³" The result in *Sindelar* would seem to mean that involuntary manslaughter, which requires that the defendant act recklessly⁷⁴ cannot be a lesser-included offense within first degree murder which requires that the defendant act purposely and with premeditated malice.⁷⁵ In other words, acting recklessly is distinct from acting purposely.

On the other hand, where first degree felony murder is charged, involuntary manslaughter or criminally negligent homicide may be properly charged as lesser included offenses, since in felony murder the state of mind need not be purposeful. In *Harris v. State*,⁷⁶ the jury found the defendant 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 accidental, thus the crimes are not mutually exclusive.⁷⁷ *Harris* did not mention the *Sindelar* case. Therefore, the case law on this point is inconsistent and confusing because *Sindelar* restricts the number of crimes which can be considered a lesser included offense of a greater crime. The Legislature can solve the problem by adopting a statute similar to Model Penal Code section 2.02(5) which will be discussed in the *mens rea* section below. Additionally, greater and lesser offenses should be drafted with their respective elements in mind, so that the lesser offense is truly a lesser included offense.

B. Inchoate Offenses

Inchoate offenses are preparatory in nature, that is, they consist of steps taken toward the commission of a crime. If

the attempted crime is committed, the attempt generally merges into the consummated offense and the inchoate crime ceases to exist.⁷⁸ So, if someone attempts to murder another, he may be charged with attempted murder. If someone actually murders another, he may be charged with murder but not with attempted murder. Thus, no actual harm need be inflicted upon any victim; inchoate offenses can be punished just as severely as if the crime is actually committed.⁷⁹

Since Wyoming's passage of inchoate offenses in 1981, they have been widely implemented. For example, where once a person who severely beat another would likely have been charged with aggravated assault and battery, today the person is more likely to be charged with attempted murder. Prior to 1981, a person who shot and wounded another intending to kill them was subject to a maximum penalty of 14 years for aggravated assault because the crime was not successful and thus the victim was alive.⁸⁰ Today, with inchoate offenses, the same perpetrator would likely be charged with attempted first degree murder and would receive a mandatory life sentence upon conviction.⁸¹ Usually, the court sentencing an inchoate offense has discretion to choose a sentence from a range of years depending upon the crime. Thus, for conspiracy to commit a burglary, the sentencing court has the discretion to order a sentence of one to ten years.⁸² However, for conspiracy to commit first degree murder, the court is required to sentence life in prison.⁸³ Is this an appropriate range for inchoate offenses? The Legislature should consider the harm done to society in creating a sentence that is disproportionate to the crime. Wyoming's scheme for imposing the same punishment for inchoate offenses as could be imposed for the objective crime is too severe and should be reformed.

C. Unfair Applications – Punishing Some While Ignoring Others

1. Self-Defense and Battered Woman Syndrome

In 1993, the Wyoming Legislature adopted Wyoming Statute section 6-1-203, which recognized battered woman syndrome as a subset of post-traumatic stress disorder (PTSD) 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.⁸⁴

The battered woman syndrome defense came before the Wyoming Supreme Court in *Witt v. State*, where Dawn Rene Witt was convicted of voluntary manslaughter in the killing of Mark Ayers, with whom she had lived for two years.⁸⁵ Witt claimed that she had shot the victim in self-defense, and offered expert testimony that she suffered from battered woman syndrome.⁸⁶ 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.⁸⁷ 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.⁸⁸ 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.⁸⁹

The Wyoming 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: "Wyoming Statute section 6-1-203 does not create a separate defense; it permits the introduction of expert testimony on the battered woman syndrome when the affirmative defense of self-defense is raised." Thus, battered woman syndrome statutorily 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. However, Wyoming courts have inconsistently applied this statute. Some cases have allowed the expert testimony while others have not. As battered woman syndrome is a category of self-defense, this is a complete defense and therefore the accused will be exonerated of the crime if the burden is met. Courts preventing expert testimony on this point seemingly convert a complete defense into a partial defense, as no defendant can meet the standard established in the self-defense statute without the required expert testimony.⁹⁰

Another problem with the battered woman's syndrome defense and its interpretation is the Legislature's unfortunate categorization of the defense as a subset of post-traumatic stress disorder under the outdated DSM-III. *The Diagnostic and Statistical Manual of Mental Disorders* (commonly abbreviated as "DSM"), was designed to help doctors put a diagnostic name to the symptoms a person is experiencing. The DSM-V is the current version and contains new improvements and definitions that the DSM-III did not contain. However, because Wyoming's battered woman syndrome statute explicitly states that the DSM-III is to be used, this defense can never evolve with advanced psychology that could greatly impact the success of the defense.⁹¹

The DSM-III diagnostic criteria for PTSD were revised in DSM-III-R (1987), DSM-IV (1994), and DSM-IV-TR (2000).⁹² DSM-IV Diagnostic criteria for PTSD included a history of exposure to a traumatic event and symptoms from each of three symptom clusters: intrusive recollections, avoidant/numbing symptoms, and hyper-arousal symptoms. A fifth criterion concerned duration of symptoms; and, a sixth criterion stipulated that PTSD symptoms must cause significant distress or functional impairment.⁹³

The latest revision, the DSM-V (2013), "has made a number of notable evidence-based revisions to PTSD diagnostic criteria, with both important conceptual and clinical implications."⁹⁴ Most relevant to the out-datedness of the Wyoming statute:

