

# MONTANA v. EGELHOFF: VOLUNTARY INTOXICATION, MORALITY, AND THE CONSTITUTION

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## INTRODUCTION

Alcoholic intoxication is a problem with which American society has been grappling for more than a century. It is estimated that nearly

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111 million Americans drink alcohol.<sup>1</sup> Given the prevalence of alcohol use and its connections with crime and violence,<sup>2</sup> it is not surprising that the legal system constantly struggles with the issues raised by intoxication. The most heated debate among legal scholars concerns the relevance of intoxication to the mens rea elements in criminal offenses.<sup>3</sup> Legislatures and courts have debated the validity

1. See Katherine Prescott, *Drawing Line Against Underage Drinking*, STAR TRIB., Sept. 16, 1996, at 11A. Of these 111 million alcohol users, more than ten million are alcoholics. See generally Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660 (1981) (discussing changes in law prompted by pervasiveness of alcohol abuse).

2. See Note, *supra* note 1, at 1681-82 (noting that approximately 50% of homicides committed involve both attackers and victims who were under the influence of alcohol at least partially). A number of studies have detailed the correlation between alcohol and violent crime. Professor Nemerson provided a small sample of these statistics:

Of 882 felons arrested in a two-year period in Cincinnati, 64 percent had a urine alcohol level of 0.10 percent or higher. In crimes of violence, the incidence varied from 67 to 88 percent. A four-year study of 588 homicide cases in Philadelphia revealed that one or both parties had been drinking in 64 percent of the cases. In 44 percent of these cases, both parties had been drinking.

Steven S. Nemerson, *Alcoholism, Intoxication, and the Criminal Law*, 10 CARDOZO L. REV. 393, 446 n.214 (1988) (citing Moore, *Legal Responsibility and Chronic Alcoholism*, 122 AM. J. PSYCHIATRY 748, 753 (1966)). These studies have led to the conclusion that alcohol abuse is more common among felons convicted of violent crimes than among the general population or convicted felons as a whole. See Note, *supra* note 1, at 1682 (citing FRANK P. GRAD ET AL., *ALCOHOLISM AND THE LAW* 2 (1971); Donald W. Goodwin et al., *Felons Who Drink: An 8-Year Follow-Up*, 32 Q.J. STUD. ALCOHOL 136, 139 (1971)). The connection between alcohol and violence is rooted in the basic inhibitory affects that alcohol has on the central nervous system. It is well established that alcohol decreases an individual's self-control and inhibitions. See Nemerson, *supra*, at 416 (asserting that suppressive effects of alcohol on one's reasoning, judgement, morals, conscience, and other cognitive abilities is well documented). This theory suggests that an individual will do things after drinking alcohol that they normally would not. See Monrad G. Paulsen, *Intoxication as a Defense to Crime*, 1961 CURRENT PROBS. IN CRIM. L. 1, 1 (arguing that "a person changes his personality to some extent" after drinking). In this respect, the physiological effects of alcohol can lead to criminal activity regardless of the individual's intentions prior to drinking. See *id.*

A variation on this direct causation theory is that alcohol does not cause crime, but rather contributes to it. See Note, *supra* note 1, at 1682. Such is the case with the individual who drinks to alleviate nerves after deciding to commit a crime. See *id.* Thus, alcohol has no role in forming the criminal intent, but provides the necessary courage to manifest it. The fact that not everyone who becomes intoxicated commits a crime suggests that this view has some validity. See *id.* Justice Scalia took this theory a step further in *Montana v. Egelhoff*, arguing that intoxicated individuals act violently not due to biology, but because society has been taught that intoxicated persons act violently as a matter of fact. See 116 S. Ct. 2013, 2021 (1996) (plurality opinion).

3. See generally Note, *supra* note 1 (providing overview of various debates regarding alcohol abuse). It is widely believed that the law has been slow in adapting to developments in the understanding of alcohol and its affects on humans. See *id.* at 1661; see also *Egelhoff*, 116 S. Ct. at 2030 (O'Connor, J., dissenting) (characterizing changes in doctrine forbidding voluntary intoxication evidence as "slow progress typical of the common law"). Despite its slow evolution, the law among the states concerning intoxication evidence and mens rea is fairly consistent, contrary to Justice Scalia's characterization that the law is in a state of flux. See *Egelhoff*, 116 S. Ct. at 2021 (plurality opinion) (holding that use of intoxication evidence in determining mens rea "has not received sufficiently uniform and permanent allegiance"). Involuntary intoxication is a complete defense, excusing the commission of the crime. Such instances, however, are extremely rare. Professor Hall argues that judgments of guilt in instances of fraud and coercion have all but eliminated the concept of involuntary intoxication. See Jerome Hall, *Intoxication and*

and necessity of allowing defendants to submit to juries the defense that alcohol prevented the defendant from possessing the required mental elements of the offense charged.<sup>4</sup>

A corollary to this debate is the repeated allusion by the U.S. Supreme Court to the right of a defendant to present a defense in a

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*Criminal Responsibility*, 57 HARV. L. REV. 1045, 1056 (1944) ("As regards 'coercion,' the case-law implies that a person would need to be bound head and foot, and the liquor literally poured down his throat . . . before the exception, so universally voiced, would have any effect of judicial decision.").

The law on voluntary intoxication defenses is less settled. Some commentators argue that voluntary intoxication never should excuse a crime. See Paulsen, *supra* note 2, at 2-3 (stating judicial and legislative belief that voluntary intoxication cannot excuse crime). One author writes that allowing a broad voluntary intoxication defense will fail to serve society's interest in safety and will not deter similar actions in the future. See Note, *supra* note 1, at 1685 (expressing need to avoid frivolous intoxication claims). Critics are fairly uniform, however, in their agreement that the failure to consider voluntary intoxication evidence in any respect is too restrictive to prove rational. Although drunkenness may deserve moral outrage, getting drunk is not in itself a crime. See Note, *supra* note 1, at 1686; see also Arthur A. Murphy, *Has Pennsylvania Found a Satisfactory Intoxication Defense?*, 81 DICK. L. REV. 199, 204-05 (1977) (arguing that because alcohol can affect ability to form intent, conviction without consideration of intoxication may punish defendant severely for "relatively minor delict of getting drunk"). More importantly, intoxication may prevent the accused from forming the required intent, raising serious questions about his culpability. Scholars cite the need to balance the potential for massive numbers of defendants who will be permitted to commit crimes while intoxicated with the realization that alcohol plays a role in crime and criminal intent. See Note, *supra* note 1, at 1686 (arguing that limitation of intoxication evidence in defense will avoid such abuses); see also *supra* note 2 and accompanying text (discussing interplay of alcohol and crime).

The compromise is the commonly followed practice of allowing evidence of voluntary intoxication when the defendant argues that he did not possess the mens rea necessary to be guilty of the crime. See Murphy, *supra*, at 199-200 ("The great majority of American jurisdictions follow what may be characterized as a 'capacity defense' approach to the defense of voluntary intoxication."). Within this middle ground, most courts draw additional lines between general and specific intent. See generally Frank J. Remington & Orrin L. Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644 (providing detailed description of general and specific intent and its role in criminal justice system). Voluntary intoxication usually cannot be considered if the crime is one of general intent. See Paulsen, *supra* note 2, at 9. In these situations, it is presumed that the intent is manifested by engaging in the illegal activity. Intoxication is relevant only if the crime is a specific intent crime; there must be a general intent to commit an act with additional intent to commit other crimes. An example of a specific intent crime is burglary, which requires intent to enter the property of another with the intent to take his possessions. Most critics assail the specific/general intent distinction as irrelevant and empty. See 2 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 111, at 104-05 (15th ed. 1995) (indicating that distinction is "difficult to perceive"). Critics claim that the relevant inquiry is whether the defendant has formed the intent to commit a crime, whether general or specific. See, e.g., Edward H. Benton et al., *Special Project: Drugs*, 33 VAND. L. REV. 1145, 1176 (1980) ("[T]he . . . logical view is to admit evidence of intoxication in all cases in which intent, whether general or specific, is an element of the crime."); Nemerson, *supra* note 2, at 423 ("This doctrinal approach is wrong in principle."); Note, *supra* note 1, at 1684 ("Both general and specific intent crimes require a particular intent."); Scott A. Anderegg, Note, *The Voluntary Intoxication Defense in Iowa*, 73 IOWA L. REV. 935, 955 (1988) (asserting that it is logical to allow intoxication to negate both general and specific intent crimes). Whether intent is labelled "specific" or "general," if intoxication negates the requisite element of intention, then the crime has not been committed. Conditioning guilt on an extra mens rea term avoids addressing the real issue: "what the legal significance of drunkenness should be." Note, *supra* note 1, at 1684 (asserting that reliance on general and specific intent is unsound).

4. See *supra* note 3 and accompanying text.

criminal trial under the Due Process Clause of the Fourteenth Amendment, as established in *Chambers v. Mississippi*.<sup>5</sup> In *Montana v. Egelhoff*,<sup>6</sup> the Court addressed what role this right played in the controversy surrounding the relevancy of voluntary intoxication to considerations of mens rea. In *Egelhoff*, the Court confronted a due process challenge to a Montana law forbidding consideration of intoxication evidence in homicide offenses.<sup>7</sup> In a 5-4 decision, the Court refused to rule that this evidentiary restriction was a due process violation.<sup>8</sup> Although the Court acknowledged the existence of the right to present a defense, it held that the combination of the deference accorded to states in instituting their criminal justice systems and the long common-law tradition of excluding intoxication evidence justified the restriction.<sup>9</sup>

*Egelhoff's* effect on the right to present a defense doctrine is unclear. Because the plurality appears to have been motivated by the moral nature of the alcohol issue, *Egelhoff* may prove to be a decision limited to its facts. Still, the role that *Egelhoff* plays in the emerging right to present a defense doctrine is worth examining and is the focus of this Note.

Part I of this Note discusses the genesis of the right to present a defense leading to *Montana v. Egelhoff*. Part II summarizes the factual and procedural background of the case, and Part III presents the Supreme Court's opinions. Part IV analyzes the *Egelhoff* decision and suggests that its effect on the right to present a defense will be limited. Finally, Part V offers recommendations on the role that *Montana v. Egelhoff* should play in the law.

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5. 410 U.S. 284 (1973).

6. 116 S. Ct. 2013 (1996) (plurality opinion), *rev'd* 900 P.2d 260 (Mont. 1995).

7. See MONT. CODE ANN. § 45-2-203 (1995). This section states:

A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance.

*Id.*

8. See *Egelhoff*, 116 S. Ct. at 2024 (plurality opinion).

9. See *id.* at 2023-24 (plurality opinion).

I. HISTORY OF THE RIGHT TO PRESENT A DEFENSE<sup>10</sup>A. *Case Law Leading to Chambers v. Mississippi*

In 1851 the Supreme Court first addressed the exclusion of a defendant's evidence in *United States v. Reid*.<sup>11</sup> *Reid*, like many of the Court's first examinations of exclusions, relied on evidentiary and procedural grounds instead of constitutional principles.<sup>12</sup> The most important of these first "evidentiary approach" cases was *Crawford v. United States*.<sup>13</sup> By invalidating the exclusion of a letter supporting the defendant's defense in a conspiracy trial, the Court expressed a concern that the defendant receive a fair trial and that part of such assurance included allowing the defendant to present relevant evidence.<sup>14</sup>

The Court began to recognize a due process right to present a defense in the late 1800s and early 1900s. Beginning in the context of civil trials, the Court started to acknowledge a general right to be heard in defense and intimated that this right was fundamental.<sup>15</sup>

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10. See generally Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711 (1976) (detailing history of right to present a defense). The history of the right to a defense is a long and complex one, and it is not the intention of this Note to provide a thorough examination of its growth. Rather, Part I of this Note seeks to sketch the general treatment of the right by the Supreme Court.

11. 53 U.S. (12 How.) 361 (1851), *overruled by* *Rosen v. United States*, 245 U.S. 467 (1918). *Reid* involved the appeal of a murder conviction and the exclusion of an accomplice's testimony on behalf of the defendant on trial. The ultimate rejection of the appeal was based on an interpretation of the Judiciary Act of 1789 and did not implicate constitutional principles. See *United States v. Reid*, 53 U.S. (12 How.) 361, 365-66 (1851); Clinton, *supra* note 10, at 742-44. In *Rosen*, the Court specifically overruled *Reid*. See *Rosen*, 245 U.S. at 470-71. There the Court also was concerned with witness exclusion issues. Recognizing a growing shift toward erring on the side of permitting relevant testimony, the Court approved the trial court's admission of testimony by a witness who had been convicted of forgery. Most importantly, the opinion expressed the notion that arriving at the truth is served best by allowing pertinent and reliable evidence and then allowing the jury to decide the importance of testimony. See *id.* at 471.

12. See Clinton, *supra* note 10, at 747. Professor Clinton explains that the Supreme Court's failure to address the constitutional significance of evidentiary exclusions was a result of how the Court came to hear the cases in the first instance. See *id.* Until approximately 1920, many of the evidence cases were heard by the Court as writ of error appeals to the lower courts. See *id.* Because the Supreme Court has supervisory power over the lower courts, it was unnecessary to approach the appeals from a constitutional standpoint. See *id.*

13. 212 U.S. 183 (1909). "[T]he strongest early statement by the Court regarding the exclusion of portions of the defense's evidence came in *Crawford v. United States*." Clinton, *supra* note 10, at 746.

14. See Clinton, *supra* note 10, at 747 (arguing that tone of decision emits concern for fair trial).

15. See, e.g., *Hovey v. Elliott*, 167 U.S. 409, 417 (1897) (asserting that right to be heard in one's defense was a fundamental right under due process); *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876) ("A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 267 (1870)

The first significant statement of these principles in a criminal case came with *Cooke v. United States*,<sup>16</sup> and continued in *In re Oliver*.<sup>17</sup> These cases, however, were minor steps toward constitutional protection for the right to present a defense because they involved the outright denial of hearings for defendants and were clear examples of due process violations.<sup>18</sup>

The important discussion of the right to a defense in situations in which the defendant's evidence was excluded only partially would not come until the late 1960s.<sup>19</sup> Although confronted with numerous cases involving partial exclusions of evidence,<sup>20</sup> the Court did not contribute significantly to the development of the due process right to a defense in these situations<sup>21</sup> until 1969 with *Jenkins v. McKeithen*.<sup>22</sup> In *Jenkins*, the Court addressed a Louisiana statute creating the Louisiana Labor-Management Commission of Inquiry.<sup>23</sup> The Supreme Court held that the Commission functioned as a

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(holding that social and judicial principles mandate that accused be given hearing).

16. 267 U.S. 517 (1925).

17. 333 U.S. 257 (1948).

18. See Clinton, *supra* note 10, at 751 (arguing that *Cooke* and *Oliver* touch only superficially on right to a defense and that greater concern is Court's application of right to a defense in cases where defendant was denied right to present a defense only partially). Both *Cooke* and *Oliver* involved cases in which the trial judge convicted the defendant of contempt without affording the defendant the right to present a defense. See *Cooke v. United States*, 267 U.S. 517, 537 (1925); *In re Oliver*, 333 U.S. 257, 258 (1948).

19. See Clinton, *supra* note 10, at 752-56. Professor Clinton laments that the Court had opportunities in cases such as *Yakus v. United States*, 321 U.S. 414 (1944), to apply the constitutional right to a defense in the partial exclusion situation. *Yakus* concerned evidence restrictions under the Emergency Price Control Act of 1942. See *Yakus*, 321 U.S. at 418. Chief Justice Stone, writing for the majority, accepted the notion that due process affords a defendant the "reasonable opportunity to be heard and present evidence." *Id.* at 433. Stone, however, felt that the opportunity had been given to the defendant prior to the criminal trial, and therefore, found no due process violation at that level. See *id.* at 434 (stating that in light of defendant's failure to assert a right to an available administrative remedy, the adequacy of administrative procedures was not an issue ripe for review).

20. See, e.g., *Specht v. Patterson*, 386 U.S. 605 (1967) (analyzing Colorado Sex Offenders Act that allowed for an increased sentence of a convicted sex offender if the judge felt that the accused was a threat to society); *Washington v. Texas*, 388 U.S. 14 (1967) (addressing Texas statute prohibiting testimony of one participant on behalf of another participant); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (addressing Georgia rule forbidding defendant from giving sworn testimony but allowing defendant to give statement to court).

21. See, e.g., *Ferguson*, 365 U.S. at 596 (grounding unconstitutionality of statute in right to counsel); Clinton, *supra* note 10, at 764 (arguing that invalidation of law under due process in *Specht* did not contribute to growth of right to defense doctrine because, as in *Cooke* and *Oliver*, defendant was denied any evidence); see also *supra* notes 16-17 and accompanying text (describing cases in which Court started to acknowledge right to be heard in defense).

22. 395 U.S. 411 (1969).

23. See *Jenkins v. McKeithen*, 395 U.S. 411, 413-14 (1969) (stating purpose of Commission included investigating and finding facts "relating to violations or possible violations of criminal laws of the state of Louisiana").

criminal enforcement body<sup>24</sup> and, as such, was subject to the requirements placed on states by the Due Process Clause of the Fourteenth Amendment.<sup>25</sup> Justice Marshall wrote in the majority opinion that these rights included "the right of a person investigated to present evidence on his own behalf."<sup>26</sup> Although *Jenkins* added significant weight to the concept of a right to a defense, the Court's opinion failed to explain the test for determining if an evidentiary exclusion violated this right.<sup>27</sup>

The most significant development of the right to a defense doctrine occurred in the early 1970s. In *Webb v. Texas*,<sup>28</sup> the Court heard a case involving a claim that the defendant's due process rights were violated when the trial judge harassed and threatened the defendant's only witness to the point that the witness refused to testify.<sup>29</sup> The Court overturned the defendant's conviction on the grounds that the judge's actions violated the defendant's due process right to present a defense.<sup>30</sup> This decision was ground-breaking in the jurisprudence

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24. See *id.* at 427-28. The Court cited numerous reasons for finding that the Commission functioned as a criminal adjudicatory body: (1) the scope of the inquiries was limited to criminal law violations; (2) the Commission did not have civil jurisdiction; (3) the Commission had the power to compel the attendance of witnesses; and (4) the Commission could conduct public hearings. See *id.* at 415-18.

25. See *id.* at 428 (finding procedures of Commission insufficient to satisfy due process requirements because no provision was made for accused to confront and cross-examine witnesses).

26. *Id.* at 429 (noting the Commission's procedures drastically limited right to present evidence on defendant's own behalf).

27. See Clinton, *supra* note 10, at 771; see also *Brooks v. Tennessee*, 406 U.S. 605, 606 (1972) (addressing a Tennessee statutory requirement that a defendant testify before any other testimony is presented to the court). The Court in *Brooks* found a statutory requirement that the defendant testify unconstitutional because it violated the defendant's right against self-incrimination. The Court's decision, however, adopted a test that balanced the state interest in making the defendant testify first against an infringement on his Fifth Amendment rights. See *id.* at 609-12. Professor Clinton argues that if Justice Brennan simply had utilized the Due Process Clause right to a defense instead of a "strained self-incrimination privilege analysis," the Court would have established a much needed analytical test in the right to present a defense. See Clinton, *supra* note 10, at 776.

28. 409 U.S. 95 (1972).

29. See *Webb v. Texas*, 409 U.S. 95, 95-97 (1972). The witness in question was himself in jail at the time of the trial. See *id.* at 95. Apparently concerned with the reliability of such a witness, the judge issued the following warning:

Now you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the likelihood [sic] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on.

*Id.* at 95-96. The Court disagreed with the lower courts, stating that the warning evinced a clear expectation on the part of the judge that the witness would lie and that the tone of his statement was such that it could be expected to intimidate the witness. See *id.* at 97-98.

30. See *id.* at 98.

of the right to present a defense because the Court's reasoning relied on the Due Process Clause and not on the Compulsory Process Clause of the Sixth Amendment as had been the trend.<sup>31</sup>

Until 1970, the Court slowly had begun to craft the right to present a defense and, with *Webb*, had indicated that such a right was found in the Due Process Clause. In 1973, the Court took the final step in the genesis of this right when it heard *Chambers v. Mississippi*.<sup>32</sup> *Chambers* was the cornerstone decision in the foundation of the due process right of a criminal defendant to present a defense.<sup>33</sup> The defendant in *Chambers* was convicted of murdering a police officer.<sup>34</sup> At issue was the application of Mississippi's voucher and hearsay rules, which led to the exclusion of important defense evidence.<sup>35</sup> The

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31. See Clinton, *supra* note 10, at 779. The language utilized in *Webb* was taken from *Washington v. Texas*, 388 U.S. 14, 19 (1967). In *Washington*, the Court found that a Texas statute forbidding the testimony of criminal participants in the defense of each other was unconstitutional as a violation of the defendant's Sixth Amendment right to have compulsory process for obtaining favorable witnesses. See *id.* Professor Clinton writes that the Court's use of language from *Washington*, although relying on the Fourteenth Amendment in *Webb*, is significant because the situation in *Webb* was probably a more egregious violation of the compulsory process than that present in *Washington*. See Clinton, *supra* note 10, at 779. More specifically, the defendant in *Washington* was denied the testimony of a witness, whereas the witness in *Webb* was the only witness. See *id.* As such, Professor Clinton indicates that the *Webb* decision might signal the Court's willingness to rely "on an elastic due process analysis." *Id.* at 778. Such an argument must be tempered with *Cool v. United States*, 409 U.S. 100 (1972), a companion case to *Webb*. At issue in *Cool* was a jury instruction concerning the testimony of one of the defendant's accomplices. See *id.* at 100. The judge's instruction, in the view of the Court, implied that the jury should throw out the testimony unless it considered the testimony valid "beyond a reasonable doubt." See *id.* at 102. The Court held that the instruction violated *Cool*'s guarantee to compulsory process by obstructing the exercise of the rights intimated in *Washington*. See *id.* at 104. It would seem that the facts in *Cool* are less amenable to a compulsory process standard than *Webb*, yet the Court used the Sixth Amendment in *Cool* but not in *Webb*. See Clinton, *supra* note 10, at 781. This fact weakens the statement that *Webb* signaled a shift to reliance on the Due Process Clause in evidentiary exclusions. Professor Westen argues that the right to present a defense would be founded best on the compulsory process guarantees of the Sixth Amendment, a proposition he supports with reference to the Constitution and its history. See Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 182-84 (1974). Professor Clinton counters that such a grounding unnecessarily would require finding the right to a defense in the penumbra of the Sixth Amendment. See Clinton, *supra* note 10, at 781-83. Professor Clinton suggests that the inherent flexibility of the Due Process Clause allows the doctrine to mature on its own terms rather than according to the restrictive phrasing of the Sixth Amendment. See *id.* The Supreme Court appears to agree with Professor Clinton, as it has moved toward grounding the right to present a defense in the Due Process Clause. See *Chambers v. Mississippi*, 410 U.S. 284 (1973).

32. 410 U.S. 284 (1973).

33. See Stephen G. Churchwell, *The Constitutional Right to Present Evidence: Progeny of Chambers v. Mississippi*, 19 CRIM. L. BULL. 131, 131-32 (1983) (stating that *Chambers* has led Supreme Court to limit exclusion of evidence based on a defendant's due process rights); Clinton, *supra* note 10, at 787.

34. See *Chambers*, 410 U.S. at 285.

35. See *id.* at 294 (discussing effect of application of voucher and hearsay rules by trial judge). The facts of *Chambers* are long and complicated. The story begins on June 14, 1969, when two officers from the Woodville, Mississippi, Police Department attempted to effect a warrant for the arrest of C.C. Jackson. Jackson resisted and was aided by at least 50 persons.