It has become apparent that PTSD is not just a fear-based anxiety disorder (as explicated in both DSM-III and DSM-IV), PTSD in DSM-5 has expanded to include anhedonic/dysphoric presentations, which are most prominent. Such presentations are marked by negative cognitions and mood states as well as disruptive (e.g. angry, impulsive, reckless and self-destructive) behavioral symptoms.⁹⁵

Furthermore, as a result of research-based changes to the diagnosis, PTSD is no longer categorized as an Anxiety Disorder. PTSD is now classified in a new category, Trauma- and Stressor-Related Disorders, in which the onset of every disorder has been preceded by exposure to a traumatic or otherwise adverse environmental event. The stressor criterion specifies that a person has been exposed to a catastrophic event involving actual or threatened death or injury, or a threat to the physical integrity of herself or others, such as sexual violence. Another new feature of the DSM-V is that all of these symptoms must have had their onset or been significantly exacerbated after exposure to the traumatic event. Finally, reckless and self-destructive behavior such as impulsive acts, unsafe sex, reckless driving and suicidal behavior are newly included side effects of battered woman syndrome in the DSM-V.

This new definition could increase the amount of evidence that can be introduced as to events of past abuse, as this evidence is now relevant to the success of the defense under the new definition. However, as Wyoming is still working exclusively under a version of the DSM now over two decades old, this excludes vast amounts of evidence and testimony. Most importantly, the reckless and impulsive behaviors that are explained in the new DSM-V post-traumatic stress disorder provision could be very helpful to jurors in explaining why a battered woman may kill her abuser. Since this defense is grounded in psychology, the statutory language should be reformed as to utilize the newest version of the DSM.

2. Aiding & Abetting

Wyoming Statute section 6-1-201(a) states, “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 describe that an accessory before the fact may be convicted as if he were a principal.

However, Wyoming law only addresses one who aids and abets in the commission of a felony, but does not address misdemeanor abettors. 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 principals.⁹⁶ But Wyoming statute 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.” The legislature should consider enacting a statute that makes this ambiguous point clear to avoid inconsistent application and prosecution.

3. Criminal Intent – A Need for Default Mens Rea

The *mens rea* principle is best summarized in *Morissette v. United States*, where the Supreme Court famously said:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.⁹⁷

In service of this universal notion, the Court read a requirement of intent into the federal conversion statute under which *Morissette* had been prosecuted.⁹⁸ More broadly, the Court recognized a general presumption that every criminal statute requires proof of “some mental element.”⁹⁹ This presumption, the Court said, could be overcome only by a “clear expression” of legislative intent to impose liability without fault.¹⁰⁰

Just this past term, in *Elonis v. United States*, the Supreme Court emphasized the need for an adequate *mens rea* requirement in criminal cases.¹⁰¹ In that case, the Court reversed a man’s conviction for violating 18 U.S.C. section 875(c) by posting threatening communications on his Facebook page that his estranged wife regarded as threatening. The Court noted that while the statute required that a communication be

transmitted and contain a threat, it was silent as to whether the defendant must have any mental state with respect to those elements and, if so, what that state of mind must be. The Court stated that “[t]he fact that the statute does not specify any required mental state, however, does not mean that none exists” and, discussing a previous decision, observed that the “‘mere omission from a criminal enactment of any mention of criminal intent’ should not be read ‘as dispensing with it.’”¹⁰² The Court, cited to other cases in which it had provided a missing *mens rea* element,¹⁰³ proceeded to read into the statute a *mens rea* requirement and reiterated the “basic principle that ‘wrongdoing must be conscious to be criminal.’”¹⁰⁴ While the Court declined to identify exactly what the appropriate *mens rea* standard is under that statute and whether recklessness would suffice, it did recognize that a defendant’s mental state is critical when he faces criminal liability and that when a federal criminal statute is “silent on the required mental state,” a court should read the statute as incorporating “that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”¹⁰⁵

The Wyoming Legislature should take special care to enact a *mens rea* standard into every crime, or create a default *mens rea* provision that applies when a statute is silent. Otherwise, courts are left to devise appropriate *mens rea* standards into every criminal statute when one is missing. This raises concerns of inappropriate delegation or outright abdication in lawmaking and, of course, contributes to unpredictable and misunderstood law.

Even when a *mens rea* standard is written down, it is not necessarily clear. 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 commits a crime. “Purposely,” “intentionally,” “voluntarily,” “knowingly,” “recklessly,” “with criminal negligence,” “believes,” and “has reasonable cause to believe” are all found in the Criminal Code. However, only “criminal negligence” and “recklessly” are defined.¹⁰⁶ In particular, second degree murder has been elusively interpreted and reinterpreted by the Wyoming Supreme Court, so the statute’s *mens rea* provision becomes exceedingly more unclear with every case that is decided.¹⁰⁷

In 2014, the law changed with *Wilkerson v. State*.¹⁰⁸ *Wilkerson* held that under the second-degree murder statute, “malice” means that the act constituting the offense was done recklessly under circumstances manifesting an extreme indifference to the value of human life, and that the act was done without legal justification or excuse. This overruled *Crozier v. State*¹⁰⁹ and *Butcher v. State*.¹¹⁰ The problem primarily lies in the fact that an “intentional act” is an element of every criminal offense,

so the requirement of an “intentional act” cannot serve to distinguish second-degree murder from innocent conduct.¹¹¹ Interpreting the second-degree murder statute to require proof of intent to kill would create a conflict with Wyoming’s manslaughter statute. The trouble arises from the first clause of the manslaughter statute, which limits the statute’s scope to homicides committed “without malice, expressed or implied.”¹¹²

It is important to note that although the case law in this area is confusing, it is the actual statutory language that is aggravating the problem. In 1890, the territorial legislature adopted a unified and revised manslaughter statute that specifically limited the statute’s reach to homicides committed “without malice, express or implied.”¹¹³ With this provision, the legislature meant to exclude from the definition of manslaughter not just homicides committed with “express malice,” but those committed with “implied malice” as well. Thus, unless the legislature meant for “implied malice” homicides to go completely unpunished, it must have assumed that those homicides would be prosecuted under the second-degree murder statute. Thus, it was not the Wyoming Supreme Court’s decision in *Crozier* that enlarged the reach of second-degree murder—transferring some killings from the category of manslaughter to that of second degree murder—but the legislature’s decision to explicitly exclude “implied malice” homicides from the scope of the manslaughter statute.