Court held 8-1 that these evidentiary exclusions violated the defendant's Due Process Clause rights,<sup>36</sup> which included "the right to a fair opportunity to defend against the State's accusations."<sup>37</sup> Justice Powell's "limitation clause," which stated that the holding in *Chambers* did nothing to create "new principles of constitutional law," tempered the seemingly unequivocal statement that Due Process

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Other officers arrived and their attempt to arrest Jackson led to the firing of five or six shots. One of the original arresting officers, Aaron Liberty, was shot and killed. Before dying, Liberty was able to fire some shots toward what many believed to be the area of the gunman. The second shot hit Leon Chambers. The police attended to Liberty, believing Chambers dead. Chambers, however, was alive and sometime later was taken to the hospital by three friends. The police placed Chambers under guard at the hospital and charged him with the murder of Officer Liberty. The controversy in the case surrounded one of Chambers' friends, Gable McDonald. McDonald was present in the crowd on June 14 and was a part of the group who took Chambers to the hospital. In November, McDonald confessed to Chamber's attorney that he had killed Liberty with his own .22-caliber revolver and that he had told another friend that he shot Liberty. McDonald submitted to the attorney that his confession was voluntary. McDonald then was taken into custody. A month later, McDonald recanted his confession. He said that another friend had convinced him to confess, promising him that he would not go to jail and could reap some of the profits that Chambers would receive in a suit against the City of Woodville. His new story was that he was not at the scene but came later when he and a friend, who were having a beer down the street, heard the shots. There they found Chambers, and he and other friends took Chambers to the hospital. He also maintained that he had owned a .22, but that it had not been in his possession for some time. Chambers, among other things, asserted at trial that McDonald had killed Liberty. One witness testified that he saw McDonald shoot Liberty, and another testified that he saw McDonald after the shooting with a gun in his hand. Chambers also attempted to show that McDonald had confessed numerous times to the shooting, but that "he was thwarted in his attempt to present this portion of his defense by the strict application of certain Mississippi rules of evidence." First, Chambers was denied an opportunity to examine McDonald as an adverse witness. The trial judge held that McDonald was "hostile" but not "adverse in the sense of the word." Chambers then attempted to admit the testimony of three witnesses to whom McDonald had confessed. All three were denied under the hearsay rule. The Mississippi Supreme Court upheld all four exclusions. Chambers appealed, claiming that these exclusions made his trial fundamentally unfair and violated his due process rights. *See id.* at 285-94.

36. *See id.* at 303

37. *Id.* at 294 (holding that hearsay and voucher exclusions prevented Chambers from receiving a fair opportunity to defend). The Court, in an opinion written by Justice Powell, first examined the trial court's refusal to allow a cross-examination of McDonald. The Court stated that the right to confront and cross-examine a witness is essential in ensuring that the truth-finding role of the trial is performed. *See id.* at 295 (citing *Pointer v. Texas*, 380 U.S. 400, 405 (1965)). Thus, the reasoning justifying the denial of this right must be scrutinized. *See id.* at 295. In this case, the State attempted to justify the restriction on the grounds that McDonald was not adverse in that he had not fingered Chambers as the gunman. *See id.* at 297. The Court rejected this argument as a technicality, hypothesizing that McDonald's confessions and subsequent retractions tended to exculpate and then incriminate Chambers. *See id.* Thus, the denial of cross-examination "plainly interfered with Chambers' right to defend against the State's charges." *Id.* at 298. The Court then turned to the trial court's refusal to allow the testimony of the three witnesses to whom McDonald had confessed. The Court stated that the right to present witnesses in one's defense is fundamental. *See id.* at 302 (citing *Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14 (1967); *In re Oliver*, 333 U.S. 257 (1948)). Under this premise, a hearsay rule should not be applied "mechanistically" when the testimony appears to be reliable and is essential to the defense. *See id.* The Court concluded that the combination of forbidding a cross-examination of McDonald by the defense and the exclusion of three reliable and pertinent witnesses amounted to a violation of Chamber's due process rights. *See id.* at 302-03.

Clause protections include the right to present a defense.<sup>38</sup> The significance of this statement still is debated in the courts,<sup>39</sup> but most judges and legal scholars agree that the Court in *Chambers* clearly based its holding on the due process right of a criminal defendant to present a defense.<sup>40</sup>

*B. The Right to Present a Defense After Chambers v. Mississippi*

Since *Chambers*, the Supreme Court has continued to invoke the right to a defense under the Due Process Clause of the Fourteenth Amendment, and consequently, the right to a defense has become a fundamental principle of law.<sup>41</sup> Substantial reliance on this right, however, has been sparse. The Court's first noteworthy use of the right to present a defense came in *California v. Trombetta*,<sup>42</sup> in which the Court addressed whether states were required under the Due Process Clause to preserve potentially important evidence for a defendant.<sup>43</sup> Although a unanimous Court held that the Fourteenth Amendment did not require a state to save such evidence,<sup>44</sup> it was clear in recognizing the right of the defendant to present an adequate defense: "Under the Due Process Clause of the Fourteenth Amend-

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38. See *id.* at 302. Justice Powell wrote:

In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

*Id.* at 302-03. Some critics have argued that this statement is modest and misplaced. See, e.g., Note, State v. Gremillion: *The Constitutional and Evidentiary Elasticity of the Louisiana Residual Hearsay Exception in Criminal Cases*, 50 LA. L. REV. 845, 855 (1990) (stating that *Chambers* established new constitutional principles). Professor Clinton submits that the decision broke ground in three ways. First, when viewed in conjunction with *Webb v. Texas*, 409 U.S. 95 (1972), the Court had rested a defendant's right solidly on the Due Process Clause instead of on another constitutional principle. See Clinton, *supra* note 10, at 791. Second, *Chambers* involved the partial restriction on a defendant's testimony. See *id.* Third, because the confession was submitted to the jury, *Chambers* "represents the first case in which the right to defend has been applied to arguably cumulative, albeit critical, defense testimony." *Id.* at 791-92.

39. See Churchwell, *supra* note 33, at 138 (noting trend in courts to use *Chambers*' principle in expansion of defendant's due process rights); see also *infra* Part I.B (examining right to present a defense after *Chambers*).

40. See Clinton, *supra* note 10, at 792.

41. See, e.g., *Montana v. Egelhoff*, 116 S. Ct. 2013, 2031 (1996) (O'Connor, J., dissenting) (labeling right to present a defense as fundamental); *United States v. Perkins*, 937 F.2d 1397, 1401 (9th Cir. 1991) ("The right to present a defense is clearly fundamental . . .").

42. 467 U.S. 479 (1984).

43. See *California v. Trombetta*, 467 U.S. 479, 481 (1984). Each of the respondents in the case were appealing drunk driving convictions on the grounds that had the state saved the breath samples on which the determination was made that they were drunk, they would have been able to impeach the evidence. See *id.* at 482-83.

44. See *id.* at 491 (holding that Due Process Clause does not require states to "preserve breath samples" for purpose of introducing such as evidence).

ment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."<sup>45</sup> This statement seems to equate the right to a defense, as defined in *Chambers*, with fundamental fairness, bolstering the right to present a defense doctrine and casting doubt on the validity of Justice Powell's "limitation clause" in *Chambers*.<sup>46</sup>

The most substantial Supreme Court case to invoke the right to present a defense was *Crane v. Kentucky*.<sup>47</sup> In *Crane* the Court addressed the exclusion of testimony pertaining to the circumstances of the defendant's confession.<sup>48</sup> The Court, in what has amounted to the strongest statement ever by the Court of this doctrine, held that the exclusion denied Crane the "fundamental constitutional right to a fair opportunity to present a defense,"<sup>49</sup> as found in the Due Process Clause.<sup>50</sup> The evidentiary restriction could not be sustained because "competent, relevant evidence" can be excluded only if there is a valid state justification, which was not present in this case.<sup>51</sup> In an apparent attempt to nullify the applicability of Justice Powell's "limitation clause" in *Chambers*, the Court wrote, "We break no new

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45. *Id.* at 485.

46. See *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("In reaching this judgment, we establish no new principles of constitutional law."); see also *supra* note 38 and accompanying text (detailing context and relevance of Justice Powell's statement).

47. 476 U.S. 683 (1986). *Crane* was not the first post-*Chambers* case to cite the right to present a defense principle. See, e.g., *Green v. Georgia*, 442 U.S. 95, 97 (1979); *Wolff v. McDonnell*, 418 U.S. 539, 583 (1974) (Marshall, J., dissenting).

48. See *Crane v. Kentucky*, 476 U.S. 683, 687 (1986). The defendant was being questioned as to possible involvement in another crime when he suddenly began confessing to various crimes. See *id.* at 684. The police took him to the station and obtained a confession for the murder in question. The defendant attempted to suppress the confession as a violation of his Fifth and Fourteenth Amendment rights and was denied. Attempts by the defendant at trial to submit evidence as to the circumstances surrounding the interrogations were excluded by the judge. The defendant appealed, claiming the exclusion was a violation of his rights under the Sixth and Fourteenth Amendments. See *id.* at 684-86.

49. *Id.* at 687 (citing *Trombetta*, 467 U.S. at 485).

50. See *id.* The Court held that the right to present a defense was grounded in the Due Process Clause after *Chambers*. See *id.* at 690; see also *Gilmore v. Taylor*, 508 U.S. 333, 343 (1993) (noting due process protection of opportunity to present a defense in cases involving evidentiary restrictions (citing *Crane*, 476 U.S. at 690; *Trombetta*, 467 U.S. at 485; *Chambers v. Mississippi*, 410 U.S. 284 (1973))); *Taylor v. Illinois*, 484 U.S. 400, 423 (1988) (Brennan, J., dissenting) (stating that Due Process Clause affords protection of right to present relevant defense evidence); *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (articulating that right to testify is protected under Due Process Clause).

51. See *Crane*, 476 U.S. at 690. The Court adopted the *Chambers* test of weighing the interests of the state in applying or adopting its evidentiary standards against the limitation that the rule places on the right of the defendant to present an adequate defense. See *id.*; see also *Rock*, 483 U.S. at 61 ("A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case.").

ground in observing that an essential component of procedural fairness is an opportunity to be heard."<sup>52</sup> The opinion also indicated that the right to present a defense assured that the prosecutor's case was subjected to "adversarial testing."<sup>53</sup>

A survey of Supreme Court cases since *Chambers* reveals that the right to present a defense has proved durable and gained widespread acceptance.<sup>54</sup> A survey of cases in the United States Circuit Courts reveals a similar endorsement.<sup>55</sup> For example, the Second Circuit in *Williams v. Lord*<sup>56</sup> adopted the right to present a defense doctrine when considering the exclusion of evidence.<sup>57</sup> In that case, the court was deciding whether the defendant, in support of her self-defense claim, had the right to introduce evidence that the victim had a history of violent activity.<sup>58</sup> The defendant maintained that

52. *Crane*, 476 U.S. at 690.

53. *Id.* at 690-91; cf. *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988) (grounding right to present evidence and to establish a defense in Sixth Amendment and Compulsory Process Clause). In *Taylor*, the Court wrote that the right to develop a defense through a presentation of relevant facts assured that the adversarial system of justice functioned properly and that such a right therefore was fundamental. See *id.* at 408-09 (citing *United States v. Nixon*, 418 U.S. 683, 719 (1974)).

54. See, e.g., *Gilmore*, 508 U.S. at 343, *Taylor*, 484 U.S. at 423 (Brennan, J., dissenting); *Rock*, 483 U.S. at 51; *Crane*, 476 U.S. at 690; *Trombetta*, 467 U.S. at 485; *Nixon*, 418 U.S. at 709.

55. See, e.g., *United States v. Lopez-Alvarez*, 970 F.2d 583, 587-88 (9th Cir. 1992) (denying crucial and reliable evidence is due process violation of right to complete defense); *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) (grounding fundamental right to present a defense in Due Process Clause (citing *Crane*, 476 U.S. at 690; *Chambers*, 410 U.S. at 302; *Washington v. Texas*, 388 U.S. 14, 19 (1967))); *Card v. Dugger*, 911 F.2d 1494, 1515 (11th Cir. 1990) (acknowledging due process restrictions on exclusion of evidence); *Ferreira v. Fair*, 732 F.2d 245, 248 (1st Cir. 1984) (stating that evidentiary restriction can amount to "deprivation of due process" (citing *Chambers*, 410 U.S. at 298)); *Trussell v. Estelle*, 699 F.2d 256, 262 (5th Cir. 1983) (indicating that exclusion of crucial evidence raised due process concerns); *Virgin Islands v. Smith*, 615 F.2d 964, 970 (3d Cir. 1980) (noting that Supreme Court has recognized "due process right to present an effective defense"); *Conner v. Auger*, 595 F.2d 407, 411 (8th Cir. 1979) (citing *Chambers* holding that due process guarantees right to present relevant evidence in defense); *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978) (finding due process right to present "clearly exculpatory evidence"); cf. *Johnson v. Chrans*, 844 F.2d 482, 484 (7th Cir. 1988) (intimating that right to present evidence, even relevant and competent exculpatory evidence, can be superseded by legitimate state justifications).

56. 996 F.2d 1481 (2d Cir. 1993).

57. See *Williams v. Lord*, 996 F.2d 1481, 1483-84 (2d Cir. 1993).

58. See *id.* at 1482. Williams was on trial for murder and weapons charges in the death of John Neil Bennett. At trial, Williams argued that Bennett's death was the result of self-defense. Bennett had paid Williams, who was a prostitute, to have oral sex. Williams claimed that Bennett smoked crack and became violent, grabbing her throat and cutting her with a knife. She grabbed the knife, stabbed Bennett, and then ran, throwing the knife away. The testimony at trial indicated that Williams had suffered no visible wounds and that there was no medical evidence consistent with the presence of narcotics in Bennett's body. To support a weak self-defense claim, Williams attempted to submit evidence that Bennett had a history of violent sexual activity in light of a memo indicating a prior rape investigation. The trial court did not allow the admission of the evidence and Williams was convicted. The New York Court of Appeals denied her appeal that the exclusion of the evidence violated her right to present a defense. She then appealed to the Court of Appeals for the Second Circuit, which granted her petition. See *id.* at 1481-83.

her constitutionally protected right to present a defense mandated the admission of the evidence.<sup>59</sup> The court acknowledged that the right to present a defense was rooted in the Due Process Clause of the Fourteenth Amendment.<sup>60</sup> Furthermore, the court determined that the proper test for addressing this right was that applied in *Rock v. Arkansas*: whether the interests in applying the evidentiary rule justified the limitations on the right to present a defense.<sup>61</sup> Although the court concluded that the defendant's right to present a defense had not been violated,<sup>62</sup> its opinion is indicative of how United States Courts of Appeal generally treat the right to present a defense.<sup>63</sup>

In sum, these decisions lead to two concrete conclusions regarding the right to present a defense. First, courts acknowledge that the right to present a defense exists under the Due Process Clause of the Fourteenth Amendment. Second, the proper standard of inquiry is to examine the rationale behind the evidentiary exclusion and to determine if those reasons are substantial enough to justify an infringement on the defendant's right to present a defense.

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59. See *id.* at 1482 (arguing that court should err on side of admission given right to present a defense (citing *Nixon*, 418 U.S. at 709; *Chambers*, 410 U.S. at 302)).

60. See *id.* at 1483. The court wrote that although it was unclear whether the right to present a defense was found in either the Due Process Clause or the Confrontation Clause of Compulsory Process guarantees of the Sixth Amendment, it was clear that either could sustain the right to present a defense. See *id.* (citing *Crane*, 476 U.S. at 690). Other opinions by the Second Circuit have been more definitive in holding that the Due Process Clause guarantees the right to present a defense. See, e.g., *Rosario v. Kuhlman*, 839 F.2d 918, 924 (2d Cir. 1988) (finding right to present a defense implicated in Due Process Clause of Fourteenth Amendment).

61. See *Williams*, 996 F.2d at 1483-84 (applying balancing test as written in *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987)); see also *Turpin v. Kassulke*, 26 F.3d 1392, 1396 (6th Cir. 1994) (noting that right to present evidence is limited by valid state justifications); *United States v. Almonte*, 956 F.2d 27, 30 (2d Cir. 1992) (per curiam) (stating that evidentiary restrictions are "constitutional if they 'serve legitimate interests in the criminal trial process' while not 'arbitrary or disproportionate to the purposes they are designed to serve'" (quoting *Rock*, 483 U.S. at 55-56)); *United States v. Lopez-Alvarez*, 970 F.2d 583, 588 (9th Cir. 1992) (holding that due process is violated if there are not valid state reasons for exclusion); *Card v. Dugger*, 911 F.2d 1494, 1501 (11th Cir. 1990) (writing that defendant's interest in presenting important evidence is defeated by courts interest in speculation about guilt of third party); *Johnson v. Chrans*, 844 F.2d 482, 484 (7th Cir. 1988) (balancing relevant and competent evidence against state justification for exclusionary rule); *Virgin Islands v. Smith*, 615 F.2d 964, 974 (3d Cir. 1980) (holding that grant of immunity should be given to witness when he or she can offer relevant evidence and when there is no strong justification for withholding immunity); *Conner v. Auger*, 595 F.2d 407, 411 (8th Cir. 1979) (balancing right to present evidence against state interest in fairness and reliability); *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978) (adopting *Chambers* test of balancing importance of evidence with justifications for exclusion).

62. See *Williams*, 996 F.2d at 1484 (determining that goals furthered by exclusion and irrelevance of evidence justified keeping evidence out of court).

63. See *supra* note 55 (citing Courts of Appeals' decisions holding that Constitution guarantees right to present a defense).

Important considerations in this standard of inquiry include the relevance and reliability of the evidence in question.<sup>64</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND OF *MONTANA V. EGELHOFF*<sup>65</sup>

### A. *Facts and Procedure at the Trial Level*

In early July 1992, James Allen Egelhoff and a friend went mushroom picking in the Yaak region near Troy, Montana.<sup>66</sup> Egelhoff had no possessions with him except for clothing and a .38 caliber handgun.<sup>67</sup> They encountered Roberta Pavola and John Christianson, who also were picking mushrooms in the area, and the four became friendly.<sup>68</sup> On July 12, 1992, Egelhoff, Pavola, and Christianson sold the mushrooms, purchased beer, and went to a party in Troy.<sup>69</sup> The three drank at the party and then at bars until 9:00 p.m. when they left in Christianson's station wagon, with Christianson driving, Pavola in the front seat, and Egelhoff in the back seat.<sup>70</sup> At approximately 9:20 p.m., Christianson and Egelhoff were seen at a grocery store.<sup>71</sup> Later that night, numerous drivers on Highway 2 reported seeing Christianson's station wagon driving erratically, repeatedly weaving between the road and a side ditch.<sup>72</sup> Sometime after midnight, sheriff's officers responded to calls of a drunk driver on Highway 2 and found Christianson's car in a ditch on the side of the road. The officers found Christianson and Pavola dead from gunshot wounds to the head in the front seat and Egelhoff in the back seat, yelling obscenities.<sup>73</sup> Egelhoff's gun was found on the driver's side floorboard with four loaded rounds and two empty casings lying beside it.<sup>74</sup> The officers took Egelhoff into custody and brought him to a nearby hospital in Libby.<sup>75</sup> The officers charged

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64. See *Chambers*, 410 U.S. at 302 (stating that evidence must be "critical" and "trustworthy"); *Turpin*, 26 F.3d at 1396 (adopting reliability and relevance criteria of *Chambers*).

65. 900 P.2d 260 (Mont. 1995), *rev'd*, 116 S. Ct. 2013 (1996) (plurality opinion).

66. See *Montana v. Egelhoff*, 900 P.2d 260, 261 (Mont. 1995), *rev'd*, 116 S. Ct. 2013 (1996) (plurality opinion).

67. See *id.* According to the Montana Supreme Court's opinion, Egelhoff took the gun from the glove compartment of Christianson's car. See *id.* at 265.

68. See *id.* at 261.

69. See *id.*

70. See *id.* at 262.

71. See *id.*

72. See *id.* Testimony by law enforcement officials indicated that Christianson's car had gone off the road in at least five locations. See *id.*

73. See *id.*

74. See *id.*

75. See *id.*

Egelhoff with two counts of deliberate homicide, which provides that a defendant is guilty if he acts "knowingly" or "purposely" in causing the death of another human being.<sup>76</sup>

At trial, Detective Gassett, who responded to the situation, testified that Egelhoff was "intoxicated, combative and cursing profusely" in the detective's presence.<sup>77</sup> For the five or six hours that Gassett was present at the scene, Egelhoff acted wildly and repeatedly needed to be restrained.<sup>78</sup> Despite Egelhoff's erratic behavior and a .36 blood alcohol content ("BAC"),<sup>79</sup> he was able to kick a camera out of the hand of a policeman.<sup>80</sup>

At trial, Egelhoff maintained that he had little memory of the day's events.<sup>81</sup> He remembered being at the party while it was still daylight and then later sitting on a hill with Christianson drinking Black Velvet.<sup>82</sup> Egelhoff did not remember leaving the party, driving in Christianson's car, shooting the gun, or kicking the camera out of the officer's hand.<sup>83</sup> Egelhoff also did not recall asking the ambulance driver repeatedly, "Did you find him?"<sup>84</sup> Forensics testing revealed that there was gunshot residue on Egelhoff's hands.<sup>85</sup> The State's firearms examiner testified that the bullet that killed Christianson could have come from "thousands of guns with characteristics like Egelhoff's gun."<sup>86</sup>

Egelhoff asserted at trial:

[B]ecause [I] was found unconscious and suffering from intoxication measured at .36 one hour after being brought to the hospital,

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76. See MONT. CODE ANN. § 45-5-102(1)(a) (1995).

77. *Egelhoff*, 900 P.2d at 262.

78. See *id.*

79. See *id.* (noting that Egelhoff registered .36 BAC one hour after being brought to hospital). Blood alcohol content ("BAC") is the term used to measure the ratio of alcohol to parts of blood in one's blood stream. See Brief for National Association of Criminal Defense Lawyers, at App. A, *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996) (No. 95-566). Under this standard, the .36 BAC seen in *Egelhoff* is defined in the following manner:

Above .30, the tier at which respondent tested, most people are not in a position to drink anymore. They are usually unconscious and will remain in a coma until the body has disposed of enough alcohol so that the nerve centers controlling consciousness may begin to function again. It is important to note that persons in this condition are near the point of death and may die if left unattended.

*Id.* at 26. In light of this statement, it may be likely that Egelhoff was capable of very little, let alone "knowingly" or "purposely" committing homicide.

80. See *Egelhoff*, 900 P.2d at 262. Egelhoff's ability to kick the camera, combined with his generally solid coordination, led Detectives Gassett and Bernall, the officer with the camera, to express surprise at Egelhoff's BAC. See *id.*

81. See *id.*

82. See *id.*

83. See *id.*

84. *Id.* at 263.

85. See *id.* at 262.

86. *Id.*

[my] level of intoxication precluded [me] from having driven the car or undertaking the physical tasks necessary to have done what the prosecution claimed [I] had done.<sup>87</sup>

Egelhoff claimed that he suffered from an alcohol-induced blackout which led to his inability to remember the events of that day.<sup>88</sup> Dr. Clyde Knecht, who examined Egelhoff at the hospital, testified that Egelhoff's behavior and .36 BAC supported the theory that Egelhoff had suffered a blackout at some point prior to his medical examination.<sup>89</sup>

At the conclusion of the trial, the judge issued Jury Instruction No. 11, practically quoting Montana Code § 45-2-203:

A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.<sup>90</sup>

The jury convicted Egelhoff of two counts of deliberate homicide.<sup>91</sup>

Egelhoff appealed to the Montana Supreme Court, raising four issues.<sup>92</sup> The Montana Supreme Court confined its deliberations to the due process violation raised by Egelhoff.<sup>93</sup>

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87. *Id.* at 262-63.

88. *See id.* at 262.

89. *See id.* at 263. Dr. Knecht continued, stating that "an intoxicated person experiencing such a blackout may walk, talk, and fully function, with people around the person unable to tell that the person experienced a blackout." *Id.*

90. *Id.* at 263. Section 45-2-203 of the Montana Code states:

Responsibility-intoxicated condition. A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

MONT. CODE ANN. § 45-2-203 (1995).

91. *See Egelhoff*, 900 P.2d at 263.