4. Disproportionate Penalties

Prostitution, violating a domestic violence protection order, and taking continental breakfast from a hotel all carry the same penalty minimum and maximum.¹¹⁴ Prank calling¹¹⁵ and grave robbing¹¹⁶ are both categorized as misdemeanors with similar penalties. Thus, in Wyoming the punishment often does not fit the crime. Rather, it seems the penalties for most crimes were decided in a vacuum without any regard to the sentences imposed by other laws that are more or less serious.

There are also other strange distinctions in the law that create provisions so specific that they will hardly ever be utilized and should just be abolished or merged with broader offenses. For example, in Wyoming littering is a misdemeanor punishable by 6 months in prison, a \$1,000 fine or both. However, littering involving the disposal of a container with “body fluids” is subject to 9 months in prison, a \$1,000 fine, or both.¹¹⁷

Additionally, Wyoming criminal law frequently assigns more harsh sentences to property crimes than crimes against a person, placing a special focus on monetary crimes¹¹⁸ and industry specific crimes. For example, shoplifting is a penalty subject to 10 years in prison, while domestic violence is subject

only to a jail sentence no longer than 6 months and a fine of no more than \$750.¹¹⁹ Wyoming also protects the coal and livestock industries, making it a criminal offense to enter a coal mine while intoxicated or leave a fence gate open.¹²⁰ In fact, in Wyoming, not only are penalties for certain property crimes and offenses against certain industries more severe than bodily offenses against people, even offenses against certain dogs more punitive.¹²¹

III. DISCUSSION AND POLICY RECOMMENDATIONS

A. Default Mens Rea

The Wyoming Legislature should enact a default *mens rea* provision to establish a minimum requirement of culpability within statutes that currently lack a standard. The legislature should consider utilizing Model Penal Code section 2.02. For example, under the Model Penal Code, if a person is charged with a crime that requires an act of criminal negligence, proof that the person acted purposely will suffice. Similarly, 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.¹²²

This would not be the first time that the Legislature looked to the Model Penal Code for guidance in crafting Wyoming law. In 1981, the Legislature enacted statutes on criminal attempt, solicitation to commit a felony, and conspiracy¹²³ and incorporated the specific language of the Model Penal Code.¹²⁴ This reform would provide a logical structure with clear-cut answers to an otherwise confusing area of Wyoming law. Additionally, this could remedy strict liability offenses that unfairly criminalize ordinary conduct without any culpable mental state present.¹²⁵

B. Probation, Parole, and Sentencing Reform

Wyoming is an indeterminate sentencing state requiring courts to prescribe a minimum and maximum confinement term when imposing a sentence upon a convicted felon.¹²⁶ Once an individual serves the minimum sentence, he becomes eligible for parole, bringing his case before the parole board. The Wyoming Supreme Court has held,

There is no constitutional or inherent right of a convicted person to be paroled before the expiration of a valid sentence. The right to parole, if it exists at all, is a right provided for by the legislature. The legislative enactment creating such a right may specify the requirements or conditions an inmate must satisfy to be eligible for parole.¹²⁷

However, the Wyoming Legislature has allowed the parole board virtually unlimited discretion in parole decisions. There are two types of conditional release methods: discretionary and mandatory. In mandatory parole states, inmates are released after they have served a percentage of their sentence.¹²⁸ The federal government and many states operate under the mandatory parole system. However, Wyoming is a discretionary parole state, allowing the Board of seven members appointed by the Governor with the consent of the Senate, the complete discretion of whether to release inmates on parole.¹²⁹ This is subject to limited restrictions of denying parole eligibility to inmates who have escaped a state penal institution, committed assault with a deadly weapon while an inmate, who are serving a life sentence, life without parole, or have been sentenced to death.¹³⁰

Over the last thirty years, discretionary parole states have become the minority. By 2000, only 24% of released prisoners were discretionary releases, and sixteen states that had once practiced discretionary parole had abolished it altogether.¹³¹ Inmates released by discretionary parole boards generally serve longer sentences than those released through mandatory parole systems.¹³² However, in Wyoming, those who do receive parole rather than finishing their sentence are less likely to return to prison three years from the completion of their parole period than those who finish their complete jail sentence.¹³³ Despite these promising statistics, only 57% of those who appear before the Board are granted parole.¹³⁴

One obvious benefit of parole release is the fiscal advantages it offers. Many inmates have court-ordered restitution obligations that cannot be met in a Wyoming state prison where inmates generally earn less than \$100 per month at most institutional jobs, with only a fraction of this applied toward restitution. Conversely, parolees routinely pay hundreds of dollars per month toward restitution as a condition of their parole.¹³⁵ Additionally, in 2011, it cost \$147.23 per day to feed, clothe, provide medical care, and house a male inmate at the maximum security facility in Rawlins, \$132.15 per day at the medium security facility in Torrington, and \$123.05 for females housed in Lusk.¹³⁶ This leads to costs as high as \$53,738.95 per inmate, per year. These numbers are outstandingly high compared to the \$5.44 per day it costs to supervise probationers and parolees.¹³⁷