92. *See id.* The four issues presented on appeal were:

I. Was Egelhoff denied due process by a jury instruction that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense?

II. Did the District Court err in permitting a lay witness to give opinion testimony?

III. Are the jury verdicts finding Egelhoff guilty of two counts of deliberate homicide supported by substantial evidence?

IV. Did the District Court err in designating Egelhoff a dangerous offender for purposes of parole?

*Id.* at 261.

93. *See id.* at 263.



*B. Montana Supreme Court Opinion*

Egelhoff argued that by keeping evidence of intoxication from the jury during its determination of his mental state, § 45-2-203 relieved the State of its burden to prove that Egelhoff had acted "knowingly" or "purposely," as required by the definition of deliberate homicide.<sup>94</sup> The State countered that Egelhoff's due process rights were not violated because he was able to use evidence of intoxication in other areas during the trial.<sup>95</sup> Furthermore, the State argued that there was no due process violation because the trial judge instructed the jury that the State had to prove every element of the crime beyond a reasonable doubt.<sup>96</sup> The Montana Supreme Court unanimously concluded that preventing consideration of evidence of intoxication when determining Egelhoff's mental state violated his due process rights, and the court found the statute unconstitutional.<sup>97</sup>

The Montana Supreme Court was concerned largely with the burden of proof for the mental elements of "knowingly" or "purposely."<sup>98</sup> The court referred to the substantial amount of evidence submitted by the state to the jury when it argued that Egelhoff had knowingly or purposely shot Christianson and Pavola.<sup>99</sup> Instruction No. 11, however, which embodied § 45-2-203, prevented Egelhoff from rebutting the state's arguments with evidence of his intoxication.<sup>100</sup> The court concluded that this instruction reduced the state's burden of proof and denied Egelhoff due process.<sup>101</sup>

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94. *See id.*

95. *See id.* Egelhoff was allowed to submit evidence of intoxication to argue that his lack of memory concerning the night's events was the result of an "alcohol-induced 'blackout'" and that it was impossible for him to drive Christianson's vehicle, as was claimed. *See id.*

96. *See id.* at 264.

97. *See id.* at 266 ("We conclude that the defendant had a due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged.").

98. *See id.* at 264.

99. *See id.* at 265 (listing evidence presented by State). First, Egelhoff had to get the gun from the glove compartment. The state also submitted evidence that Egelhoff made attempts to escape detection, and that a witness saw a stick in the back seat of the car that she believed enabled Egelhoff to drive the car from the back seat. A large number of people who encountered Egelhoff that evening testified that he was coherent and did not appear drunk; these included an employee at the grocery store and a motorist who attempted to aid the car once it had settled in a ditch. Finally, Egelhoff's ability to kick the camera out of the officer's hand demonstrated excellent coordination. *See id.*

100. *See id.* (stating that intoxication evidence was relevant to whether Egelhoff acted "knowingly" or "purposely").

101. *See id.*

The court stated that under *Chambers v. Mississippi*,<sup>102</sup> this fundamental due process right was "the right to a fair opportunity to defend against the State's accusations."<sup>103</sup> Specifically, the court was concerned with the burden of proof under this right. The court first cited *In re Winship*<sup>104</sup> for the constitutional requirement that the state prove, beyond a reasonable doubt, the elements of an offense. Second, the court cited *Sandstrom v. Montana*<sup>105</sup> for the premise that

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102. 410 U.S. 284 (1973).

103. *Egelhoff*, 900 P.2d at 265 (citing *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)).

104. 397 U.S. 358 (1970). *In re Winship* involved the question of whether the Due Process Clause requires proving the elements of crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 359 (1970). The Petitioner was a 12-year-old boy who had stolen \$112 from a pocketbook. The boy was charged with delinquency that would have amounted to larceny had the boy been an adult, making him a juvenile delinquent under New York law. During an adjudicatory hearing, the boy's attorney argued that the court should require a delinquency charge to be proved beyond a reasonable doubt. The judge, although acknowledging that the evidence might not support a reasonable doubt standard, felt that such a standard was not constitutionally required. Rather, under section 744 of the New York Family Court Act, all that was required was a preponderance of the evidence standard. *See id.* at 358-60. The Appellate Division of the New York Supreme Court and the New York Court of Appeals affirmed the decision and the constitutionality of section 744. *See id.* at 360. The boy petitioned the Supreme Court for certiorari on the grounds that the Constitution required a reasonable doubt standard. *See id.* at 358. Whereas the Court in *Winship* was addressing whether a juvenile was entitled to a reasonable doubt standard, the Montana Supreme Court was concerned with the conclusion that the Due Process Clause requires a reasonable doubt standard in criminal trials. *Compare id.* at 359, with *Egelhoff*, 900 P.2d at 264.

105. 442 U.S. 510 (1979). The issue in *Sandstrom* was the constitutionality of a jury instruction in Montana that the "law presumes that a person intends the ordinary consequences of his voluntary acts." *Sandstrom v. Montana*, 442 U.S. 510, 513 (1979) (adopting prosecution's request to judge for jury instruction). David Sandstrom was on trial for the deliberate homicide of Annie Jessen. *See id.* at 512. Sandstrom argued that a personality disorder aggravated by alcohol consumption had prevented him from acting "knowingly" or "purposely," as required by statute. *See id.* (quoting MONT. CODE ANN. § 45-5-102(1)(a) (1978)). The State requested the jury instruction in question and Sandstrom objected, claiming that the instruction unconstitutionally shifted the burden of proof for "knowingly" or "purposely" to the defense. *See id.* at 513. The judge overruled the objection, delivered the instruction, and Sandstrom was convicted. *See id.* The Supreme Court of Montana agreed with Sandstrom's contention that *Mullaney v. Wilbur*, 421 U.S. 684 (1975), *In re Winship*, 397 U.S. 197 (1970), and *Patterson v. New York*, 432 U.S. 197 (1977), prohibited shifting the burden of proving the offense elements, but that the prohibition was not absolute and that the state could shift the burden under some circumstances. *See Sandstrom*, 442 U.S. at 513-514; *see also infra* note 119 (discussing *Mullaney*); *supra* note 104 (discussing *Winship*); *infra* note 119 (discussing *Patterson*). The Court stated that because Sandstrom was required to submit evidence that "he did not intend the ordinary consequences of his acts, [and] not to disprove that he acted purposely or knowingly," the instruction was constitutional. *See Sandstrom*, 442 U.S. at 513. The Supreme Court reversed, concentrating on the practical effect of the instruction on the jury. *See id.* at 514. The Court stated that a reasonable jury could have concluded from the language in the instruction that there was a presumption of intent and that it was irrebutable if sufficient facts were presented. *See id.* at 517. The jury also could have believed that they should find intent unless Sandstrom provided significant evidence otherwise, effectively shifting the burden onto the defense to disprove intent. *See id.* The Court determined that either of these interpretations would have violated the prohibition on burden shifting established in *In re Winship* and its progeny. *See id.* at 521. Ultimately, the Court held that the jury instruction was a due process violation because it shifted the burden of proof of the mental elements of the crime. *See id.*

shifting the burden of proof of the mental element of a crime to the defendant was unconstitutional.<sup>106</sup>

The court also cited dicta in *Martin v. Ohio*<sup>107</sup> to support its conclusions.<sup>108</sup> The defendant in *Martin* was convicted of murder despite a claim of self-defense.<sup>109</sup> The Supreme Court affirmed the decision, stating that it was not unconstitutional to shift the burden of proving self-defense to a defendant.<sup>110</sup> In its discussion, the Court differentiated between a situation such as that in *Martin*, in which the defendant is required to put forward the evidence in support of her defense, and another in which a jury is ordered not to consider evidence relevant to determining whether the defendant is guilty.<sup>111</sup>

The Montana Supreme Court, although noting that this discussion was not central to the *Martin* holding, indicated that it was responsive to the situation in *Egelhoff*.<sup>112</sup> Egelhoff was allowed to admit evidence relating to his intoxication, but § 45-2-203 prevented the jury from using the evidence to determine if he acted knowingly or purposely.<sup>113</sup> "By allowing the jury to consider such evidence,"

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106. See *Egelhoff*, 900 P.2d at 265.

107. 480 U.S. 228 (1987).

108. See *Egelhoff*, 900 P.2d at 265-66.

109. See *Martin v. Ohio*, 480 U.S. 228, 231 (1987). The defendant in *Martin* was on trial for the murder of her husband. After the two had argued over money, the defendant went upstairs, coming downstairs later with her husband's gun in her hand. He questioned her as to what was in her hand and "came at her." *Id.* at 231. She fired several shots, hitting him with three and killing him. Mrs. Martin was charged with aggravated murder and pleaded self-defense at trial. Ohio case law had held that self-defense was an affirmative defense. See *id.* at 230 (citing *Martin v. Ohio*, 488 N.E.2d 166, 168 (1986)). Under Ohio law, the defendant had the burden of proving an affirmative defense. See *id.* (citing OHIO REV. CODE ANN. § 2901.05(A) (1982)). Martin was convicted, and she appealed the decision, claiming that placing the burden on her violated the Due Process Clause. See *id.* at 231. Both the Ohio Court of Appeals and the Supreme Court of Ohio rejected her claim. See *id.* at 230-31.

110. See *id.* at 233. As in *Egelhoff*, the Court relied on *Patterson* to analyze Martin's due process claim. See *id.* at 232-33; see also *infra* note 119 and accompanying text (discussing facts of *Patterson* and Court's holding that defendant's due process rights were not violated because defendant was not required to disprove any facts essential to charge of second-degree murder). In *Patterson*, the Court cited the requirement of *In re Winship* that the prosecution satisfy its burden of proof of every element of the charged offense beyond a reasonable doubt. The Court held that this results in the state requiring the defendant to prove the affirmative defense of extreme emotional disturbance. See *Patterson*, 432 U.S. at 206. The Court in *Martin* felt that the similarity between the situations in *Martin* and *Patterson*, combined with the deference accorded the states in defining their criminal justice systems, made the Ohio statute constitutional. See *Martin*, 480 U.S. at 233. Specifically, there was no constitutional violation because Martin had the opportunity to convince the jury that she had acted in self-defense, and the jury decided to convict. See *id.*

111. See *Martin*, 480 U.S. at 233-34 (stating that it would be contrary to the holding of *In re Winship* if the "jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case").

112. See *Egelhoff*, 900 P.2d at 265.

113. See *id.* at 266.

wrote the court, "we permit the jury to make its decision on all of the relevant evidence as required under *Martin*."<sup>114</sup>

### III. U.S. SUPREME COURT DECISION: *MONTANA V. EGELHOFF*

#### A. *Plurality Opinion*

The U.S. Supreme Court, in a 5-4 decision, overruled the Montana Supreme Court and held that Montana's exclusion of involuntary intoxication evidence when determining the mental status of a defendant was not a due process violation.<sup>115</sup> The decision, written by Justice Scalia, assailed the Montana Supreme Court's assertion that the Due Process Clause guaranteed the right to introduce all relevant evidence.<sup>116</sup> Justice Scalia emphasized that there are a number of evidentiary exclusions that have been found constitutional,<sup>117</sup> in part due to the deference the Court accords states in administering their criminal justice systems.<sup>118</sup> In light of this deference, the Court stated that the evidentiary restriction in *Egelhoff* should be analyzed under the test established in *New York v. Patterson*.<sup>119</sup> The relevant

114. *Id.*

115. See *Montana v. Egelhoff*, 116 S. Ct. 2013, 2025 (1996) (plurality opinion), *rev'g* 900 P.2d 260 (Mont. 1995).

116. See *id.* at 2017 (plurality opinion).

117. See *id.* (plurality opinion). Justice Scalia cited *Michigan v. Lucas*, 500 U.S. 145 (1991), in which the Court held that relevant evidence may be excluded if the defendant does not adhere to proper procedures. See *Egelhoff*, 116 S. Ct. at 2017 (plurality opinion). Justice Scalia also relied on Federal Rule of Evidence 403, which permits the exclusion of relevant evidence for a number of reasons, including the danger of misleading the jury or unfair prejudice. See *Egelhoff*, 116 S. Ct. at 2017 (plurality opinion); FED. R. EVID. 403. Finally, the Court pointed to hearsay exclusions, which keep unreliable evidence out of court. See *Egelhoff*, 116 S. Ct. at 2017 (plurality opinion).

118. See *Egelhoff*, 116 S. Ct. at 2017 (plurality opinion) (citing *New York v. Patterson*, 432 U.S. 197, 201-02 (1977)). The Court in *Patterson* extended great latitude to the states in administering their criminal justice system and held that, accordingly, the Court should be careful to dismantle an action taken by the states in this area. See 432 U.S. at 201-02.

119. 432 U.S. 197, 201-02 (1977), *cited in Egelhoff*, 116 S. Ct. at 2017 (plurality opinion). The Court in *Patterson* addressed the constitutionality of a New York law placing the burden on the defendant to prove, by a preponderance of the evidence, the affirmative defense of extreme emotional distress when attempting to reduce a second-degree murder charge to manslaughter. The defendant, Gordon Patterson, separated from his wife, Roberta Patterson. Roberta began to see an ex-fiancé, John Northrup. On December 27, 1970, Patterson borrowed a rifle from a friend and went to the home of his father-in-law. There he saw Roberta naked with Northrup and proceeded to shoot Northrup twice in the head, killing him. See *id.* at 198. Patterson was charged with second-degree murder.

New York allowed defendants to assert the affirmative defense of "act[ing] under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." *Id.* (citing N.Y. PENAL LAW § 125.25 (McKinney 1975)). The trial judge instructed the jury that under New York law, the State had to prove the elements of second-degree murder beyond a reasonable doubt and that Patterson had to prove that he acted while under the influence of extreme emotional distress by a preponderance of the evidence. If the jury believed that Patterson acted under the influence of extreme emotional distress in intentionally killing Northrup, it could convict him for manslaughter, but not for murder. See *id.* at 200. The

language in *Patterson* indicates that the judgment of a state in administering its criminal justice system "is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>120</sup> Thus, wrote Justice Scalia, Egelhoff

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jury convicted Patterson of second-degree murder, and the Appellate Division affirmed. *See id.* at 201.

After Patterson appealed to the New York Court of Appeals, the Supreme Court decided *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In *Mullaney*, the Court struck down a Maine statute that allowed a defendant to rebut the statutory presumption that he committed murder with malice aforethought if the defendant proved that he acted in the "heat of passion on sudden provocation." *Mullaney*, 421 U.S. at 703 (rejecting Maine's statute, ME. REV. STAT. ANN. tit. 17 § 2551 (West 1964)). The Court expounded that the statute violated due process because it shifted the burden of persuasion from the prosecution to the defense. *See id.* at 704.

Patterson argued that the New York law was identical to the Maine law, but the Court of Appeals rejected this argument. *See Patterson*, 432 U.S. at 201, *aff'g* 347 N.E.2d 898 (N.Y. 1976). The decision stated that the New York law was different than the one in *Mullaney* because, in proving that he acted under extreme emotional disturbance, Patterson was not required to disprove any facts essential to the charge of second-degree murder. *See id.* at 214-15 (discussing reasoning of New York Court of Appeals). Patterson appealed to the Supreme Court on due process grounds. *See id.* at 201.

120. *Egelhoff*, 116 S. Ct. at 2017 (plurality opinion) (quoting *Patterson*, 432 U.S. at 201-02). The Court in *Patterson*, much like the Court in *Egelhoff*, began its fundamental rights inquiry by discussing the history of the issue. The Court noted that placing the burden of proving extreme emotional distress on the defendant was a broader version of the common-law heat of passion on sudden provocation defense, which also required a defendant to prove the elements of the defense. *See Patterson*, 432 U.S. at 202. This was the rule for many affirmative defenses at common law, until the Court in *Davis v. United States*, 160 U.S. 469, 492-93 (1895), rejected such a burden for insanity. It soon became a requirement for prosecutors to disprove the elements of most defenses, including provocation. *See Patterson*, 432 U.S. at 202.

The Court in *Patterson* noted, however, that the decision in *Davis* was not a constitutional ruling, as evidenced by the ruling in *Leland v. Oregon*, 343 U.S. 790 (1952). *Leland* affirmed the placement of the burden of proving affirmative defenses on the defendant. *See Patterson*, 432 U.S. at 203-04 (restating holding of *Leland* that affirmed constitutionality of requiring defendant to prove defense of insanity by reasonable doubt).

The Court then considered the doctrine established by *In re Winship*, 397 U.S. 358 (1970), and its progeny. *See Patterson*, 432 U.S. at 204. The Court in *In re Winship* stated that the Constitution requires that states prove every element of the offense beyond a reasonable doubt to obtain a conviction. *See Winship*, 397 U.S. at 364.

The Court also considered *Mullaney*, which reinforced the holding of *In re Winship* by finding that a Maine statute, which required a defendant to prove an affirmative defense by disproving an element of the charge against him, violated the Due Process Clause. *See Patterson*, 432 U.S. at 205.

The Court then considered the implication of *Rivera v. Delaware*, 429 U.S. 877 (1976), an appeal that claimed *Leland*'s approval of the reasonable doubt standard in the insanity defense had been overruled in *In re Winship* and *Mullaney* and replaced by the "preponderance of the evidence" standard. *See Patterson*, 432 U.S. at 204. In *Rivera*, the Court dismissed for lack of a substantial federal question. *See Rivera*, 429 U.S. at 877.

The Court in *Patterson* stated that these cases stood for the proposition that once a state proved the elements of the charged offense beyond a reasonable doubt, it could choose to allow a defendant to submit an affirmative defense of insanity if proven by a preponderance of the evidence. *See Patterson*, 432 U.S. at 206. The Court then determined that the New York law on severe emotional disturbance adhered to this doctrine. *See id.* The prosecution was required to prove every element of second-degree murder beyond a reasonable doubt, and the court instructed the jury accordingly. *See id.* at 205-06. Additionally, none of the evidence submitted to establish severe emotional distress was required to disprove an element of second-degree murder. *See id.* at 206. Distinguishing the situation in *Mullaney* from *Patterson*, the Court

had to show that the "right to have a jury consider evidence of his voluntary intoxication in determining whether he possesses the requisite mental state is a 'fundamental principle of justice.'"<sup>121</sup>

Justice Scalia analyzed the historical treatment of the relationship between voluntary intoxication and mental state.<sup>122</sup> The Court noted that prior to the nineteenth century, it almost uniformly was held that evidence of intoxication could not be presented at trial.<sup>123</sup> In contrast, Egelhoff had argued that during the course of the nineteenth century, courts had accepted such evidence to show that a defendant did not possess the required mental state to be guilty of the crime.<sup>124</sup> The Court, however, gave great weight to the ten states (including Montana) that continue to adhere to the old common-law rule,<sup>125</sup> and stated that it was difficult to recognize the right to present intoxication evidence as fundamental when one-fifth of the states practiced otherwise.<sup>126</sup>

reiterated that there were no presumptions of guilt against Patterson and that the jury simply decided that he failed to prove his defense. *See id.* at 216-17. Consequently, the Court deemed the New York law on the affirmative defense of extreme emotional disturbance constitutional. *See id.* at 205.

121. *Egelhoff*, 116 S. Ct. at 2017 (plurality opinion).

122. *See id.* (plurality opinion) ("Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice.").

123. *See id.* at 2018-19 (plurality opinion) (discussing early history of intoxication evidence in law). Justice Scalia began his examination with the premise that colonial England viewed an intoxicated offender as if he committed the crime while sober. *See id.* at 2018 (plurality opinion) (citing 1 M. HALE, *PLEAS OF THE CROWN* \*32-33). Early American law adopted a similar stance, rejecting intoxication as a defense to a crime. *See id.* (plurality opinion) (citing HALE, *supra*, at \*32 n.3).

124. *See id.* at 2019-20 (plurality opinion) (examining treatment of intoxication evidence since 19th century). According to Justice Scalia, the earliest acceptance of intoxication evidence came in 1819 in an English case in which the judge considered intoxication relevant to whether the defendant committed premeditated murder. *See id.* at 2019 (plurality opinion) (citing 1 W. RUSSELL, *CRIMES AND MISDEMEANORS* \*8). Although the view was slow to gain acceptance, Justice Scalia concedes that it became widely accepted by the end of the 19th century. *See id.* (plurality opinion).

125. *See id.* at 2020 n.2 (plurality opinion) (noting that Arizona, Arkansas, Delaware, Georgia, Hawaii, Mississippi, Missouri, South Carolina, and Texas adhere to common-law rule). Three of the nine states have case law that bars the use of voluntary intoxication evidence: Arkansas (*White v. State*, 717 S.W.2d 784 (Ark. 1986)); Mississippi (*Lanier v. State*, 533 So. 2d 473 (Miss. 1988)); and South Carolina (*State v. Vaughn*, 232 S.E.2d 328 (S.C. 1977)). Five states have enacted statutes interpreted to bar such evidence: Delaware (*Wyant v. State*, 519 A.2d 649 (Del. 1986) (construing DEL. CODE ANN. tit. 11, § 421 (1987))); Georgia (*Foster v. State*, 374 S.E.2d 188 (Ga. 1988) (construing GA. CODE ANN. § 16-3-4 (1968))); Hawaii (*State v. Souza*, 813 P.2d 1384 (Haw. 1991) (construing HAW. REV. STAT. § 702-230 (1986))); Missouri (*State v. Erwin*, 848 S.W.2d 476 (Mo. 1993) (construing MO. REV. STAT. § 562.076 (1983))); and Texas (*Hawkins v. State*, 605 S.W.2d 586 (Tex. Crim. App. 1980) (construing TEX. PENAL CODE ANN. § 8.04 (West 1974))). Arizona recently has enacted a voluntary intoxication statute. *See ARIZ. REV. STAT. § 13-503* (1995).

126. *See Egelhoff*, 116 S. Ct. at 2019-20 (plurality opinion).

The Court attempted to defend the application of the old common-law rule by offering various justifications.<sup>127</sup> The first was that excluding evidence of intoxication deters the commission of other crimes while intoxicated.<sup>128</sup> Second, the Court stated that

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127. See *id.* at 2020 (plurality opinion) (stating justifications to support argument that rule permitting intoxication evidence in determinations of mental state is not fundamental principle of justice).

128. See *id.* (stating that exclusion of intoxication evidence generally deters crimes by increasing punishments for all crimes and specifically by incarcerating intoxicated offenders). The deterrence argument's greatest fault lies in the case of alcoholics. See generally Nemerson, *supra* note 2, at 434-40 (undertaking extensive examination of legal ramifications of alcoholism). The inability of the law to keep pace with society on issues involving alcohol is best represented in its approach to alcoholism. See *id.* at 395.

The American Medical Association has defined alcoholics as "those excessive drinkers whose dependence on alcohol has attained such a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations and their satisfactory social and economic functioning." Frederick P. Hafetz, *Alcoholism & Drug Addiction: The Affect on Mens Rea*, in MENS REA: STATE OF MIND DEFENSES IN CRIMINAL AND CIVIL FRAUD CASES 9, 11 (PLI Litig. & Admin. Practice Course Handbook Series No. 140, 1985). It generally is believed in the medical community that alcoholism is a disease. See ELVIN MORTON JELLINEK, *THE DISEASE CONCEPT OF ALCOHOLISM* 12 (1960) (providing what many consider original work on disease concept of alcoholism).

The majority of courts, including the U.S. Supreme Court, refuses to acknowledge that alcoholism is a disease marked by an uncontrollable urge to drink. See, e.g., *Powell v. Texas*, 392 U.S. 514, 535 (1968) (refusing to recognize "irresistible compulsion to drink" argument for alcoholics). Rather, the law maintains that the consumption of the first drink is voluntary, making any intoxication that might follow also voluntary. See *United States v. Shuckahasee*, 609 F.2d 1351, 1355 (10th Cir. 1980) (holding alcoholic defendant responsible for intoxicated actions). Such an approach is too rigid in light of the current state of knowledge on the biology and psychology of alcoholism as a disease. See Nemerson, *supra* note 2, at 398. Given that the law permits the mental disease of insanity as an excusing factor in the commission of a crime, its stubborn refusal to adopt the mental disease approach to alcoholism based on its conception of the first drink as voluntary is troubling. See Earle B. Wilson, *Alcoholism: A Mitigating Factor in the Disciplinary Process*, 31 *How. L.J.* 355, 357 (1988) (submitting that voluntary nature of first drink has prevented alcoholism from attaining status of insanity in criminal defenses).