Undoubtedly, not all inmates should be released early as certain offenders pose a risk to the community. However, the notion that all inmates should be imprisoned for as long as possible has proven to deplete budgets and does little to change safety and recidivism. It will benefit the legislature to consider the budget and statistics, while facing the inevitable reality that

93% of all inmates will return to the community at some point even in the absence of any early release program, making the safety to the community argument moot.¹³⁸

Wyoming should consider adopting the federal model and moving from a discretionary system to a mandatory system. However, if Wyoming does choose to remain within the discretionary model, the Board should not have complete discretion, but rather guidelines implemented by the legislature to allow some inmates to reenter society on early release provided they have served a majority of their sentence. This modified discretionary model would help alleviate the need to build additional prisons and save millions of dollars in housing and medical costs of inmates who will inevitably be released in the near future. Additionally, this will keep in step with Wyoming's Constitutional mandate that "[t]he penal code shall be framed on the humane principles of reformation and prevention."¹³⁹ Probation and parole policies should also face reform as this is significantly contributing to the overcrowding problem. "19 percent of [prison] admissions are from parole violations and 26 percent are from probation violations."¹⁴⁰ In this regard, some question whether two year prison sentences for "technical" parole or probation violations actually impact recidivism rates at all.¹⁴¹

Colorado released nearly 6,400 inmates early to help save \$19 million toward a budget shortfall.¹⁴² However, releasing felons may not be the ideal option. Perhaps Wyoming should consider implementing a more conservative alternative, such as the Wisconsin model. Wisconsin, facing a state budget shortage, charged the Department of Corrections with reviewing hundreds of non-violent offenders, including some with extraordinary health conditions, to consider early release in exchange for good behavior.¹⁴³ Wisconsin stated that extraordinary health conditions included age, infirmity, disability, or a need for a medical treatment that was not available within the prison.¹⁴⁴ Wisconsin state officials estimate that this could allow early release for as many as 3,000 non-violent inmates and save the state up to \$30 million over two years.¹⁴⁵

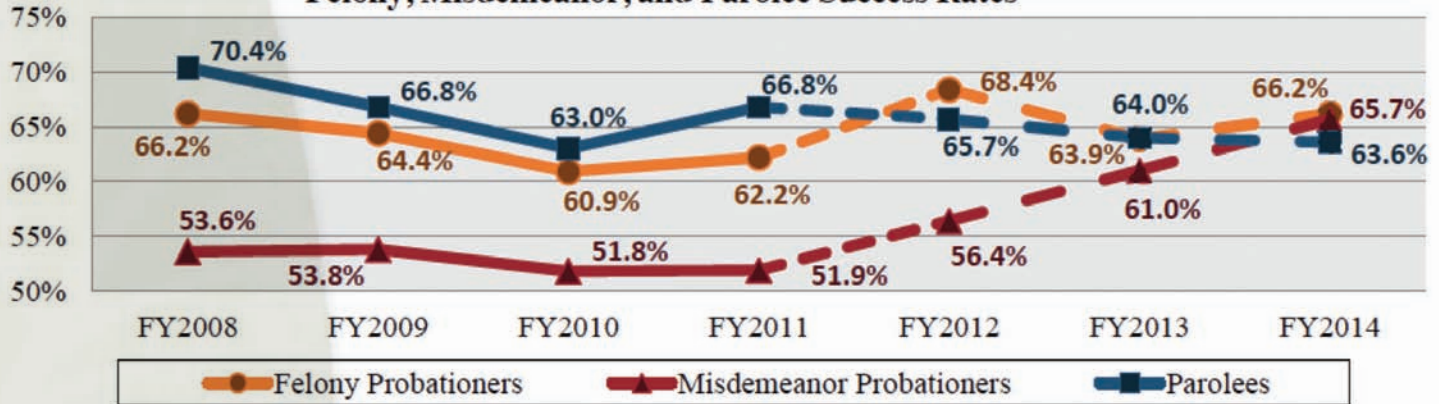
Additionally, Wyoming could establish a merit-based early release program that would be supervised and optional to inmates who meet legislatively-established criteria. This conditional release could be crafted by the legislature to mandate inmate commitment to rehabilitative programs with no infractions. This would allow inmates to still seek parole at the discretion of the parole board. However, this would allow inmates who have been repeatedly denied parole but have participated in institutional programs and remained free from

disciplinary violations to automatically qualify for early release pursuant to legislative reform.

The legislature could limit this type of early release program to the last year of the inmate's sentence, allowing adequate time for supervision. The pre-determined criteria of the supervision should be imposed according to criminological

monitor as it focuses on changing the way that a criminal thinks and prepares them for successful re-entry. A program of this nature will be in line with legislation that already provides for discharge from imprisonment for, "purposes, consistent with the public interest, necessary for the inmate's successful reintegration into society."¹⁵²

Felony, Misdemeanor, and Parolee Success Rates



Wyoming DOC Annual Report (2014) available at corrections.wy.gov/Media.aspx?mediaId=448.

risks based on the crime and relating to a variety of factors including sobriety, employment, and reentry into society. This sort of program should not be a one-size-fits all solution such as the ankle monitor bill recently rejected by a Wyoming legislative committee.¹⁴⁶ Instead, a successful early-release program should model the Positive Reinforcement, Incentives and Sanctions Matrix or "PRISM" that offers sanctions and rewards for those on probation.¹⁴⁷ If offenders in this program violate their probation, rather than immediate revocation, the sanctions are gradual. Additionally, rewards are instituted if the offender does well. This includes something as simple as a letter saying that they are doing a good job. Referrals are given to mental care and treatment centers if the offender needs these services. Also, the offenders are guided toward workforce centers.