Under the most widely accepted disease model of alcoholism, the alcoholic has little control over his consumption. See Nemerson, *supra* note 2, at 397. A commission on alcoholism wrote that alcoholism is "a condition in which an individual has lost control over his alcohol intake in the sense that he is consistently unable to refrain from drinking or to stop drinking before getting intoxicated." *Id.* at 397 n.20 (citing THOMAS F.A. PLAUT, *COOPERATIVE COMM'N ON THE STUDY OF ALCHOLISM, ALCOHOL PROBLEMS: A REPORT TO THE NATION* 39 (1967)). In this sense, an alcoholic is unable to choose when to drink or, once drinking commences, to choose to stop. See *id.* at 399 (citing Mark Keller, *The Disease Concept of Alcoholism Revisited*, 37 *J. STUD. ALCOHOL* 1694, 1704 (1976)).

Almost equally as important to the analysis of alcoholism under the law is the belief that one cannot become an alcoholic, but rather, the need for alcohol develops naturally, and not as a result of deliberate action by the individual. See *id.* at 399 n.27 (citing Jackson A. Smith, *The Choice of Treatment Procedure in the Alcoholic*, in *ALCOHOLISM: BASIC ASPECTS AND TREATMENT* 173, 174-75 (Harold Edwin Himwich ed., 1957)). The response of alcoholics to alcohol will vary, but most who have developed a tolerance to alcohol "can walk a straight line, speak clearly, carry on business, and drive a car with alcohol levels in their blood that would make the novice unable to walk!" *Id.* at 403 (quoting F. Seixas, *The Course of Alcoholism*, in NADA J. ESTES & M. EDITH HEINEMANN, *ALCOHOLISM: DEVELOPMENT, CONSEQUENCES, AND INTERVENTIONS* 70 (2d ed. 1986)).

Alcoholics also display a tendency to blackout. See *id.* at 406 (citing Mark Keller, *A Lexicon of Disabilities Related to Alcohol Consumption*, in *ALCOHOL-RELATED DISABILITIES* 23 (Griffith Edwards et al. eds., 1977)). It is interesting that Egelhoff displayed both of these characteristics,

such rules codify the moral culpability of crimes committed while intoxicated.<sup>129</sup> A third justification was to avoid confusing juries

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although there is no mention that Egelhoff asserted that he was an alcoholic. *See* Egelhoff, 116 S. Ct. at 2016 (plurality opinion). The most important characteristic of the alcoholic in relation to the deterrence justification is that he often does not know of his tendency to consume. *See* Nemerson, *supra* note 2, at 434. Thus, the alcoholic is unaware that the threats of increased punishment are aimed at him. *See id.* at 435. In this way, the deterrence argument fails. It is unlikely that an individual who is unaware of his predisposition to drinking will curb consumption in an effort to avoid the stiff penalties that may follow an intoxicated action. Similarly, many alcoholics have a subjective denial of their addiction. *See id.* This fact, combined with the inability to control either the onset of drinking, subsequent consumption, or the results of such drinking, makes these types of alcoholics immune to any deterrent force of provisions such as § 45-2-203.

129. *See* Egelhoff, 116 S. Ct. at 2020 (plurality opinion) (expressing view that exclusion rules reflect society's "moral perception" that those who become intoxicated voluntarily should be culpable for their actions). A number of critics argue that morality is not sufficient to justify a complete bar on evidence of intoxication. One must balance this concept with a basic tenet of criminal law: "The legal system must not impose punishment unless the defendant is blameworthy or bears moral responsibility for her act." R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459, 459-60 (1994). Professor Wright argues that the requirement of moral guilt is a uniformly acknowledged concept. *See id.* at 460 n.4 (listing numerous legal scholars supporting concept of moral guilt). Once again, the alcoholic presents problems for Justice Scalia. As discussed above, the alcoholic is unable to control the consumption of alcohol. *See supra* note 128 (describing status of alcoholism in medical community as a disease); *see also* Susan F. Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxicating Defenses*, 53 FORDHAM L. REV. 221, 251 n.138 (1984) (positing that sufferers of alcoholism are unable to control amount they drink).

Associated with this theory is the idea that the first drink often is involuntary. *See supra* note 128 and accompanying text. Although science is fairly certain that the alcoholic is predisposed to drinking, *see* Nemerson, *supra* note 2, at 398, it still is quite difficult to identify an individual in that category. *See id.* at 400-14 (discussing causes of alcoholism). Thus, unless an individual is aware that his drinking will lead to an uncontrollable addiction, it is hard to assign moral blame, because "[t]o blame an individual for doing an act, when he could not have done other than that act, is to misapply the concept of blame." *Id.* at 414. Similarly, if the law permits involuntary intoxication to excuse violations of the law, then it is hard to punish the alcoholic, who essentially suffers from involuntary intoxication. *See id.* ("Whether the cause of the intoxication is an external person over whom the actor has no control, or an internal disease over which he has not control, the lack of culpability is the same.").

The second problem with this rationale is that the law permits morally guilty defendants to assert that they did not have the requisite mental state to be convicted of the offense. For example, the Model Penal Code forbids an intoxicated defendant from claiming that his inebriation prevented him from forming the required intent to commit a crime. *See* MODEL PENAL CODE § 2.08 (Proposed Official Draft 1962). The same Code would allow the defendant who, knowing that he needs to take medication, fails to do so and commits a crime to escape punishment based on a failure to meet the mental requirement of the crime. *See id.* § 4.02. Although the two are equally guilty on moral grounds, the end result is radically different and is a strong indication that morality is a weak basis for law. *See* discussion *infra* Part IV (analyzing how morality dictated decision in *Egelhoff*).



with misleading evidence.<sup>130</sup> The Court concluded that although

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130. See *Egelhoff*, 116 S. Ct. at 2021 (plurality opinion) (concluding that evidence of intoxication can be viewed as misleading because juries incorrectly will accept argument that defendant could not possess required mental state). Justice Scalia suggested that "drunks" behave violently not because of a biological reaction, but because society has established that this is how "drunks" act. See *id.* (plurality opinion). He asserted that juries will be quick to accept this belief and incorrectly will acquit a defendant. See *id.* (plurality opinion); see also George E. Dix, *Due Process and Voluntary Intoxication Defense: Montana Case Could Show Whether the Supreme Court Is Inclined to Constitutionalize Difficult Questions of Criminal Law*, TEX. LAW., Feb. 5, 1996, at 290-91 (advancing theory that legislatures can argue that exclusions such as § 45-2-203 properly avoid having juries consider misleading evidence).

Four problems have been identified when there is speculation about the effects of intoxication on behavior. First, one must determine what the defendant consumed. Second, one must reconstruct circumstances of the situation. Third, one must factor in personal variations, for example how much the defendant regularly drank and how high his alcohol tolerance was. Fourth, one must determine how much the defendant's cognitive skills were impaired by the alcohol. See Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 436 n.18 (1980); see also 2 MCCORMICK ON EVIDENCE § 205, at 883-89 (John William Strong et al. eds., 4th ed. 1992) (examining problems and inaccuracies involved in testing for drunkenness).

Although the often speculative nature of intoxication evidence has been acknowledged, concerns with respect to accuracy must yield to the ethical problem of convicting a defendant when he may not satisfy the elements of a crime. See Bonnie & Slobogin, *supra*, at 438 (arguing that notions of fairness would be sacrificed if state defined guilt subjectively while forbidding defendant opportunity "to reconstruct his actual state of mind"); see also LAFAYE & SCOTT, CRIMINAL LAW § 3.11(a), at 268 (1986) ("[I]t is a basic premise of Anglo-American criminal law that the physical conduct and the state of mind must concur."). Thus, it is difficult to justify the absolute exclusion of relevant evidence when a state still imposes a mental element for a proper conviction.

In addition, the rules of evidence already allow the admission of evidence that is at best speculative as to the mental state of a defendant. See Bonnie & Slobogin, *supra*, at 473 (examining courts treatment of expert testimony on mental state); see also FED. R. EVID. 401-403 (providing standards for admission of relevant evidence). For example, most jurisdictions allow a defendant to provide testimony that due to insanity or diminished capacity, he lacked the required mental state to be guilty of a crime. See Bonnie & Slobogin, *supra*, at 473 (suggesting that courts should be more likely to accept expert testimony on mens rea than on claims such as insanity); see also Mandiberg, *supra* note 129, at 240 (arguing that because jury will examine history of defendant and events in question, it is less likely that defendant will be able to fake intoxication evidence than evidence for insanity, mistake, or legal provocation).

Similarly, there is little reason to believe that the intoxicated defendant will have an easier time fabricating a defense than a defendant asserting insanity or diminished capacity. The intelligence and planning required to accomplish such a deception often is much beyond the capability of the typical defendant, who, more often than not, is "weak, impulsive, and frequently diseased." See Hall, *supra* note 3, at 1048.

What further frustrates the argument that intoxication evidence misleads juries is the use of such evidence as elements of crimes. It is hard to argue that intoxication evidence is relevant when used to show that a defendant was guilty of a crime such as driving while intoxicated, and then to argue that the very same evidence is "misleading" as to the mental state of a defendant for a crime such as deliberate homicide. Egelhoff advanced this argument in his brief, asserting that the legislature did not deem the evidence in question as irrelevant or unreliable because it predicated an entire section of its criminal code on evidence of intoxication. See Brief for Respondent at 32 n.16, *Egelhoff* (No. 95-566) (citing MONT. CODE ANN. §§ 61-8-401 to -422 (1991) as examples of crimes in Montana requiring intoxication for liability).

Justice Scalia fears that allowing intoxication evidence will lead to a large number of acquittals in criminal cases. Therefore, he believes that elimination of intoxication from examination will deter criminals from committing crimes while intoxicated. See *Egelhoff*, 116 S. Ct. at 2020 (plurality opinion); see also Note, *supra* note 1, at 1684 (mentioning "floodgate" concern). Although many commentators believe that Justice Scalia's concern is valid when allowing

many states recognized the relevance of intoxication to mens rea, the rule permitting intoxication evidence on the question of mens rea was of "too recent vintage, and has not received sufficiently uniform and permanent allegiance to qualify as fundamental, especially since it displaces a lengthy common-law tradition which remains supported by valid justifications today."<sup>131</sup>

Justice Scalia then addressed the due process guarantees that the Montana Supreme Court cited in finding § 45-2-203 unconstitutional. The Court first dismissed the Montana Supreme Court's reliance on *Chambers v. Mississippi*.<sup>132</sup> The plurality wrote that "*Chambers* was an exercise in highly case-specific error correction"<sup>133</sup> and made much of Justice Powell's limitation clause in *Chambers* that stated: "In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures."<sup>134</sup> Thus, to the majority, *Chambers* represented nothing more than the

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intoxication as a defense, other commentators express the idea that allowing intoxication evidence in determining mens rea will not lead to massive numbers of free criminals. *See id.* at 1686 (examining "floodgate" concern but stating that as long as intoxication defense is "limited to appropriate circumstances," it will not be a problem).

Most commentators agree that juries should treat each intoxication situation on its own merits and determine if the accused did indeed form intent. *See id.* at 1687 (suggesting that few defendants will be able to convince juries that their intoxication prevented them from forming intent to commit crime).

131. *Egelhoff*, 116 S. Ct. at 2021 (plurality opinion). One can argue that Justice Scalia gives too much deference to a common-law doctrine that has significantly shifted over time. Although courts did forbid consideration of voluntary intoxication early in the history of criminal law, as Justice Scalia maintains, *see id.* at 2018-20 (plurality opinion) (discussing early common-law abhorrence of intoxication), there has been a definitive shift away from such a draconian approach, *see id.* at 2030 (O'Connor, J., dissenting) (pointing to "significant modification" to common-law doctrine on intoxication in 19th century); *see also* Hall, *supra* note 3, at 1048 (noting "radical modification" towards more logical and humane intoxication doctrine during 19th century).