On this point, one offender in the PRISM program stated, "The treatment center is a lot harder work. In prison you can get your own room, a PlayStation and color TV."¹⁴⁸ He says treatment is more structured and "in-your-face."¹⁴⁹ Some believe that the PRISM program is partly responsible for Wyoming's low recidivism rate. Wyoming's 24.8% recidivism rate is the second lowest in the country.¹⁵⁰ Nationally, the rate is 43.3%.¹⁵¹ A merit-based early release program initiated by the legislature could set out conditions based on criminological risks of the crime that relate to sobriety, employment, and reentry into society. This solution is better than a mere ankle

From 2008 to 2014, out of all Wyoming prisoners who were felony probationers, misdemeanor probationers, and parolees, the Wyoming Department of Corrections stated that "... parolees demonstrate the most success at remaining in the community" displaying the lowest comparative recidivism rate of all three categories.¹⁵³ The Department of Corrections says that there are two significant reasons for the success of early parolees. First, those eligible for parole are provided programs while they are incarcerated that target their individual criminogenic needs. Second, Enhanced Case Management services are offered during incarceration to focus on reentry into society in areas of education, employment, housing, mental health, and substance abuse.¹⁵⁴

CONCLUSION

It is an inevitable reality that almost every inmate will be released from prison at some point. Thus, programs that assist former inmates to become productive members of society and simultaneously save Wyoming's fiscal resources should be considered by the legislature.

There is a significant difference between regulations that carry civil or administrative penalties for violations and those that carry criminal penalties. People caught up in the latter may find themselves deprived of their liberty and stripped of their rights to vote, sit on a jury, or possess a firearm, among

other penalties that do not apply when someone violates a regulation that carries only civil or administrative penalties. There is also a unique stigma that is associated with being branded a “criminal.” A person stands to lose not only his liberty and certain civil rights, but also his reputation. In addition to standard penalties that are imposed on those who are convicted of crimes, a series of burdensome collateral consequences often imposed by state or federal laws can

follow a person for life. Legislators must resist the temptation to criminalize activities that do not fit a common-sense understanding of what constitutes a “crime.” The Wyoming Legislature should consider the suggested policy reforms that adhere to the often repeated cadence that *actus non facit reum nisi mens sit rea*, “There can be no crime, large or small, without an evil mind.”²⁹¹⁵⁵

ENDNOTES

¹ Wyo. Stat. § 6-9-203.

² Wyo. Stat. § 6-4-304(b).

³ Wyo. Stat. § 6-9-201.

⁴ Wyo. Stat. § 6-9-103.

⁵ Wyo. Stat. § 35-9-505.

⁶ Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, available at <http://www.nytimes.com/2008/04/23/us/23prisons.html>.

⁷ THE PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 1 (2010) [hereinafter PRISON COUNT 2010], available at http://www.pewcenteronthestates.org/report_detail.aspx?id=57653.

⁸ *Id.* at 7.

⁹ *Id.* at 7. Maine, for example, housed only 140 more prisoners than Wyoming despite a population that was three times as large.

¹⁰ State of Wyoming, 2009-2010 Biennium Appropriations Through 2009 General Session, available at <http://ai.state.wy.us/budget/pdf/0910Appropriations09GS/B1EXCEL.pdf>.

¹¹ *Wyoming Lawmakers Look at Prison, Judicial Reforms*, WYOMING NEWS, Dec. 6, 2015, available at http://www.wyomingnews.com/articles/2014/09/16/news/19local_09-16-14.txt.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Bob Moen, *Wyoming State Penitentiary Fix to Cost Tens of Millions*. ASSOCIATED PRESS. Oct. 14, 2015. Available at <http://www.washingtontimes.com/news/2015/oct/14/state-prison-fix-to-cost-tens-of-millions/>.

¹⁸ Laura Hancock, *As Number of People Sent to Prison Increases, Wyoming Lawmakers Look at Sentence*

Reform. BILLINGS GAZETTE. Nov. 6, 2015. Available at http://billingsgazette.com/news/state-and-regional/wyoming/as-number-of-people-sent-to-prison-increases-wyoming-lawmakers/article_21aa1989-a2cc-577c-9fe4-103f8e8fa7ad.html#.Vj3-Fij2uuw.facebook.

¹⁹ *Wyoming State Government Revenue Forecast, Fiscal Year 2016-20*. BILLINGS GAZETTE. Oct. 2015. Available at http://billingsgazette.com/october-creg-report/pdf_2a04094c-5d02-5cd4-8d7c-f9462dc0b40b.html.

²⁰ Common law crimes have been abolished, while common law defenses have been retained. Wyo. Stat. § 6-1-102. This brief counts only the specific crimes. However, it is important to note that there are multiple subsections that detail the many circumstances under which a crime could be committed. See, e.g., Wyo. Stat. § 6-2-105 (Manslaughter statute describes the elements for both voluntary and involuntary manslaughter, although the two share the same penalty and are listed as the same “crime”). Similarly, sentence enhancements are not counted as different crimes in this brief. See, e.g., Wyo. Stat. § 6-2-109 (mandating a sentence enhancement for homicide of a pregnant woman); see also Wyo. Stat. § 6-2-201 (allowing for different sentencing if the defendant voluntarily or involuntarily releases a kidnapped victim). Offenses and aggravated offenses have been counted separately as they contain different elements and carry different penalties. See, e.g., Wyo. Stat. § 6-2-502. (Detailing the different circumstances in which assault versus aggravated assault could apply).

²¹ Wyo. Stat. § 6-10-101.

²² Wyo. Stat. § 6-10-107.

²³ Wyo. Stat. § 6-10-104.

²⁴ Wyo. Stat. § 6-10-102.

²⁵ Wyo. Stat. § 7-13-201.

²⁶ See Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461 (2009) (Examining the history of the felony/misdemeanor distinction).

²⁷ Wyo. Stat. § 6-10-103.

²⁸ Wyo. Stat. § 27-3-101.

²⁹ Wyo. Stat. § 9-1-907.

³⁰ Wyo. Stat. § 9-2-1016.

³¹ Wyo. Stat. § 27-3-101.

³² See Wyo. Stat. § 27-3-102.

³³ See Wyo. Stat. § 6-1-101.

³⁴ Wyo. Stat. § 35-4-109.

³⁵ Wyo. Stat. § 35-4-202.

³⁶ Wyo. Stat. § 35-7-364.

³⁷ Wyo. Stat. § 35 10 402.

³⁸ Wyo. Stat. § 35-10-407

³⁹ See Wyo. Stat. § 9-4-829.

⁴⁰ See Wyo. Stat. §§ 6-10-101 – 6-10-109.

⁴¹ Kan. Stat. Ann. §§ 21-6804, 21-6805. Level “A” is reserved for defendants with three or more convictions for felonies committed on a person. Conversely, level “I” is the least serious designation for defendants with no criminal record or only one misdemeanor conviction.

⁴² See Kan. Stat. Ann. § 21-6806.

⁴³ Kan. Stat. Ann. § 21-6611.

⁴⁴ See *United States v. Booker*, 543 U.S. 220, 221 (2005).

⁴⁵ *Remmick v. State*, 275 P.3d 467 (Wyo. 2012) (upholding the delay of criminal charges for forgery and larceny for six years, during which time the defendant served a federal sentence for tax evasion).

The approaches and limitation periods of state provisions vary. South Carolina and Wyoming do not have any such statutes. Kentucky, Maryland, and North Carolina only limit the time period for prosecuting misdemeanors. Ky. Rev. Stat. § 500.050 (Michie/Bobbs-Merrill 1990); Md. Code Ann. § 5-106 (1989 & Supp.1994); N.C. Gen. Stat. § 15-1 (1983). Virginia and West Virginia do not limit the prosecution of any traditional felonies. Va. Code Ann. § 19.2-8 (Michie 1990 & Supp.1994); W. Va. Code Ann. § 61-11-9 (1992). Mississippi excludes many, but not all, major felonies from limitations. Miss. Code Ann. § 99-1-5 (1994).

⁴⁶ See Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*,

37 WM. & MARY L. REV. 199, 200 (1995).

⁴⁷ Wyo. Stat. § 35-10-402.

⁴⁸ Ariz. Stat. Ann. § 13-107.

⁴⁹ Nev. Stat. Ann. § 171.095.

⁵⁰ See, e.g., *Toussie v. United States*, 397 U.S. 112, 114-15 (1970) (stating that criminal statutes of limitations protect individuals); *Bridges v. United States*, 346 U.S. 209, 215-16 (1953) (discussing how created an exception to a longstanding congressional “policy of repose” that is “fundamental to our society and our criminal law”); *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (“Statutes of limitations are vital to the welfare of society and are favored in the law.”); *Adams v. Woods*, 6 U.S. 336, 341 (1805) (stating that restricting the fine and forfeiture penalty provision of the 1790 federal statute of limitations to criminal prosecutions would be “utterly repugnant to the genius of our laws”) (Marshall, C.J.).

⁵¹ Miss. Code Ann. § 99-1-5 (1994).

⁵² Wyo. Stat. § 6-10-201.

⁵³ *Id.*

⁵⁴ *Rich v. State*, 899 P.2d 1345 (Wyo. 1995); see U.S. CONST. amend. VIII.

⁵⁵ *Id.*

⁵⁶ *Ewing v. California*, 538 U.S. 11, 14 (2003).

⁵⁷ *Id.* at 1183-85.

⁵⁸ *Id.* at 1190.

⁵⁹ See e.g., *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003). See also *Brown v. State*, 99 P.3d 489, 496-97 (Wyo. 2004).

⁶⁰ Wyo. Stat. § 6-10-301.

⁶¹ See generally Theodore E. Lauer, *The Wyoming Criminal Code Revisited: Reflections After Fifteen Years*, 33 LAND & WATER L. REV. 523, 526 (1998).

⁶² For example, Wyo. Stat. § 6-3-608(b) Contractors who do not pay their subcontractors are guilty of a felony subject to 5 years imprisonment and a \$10,000 fine, or both. See also Wyo. Stat. § 6-3-306 allowing for a forcible entry and detainer crime despite the fact that a civil remedy already exists within the circuit court’s jurisdiction as stated in Wyo. Civ. Pro §1-21-1001.

⁶³ For example, the domestic violence statute is not listed in Article 4’s “Offenses Against the Family.”

⁶⁴ Wyo. R. Crim. P. 31.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See *Dean v. State*, 77 P.3d 692 (Wyo. 2003).

⁶⁸ 891 P.2d 70 (Wyo. 1995).

⁶⁹ 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.

⁷⁰ 932 P.2d 730 (Wyo. 1997).

⁷¹ 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.

⁷² 860 P.2d 1118 (Wyo. 1993).

⁷³ 932 P.2d 730, 733 (Wyo. 1997).

⁷⁴ Wyo. Stat. § 6-2-105(a)(ii).

⁷⁵ *Id.* § 6-1-201(a).

⁷⁶ 933 P.2d 1114 (Wyo. 1997).

⁷⁷ *Id.* at 1120.

⁷⁸ Wyo. Stat. § 6-1-302(a).

⁷⁹ 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. This leaves open the ambiguous possibility that one who conspires to commit first degree murder may be subject to the death penalty for the conspiracy if the murder is committed.

⁸⁰ See Wyo. Stat. § 6-70.B, § 6-69 (Michie 1957 & Supp. 1975).

⁸¹ See, e.g., *Geiger v. State*, 859 P.2d 665 (Wyo. 1993). The defendant quarreled with the victim, then went home and returned with a gun, intending to “hurt” the victim. The defendant then followed him home and shot him three times. Although the victim lived, the defendant received a mandatory life sentence.

⁸² Burglary is punishable by imprisonment for not more than ten years. See Wyo. Stat. § 6-3-101(b). The court may grant probation following a conviction of burglary or conspiracy to commit burglary. See, e.g., Wyo. Stat. § 7-13-302, permitting the trial court to order probation following conviction “for any offense, except crimes punishable by death or life imprisonment.”

⁸³ 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,” Wyo. Stat. § 6-1-304, leaving life imprisonment as the only possible penalty for conspiring to commit first degree murder where the murder is not

committed. Additionally, a person convicted of a crime punishable by life in prison cannot be given probation. Wyo. Stat. § 7-13-302.

⁸⁴ Wyo. Stat. § 6-1-203.

⁸⁵ *Witt v. State*, 892 P.2d 132, 135 (Wyo. 1995).

⁸⁶ *Id.*

⁸⁷ *Id.* at 138.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Wyo. Stat. § 6-2-202 states “reasonable fear of imminent peril of death or serious bodily injury to himself or another” must be established. Thus, the psychology behind battered woman’s syndrome would not only be helpful to the jury, it is necessary to establish whether the defense is successful at all.

⁹¹ See Wyo. Stat. § 6-1-203.

⁹² <http://www.ptsd.va.gov/professional/PTSD-overview/ptsd-overview.asp>.

⁹³ *Id.*

⁹⁴ American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders*, (5th ed.). Washington, DC.

⁹⁵ *Id.*

⁹⁶ 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.

⁹⁷ 342 U.S. 246 (1952).

⁹⁸ *Id.* at 273.

⁹⁹ *Id.* at 252.

¹⁰⁰ *Id.* at 255 n.14.

¹⁰¹ See *Elonis v. United States*, 342 U.S. 250 (2015).

¹⁰² *Id.*

¹⁰³ See *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513 (1994); *Liparota v. United States*, 471 U.S. 419 (1985).

¹⁰⁴ *Elonis*, 342 U.S. at 250.

¹⁰⁵ *Id.*

¹⁰⁶ Wyo. Stat. Ann. § 6-1-104(a)(iii) and (ix).

¹⁰⁷ See *Crozier v. State*, 723 P.2d 42 (Wyo. 1986), overruled by *Wilkerson v. State*, 336 P.3d 1188 (Wyo. 2014). As the law stands now, “general intent” implies that intent is not an element the of crime

and requires that prohibited conduct be undertaken voluntarily, while “specific intent” means that intent is or may be made element of crime which must be proved beyond reasonable doubt as any other fact in case. “Purposely,” as in second-degree murder, is a general-intent element and describes an act, not intention, to produce a desired, specific result.¹⁰⁷ Premeditation is element which makes first-degree murder a specific-intent crime separate from general-intent crime of second-degree murder. Ambiguity results in the verbiage as the court has held that words “purposely,” “deliberately,” and “intentionally” are synonymous with the word “willfully,” and the intent to be derived from word “willfully” is mere general intent. This is particularly relevant for purposes of determining whether second-degree murder is a general or specific-intent crime to which intoxication, and other specific-intent defenses, can be applicable.

¹⁰⁸ 336 P.3d at 1188.

¹⁰⁹ 723 P.2d at 42.

¹¹⁰ 123 P.3d 543.

¹¹¹ For a discussion of this point see Eric A. Johnson, *The Crime That Wasn't There: Wyoming's Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1, 2 (2007).

¹¹² Wyo. Stat. § 6-2-105.

¹¹³ 1890 Wyo. Sess. Laws Ch. 73, § 17.

¹¹⁴ Wyo. Stat. § 6-4-101; 6-4-404; 6-3-406.

¹¹⁵ Wyo. Stat. § 6-6-103.

¹¹⁶ Wyo. Stat. § 6-4-501.

¹¹⁷ Wyo. Stat. § 6-3-204(c).

¹¹⁸ Many Wyoming crimes contain a more severe punishment for crimes that involve stealing something over \$1,000 as opposed to under \$1,000. See e.g., Wyo. Stat. § 6-3-404 (Wyoming's shoplifting statute).

¹¹⁹ Wyo. Stat. § 6-3-404; 6-2-501(b).

¹²⁰ Wyo. Stat. § 35 10 402.

¹²¹ Wyo. Stat. § 6-5-211 shows that it is a felony to harm a search or police dog.

¹²² Theodore E. Lauer, *The Wyoming Criminal Code Revisited: Reflections After Fifteen Years*, 33 Land & Water L. Rev. 523, 533 (1998)

¹²³ 1981 Wyo. Sess. Laws ch. 11, § 1. Attempt, solicitation and conspiracy are now found in Wyo. Stat. §§ 6-1-301 to 6-1-303.

¹²⁴ Model Penal Code §§ 5.01, 5.03 (1985).

¹²⁵ See Wyo. Stat. § 35 10 402 creating a strict liability crime for those who enter a sawmill while intoxicated.

¹²⁶ Wyo. Stat. § 7-13-201.

¹²⁷ *Dorman v. State*, 665 P.2d 511, 512 (Wyo. 1993).

¹²⁸ Mandatory parole states include, among others, Arizona, California, Illinois, Indiana, Minnesota, Ohio, Oregon, Virginia, and Wisconsin. See JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 66-67 (2003).

¹²⁹ Wyo. Stat. § 7-13-401(b).

¹³⁰ Wyo. Stat. §§ 6-10-301(c), 7-13-402(a)-(b).

¹³¹ AMY L. SOLOMON ET AL., DOES PAROLE WORK: ANALYZING THE IMPACT OF POSTPRISON SUPERVISION ON REARREST OUTCOMES 2 (Mar. 2005), available at http://www.urban.org/UploadedPDF/311156_Does_Parole_Work.pdf.

¹³² TIMOTHY HUGHES ET AL., BUREAU OF JUSTICE STATISTICS, TRENDS IN STATE PAROLE 1990-2000, at 1, 5 (2001).

¹³³ WYO. DEP'T OF CORR., ANNUAL REPORT (2009), available at http://corrections.wy.gov/about/annual_report.html.

¹³⁴ WYOMING BOARD OF PAROLE ANNUAL REPORT FISCAL YEAR 2010, available at <http://bop.state.wy.us/pdf/10%20Annual%20Report%20for%20Agency%20081.pdf>.

¹³⁵ Wyo. Stat. § 7-13-421(b).

¹³⁶ Steven Senne, *States: Freed Inmates Would Save Millions*, USA TODAY, Apr. 3, 2008, available at http://www.usatoday.com/news/nation/2008-04-03-prison-release_N.htm.

¹³⁷ Daniel M. Fetsco, *Early Release from Prison in Wyoming: An Overview of Parole in Wyoming and Elsewhere and an Examination of Current and Future Trends*, 11 WYO. L. REV. 99, 114 (2011) citing Wyo. Dept of Corr., Cost Per Day 1 (Sept. 30, 2009) (unpublished statistics) (on file with Daniel M. Fetsco).

¹³⁸ See Joan Petersilia, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 3 (2003).

¹³⁹ Wyo. Const. art. 1, § 15.

¹⁴⁰ *Wyoming Lawmakers Look at Prison, Judicial Reforms*. WYOMING NEWS. Available at http://www.wyomingnews.com/articles/2014/09/16/news/19local_09-16-14.txt#.VmR94ngijwx (December 6, 2015).

¹⁴¹ Jeff McLeod with the National Governor's Association stated, “It may not require two years to get the point across. The question is how long does that sentence actually impact recidivism rates? Generally, best practices suggest that targeted, proportional penalties are more effective in

changing behavior.” *Wyoming Lawmakers Look at Prison, Judicial Reforms*. WYOMING NEWS, Dec. 6, 2015, available at http://www.wyomingnews.com/articles/2014/09/16/news/19local_09-16-14.txt.

¹⁴² Kirk Mitchell, *First 10 Felons Set Free Under Colorado Early-Release Initiative*, DENVER POST, Oct. 15, 2009, available at http://www.denverpost.com/ci_13564285.

¹⁴³ *State Prisons to Release Inmates Early*, JANESVILLE GAZETTE, Jan. 5, 2010, available at <http://www.gazetteextra.com/weblogs/latest-news/2010/jan/05/state-prisons-release-inmates-early/>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Laura Hancock, *Wyoming Lawmakers Reject Bill for Early Prison Release of Nonviolent Felons*, Nov. 8, 2015. Billings Gazette available at http://billingsgazette.com/news/state-and-regional/wyoming/wyoming-lawmakers-reject-bill-for-early-prison-release-of-nonviolent/article_9104d93f-7b26-544b-bda9-5a64c22c774d.html

¹⁴⁷ *Felony Convictions More Than Just Prison*, July 8, 2012, Wyoming Tribune Eagle available at http://www.wyomingnews.com/articles/2012/07/09/news/01top_07-09-12.txt#.VnS-ongijwx.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Wyo. Stat. § 7-13-701.

¹⁵³ Wyoming DOC Annual Report (2014) available at corrections.wy.gov/Media.aspx?mediaId=448.

¹⁵⁴ *Id.*

¹⁵⁵ “The general rule of English law is, that no crime can be committed unless there is *mens rea*.” *Williamson v. Norris*, [1899] 1 Q. B. 7, 14, *per Lord Russell*, C. J. “It is a sacred principle of criminal jurisprudence, that the intention to commit the crime, is of the essence of the crime, and to hold, that a man shall be held criminally responsible for an offense, of the commission of which he was ignorant at the time, would be intolerable tyranny.” *Duncan v. State*, 7 Humph. 148, 150 (Tenn. 1846).