Additionally, one commentator has suggested that 150 years of English and American case law support the rule allowing evidence of intoxication to mitigate specific intent crimes. *See* Benton, *supra* note 3, at 1177. Justice Scalia also fails to recognize that the common law did allow evidence of involuntary intoxication. *See* HALE, *supra* note 123, at \*32 (noting that intoxication resulting from incorrect medical prescription or that actions of enemy excused commission of crime). Thus, the common law recognized the relevance of intoxication to criminal activity, but did not comprehend the inconsistencies in their stances on involuntary and voluntary intoxication until the nineteenth century when it began to carve out exceptions to exclusions for voluntary intoxication. *See Egelhoff*, 116 S. Ct. at 2030 (O'Connor, J., dissenting) (examining the 19th century modification and its effect).

The common-law tradition is outdated, given that scholars and politicians alike substantially recognize that morality alone cannot justify the exclusion of relevant evidence. *See supra* note 120 and accompanying text.

132. 410 U.S. 284 (1973).

133. *Egelhoff*, 116 S. Ct. at 2022 (plurality opinion).

134. *Id.* at 2021-22 (plurality opinion) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973)).

idea that faulty evidentiary rules, when viewed in their totality, can lead to a violation of the Due Process Clause.<sup>135</sup> The Court also rejected Egelhoff's argument that *Crane v. Kentucky*<sup>136</sup> represented the correct interpretation of *Chambers*.<sup>137</sup> Justice Scalia wrote that *Crane* stood for the notion that evidentiary restrictions are unconstitutional under the *Chambers* doctrine when there is no valid state justification, and that was not the case with § 45-2-203.<sup>138</sup>

Addressing the Montana Supreme Court's use of *In re Winship*<sup>139</sup> and *Sandstrom v. Montana*,<sup>140</sup> the Court held these cases inapplicable because § 45-2-203 did not shift the burden of proof in proving an element of the offense.<sup>141</sup> As the Montana Supreme Court opined, the statute did not shift the prosecution's burden, but did reduce it.<sup>142</sup> Such a reduction, wrote the Court, never has been unconstitutional unless it violated "a fundamental principle of fairness;"<sup>143</sup> here it did not.<sup>144</sup>

Finally, the Court made quick work of the Montana Supreme Court's reliance on *Martin v. Ohio*.<sup>145</sup> Justice Scalia stated that the Court must concern itself with its prior holdings and not dicta.<sup>146</sup> Because no decision of the Court had adopted the ideas reflected in the *Martin* dicta, they were, in Justice Scalia's opinion, irrelevant to the case at hand.<sup>147</sup>

### B. Justice Ginsburg's Concurrence

In a concurring opinion, Justice Ginsburg suggested that the constitutionality of § 45-2-203 turned on its characterization.<sup>148</sup> If § 45-2-203 was a bar to admitting relevant evidence, then it was a due

135. See *id.* at 2022 (plurality opinion).

136. 476 U.S. 683 (1986).

137. See *Egelhoff*, 116 S. Ct. at 2022 (plurality opinion) (reiterating *Crane* holding that exclusion of evidence in that case was unjustified and, thus, a due process violation).

138. See *id.*

139. 397 U.S. 358 (1970).

140. 442 U.S. 510 (1979).

141. See *Egelhoff*, 116 S. Ct. at 2022 (plurality opinion).

142. See *Montana v. Egelhoff*, 900 P.2d 260, 266 (Mont. 1995), *rev'd*, 116 S. Ct. 2013 (1996) (plurality opinion).

143. *Egelhoff*, 116 S. Ct. at 2023 (plurality opinion).

144. See *id.* at 2018-23 (plurality opinion) (examining historical treatment of intoxication and concluding that common-law tradition of treating intoxicated defendant as culpable is established rule).

145. 480 U.S. 228 (1987).

146. See *Egelhoff*, 116 S. Ct. at 2023 (plurality opinion) ("It is to the holdings of our cases, rather than their dicta, that we must attend." (quoting *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673, 1676 (1994))).

147. See *id.* at 2023 (plurality opinion) (stating that even if *Martin* dicta required admission of all relevant evidence, Supreme Court case law has shown that it is incorrect).

148. See *id.* at 2024 (Ginsburg, J., concurring).

process violation.<sup>149</sup> If it was a legislative redefinition of the mens rea element for deliberate homicide, then there was no constitutional infringement of Egelhoff's rights.<sup>150</sup> Ginsburg ultimately opined that although she did not feel § 45-2-203 was simply an evidentiary restriction, she would decline to rule § 45-2-203 unconstitutional.<sup>151</sup>

First, Justice Ginsburg pointed out that § 45-2-203 appears in Title 45 ("Crimes") and not Title 26 ("Rules of Evidence") of the Montana Code, indicating that it might not be a strictly evidentiary statute.<sup>152</sup> Rather, § 45-2-203 represented the Legislatures' desire to remove voluntary intoxication from the inquiry into the mental state of a defendant.<sup>153</sup> As such, in proving the mental state of deliberate homicide, the State had to show that the defendant committed the murder purposely or knowingly, or "under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication.'" <sup>154</sup> Thus, § 45-2-203 did not run afoul of *In re Winship's* requirement that the prosecution must prove every element of a crime beyond a reasonable doubt because the State's definition of the offense guided the inquiry.<sup>155</sup>

Second, Justice Ginsburg reiterated that a state is accorded deference in defining the elements of its crimes, and that criminal statutes are unconstitutional only if they offend a fundamental principle of justice.<sup>156</sup> Restating the rationale of the plurality, Justice Ginsburg intimated that the common-law history of refusing to admit evidence of voluntary intoxication, combined with the "significant minority" of states that still employ the common-law

149. See *id.* (Ginsburg, J., concurring).

150. See *id.* (Ginsburg, J., concurring).

151. See *id.* at 2024-25 (Ginsburg, J., concurring).

152. See *id.* at 2024 (Ginsburg, J., concurring) (citing MONT. CODE ANN. § 45-2-203 (1995)). Justice Ginsburg indicated that the presence of measures referring to duress and entrapment supported this line of reasoning. See *id.* (Ginsburg, J., concurring).

153. See *id.* (Ginsburg, J., concurring).

154. *Id.* (Ginsburg, J., concurring) (quoting Brief for American Alliance for Rights and Responsibilities et al. as Amici Curiae at 6, *Egelhoff* (No. 95-566)); see also Brief for Petitioner at 35-36, *Egelhoff* (No. 95-566) ("[I]n the instant case . . . the State convinced the jury, which was instructed to convict only if it found beyond a reasonable doubt that Egelhoff . . . [killed] . . . the victims knowingly or purposely, that he had done so . . ."); Brief for United States as Amicus Curiae at 10-12, *Egelhoff* (No. 95-566) (stating that the Montana statutes "require proof of purposeful or knowing conduct, apart from voluntary intoxication").

155. See *Egelhoff*, 116 S. Ct. at 2024 (Ginsburg, J., concurring) (citing *Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977)).

156. See *id.* at 2024-25 (Ginsburg, J., concurring) (citing *Martin v. Ohio*, 480 U.S. 228, 232 (1987)); *Patterson*, 432 U.S. at 201-02 (stating that in due process challenge, courts should examine whether law violates a fundamental principle of justice). Justice Ginsburg asserted that the deference is even greater when examining "the extent to which moral culpability should be a prerequisite to conviction of a crime." *Egelhoff*, 116 S. Ct. at 2024 (Ginsburg, J., concurring) (citing *Powell v. Texas*, 392 U.S. 514, 545 (1968) (Black, J., concurring)).

doctrine, made § 45-2-203 constitutional.<sup>157</sup> Justice Ginsburg's concurrence accorded great deference to the other states that have adopted statutes similar to Montana's and reasoned that such laws, which already have been declared constitutional, should not be found otherwise by this case.<sup>158</sup> She concluded that § 45-2-203 suffered no "constitutional shoal."<sup>159</sup>

### C. Justice O'Connor's Dissent

Justices Stevens, Souter, and Breyer joined Justice O'Connor's vehement dissent arguing that § 45-2-203 violated the boundaries established in the right to present a defense doctrine.<sup>160</sup> Justice O'Connor attacked the plurality's assertion that § 45-2-203 fell within the ambit of other constitutional evidentiary restrictions and argued that none of the restrictions cited by the plurality led to a complete bar of relevant evidence, as did the Montana statute at issue.<sup>161</sup> By excluding evidence that would allow the defendant to mitigate the prosecution's mental state argument, the state no longer had to prove

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157. See *Egelhoff*, 116 S. Ct. at 2025 (Ginsburg, J., concurring) (citing *Egelhoff*, 116 S. Ct. at 2017-19 (plurality opinion)).

158. See *id.* at 2025 (Ginsburg, J., concurring) (citing statutes and case law in Arizona, Hawaii, and Pennsylvania). The court in *State v. Souza*, 813 P.2d 1384 (Haw. 1991), ruled that Hawaii's version of § 45-2-203 was constitutional, stating that: "[The] legislature was entitled to redefine the mens rea element of crimes and to exclude evidence of voluntary intoxication to negate state of mind." *Egelhoff*, 116 S. Ct. at 2025 (Ginsburg, J., concurring) (quoting *Souza*, 813 P.2d at 1386).

In Arizona, the voluntary intoxication statute was deemed constitutional in *State v. Ramos*, 648 P.2d 119 (Ariz. 1982) (en banc), in which the court noted: "Perhaps the state of mind which needs to be proven here is a watered down *mens rea*; however, this is the prerogative of the legislature." *Egelhoff*, 116 S. Ct. at 2025 (Ginsburg, J., concurring) (quoting *Ramos*, 648 P.2d at 121).

The Pennsylvania statute on voluntary intoxication was upheld in *Commonwealth v. Rumsey*, 454 A.2d 1121 (Pa. Super. Ct. 1983), in which the court stated:

Redefinition of the kind and quality of mental activity that constitutes the *mens rea* element of crimes is a permissible part of the legislature's role in the "constantly shifting adjustment between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man."

*Id.* at 1122 (quoting *Powell v. Texas*, 392 U.S. 514, 536 (1968)).

159. *Egelhoff*, 116 S. Ct. at 2025 (Ginsburg, J., concurring).

160. See *id.* at 2026-27 (O'Connor, J., dissenting) (detailing Court's doctrine establishing right to present a defense).

161. See *id.* at 2026 (O'Connor, J., dissenting) (discussing plurality's classification of § 45-2-203 as one of many evidentiary exclusions deemed constitutional). Justice O'Connor admitted that the defendant does not enjoy a complete right to present all relevant evidence. See *id.* (O'Connor, J., dissenting); see also *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (stating that Supreme Court recognizes a state's right to exclude evidence "even if a defendant would prefer to see that evidence admitted"). Many of the examples of evidentiary exclusions that Justice Scalia cited, however, operated as partial bars to evidence. See *Egelhoff*, 116 S. Ct. at 2026 (O'Connor, J., dissenting). Section 45-2-203 cannot be classified among these evidentiary rules because it "places a blanket exclusion on a category of evidence that would allow the accused to negate the offense's mental-state element." *Id.* (O'Connor, J., dissenting).

beyond a reasonable doubt that Egelhoff had formed the required mens rea.<sup>162</sup> As a result, § 45-2-203 constituted a due process violation.<sup>163</sup>

In the first section of her dissent, Justice O'Connor dismantled the plurality's treatment of Court precedent as "fact-bound, irrelevant, and dicta."<sup>164</sup> Justice O'Connor traced *Chambers* and its progeny, concluding that those cases manifested the Court's belief that State evidentiary exclusions violate a defendant's right to present a defense if there are no valid justifications supporting them.<sup>165</sup> Importantly, Justice O'Connor dismissed the plurality's characterization of *Chambers* as "case-specific error correction."<sup>166</sup> She argued that the plurality also ignored the warnings of *Crane v. Kentucky*,<sup>167</sup> that the prosecution's case must be fully tested through the presentation of relevant, reliable, contradictory evidence.<sup>168</sup> Justice O'Connor also cited *Washington v. Texas*<sup>169</sup> for the proposition that the Due Process Clause grants a defendant the right to call witnesses in his or her defense.<sup>170</sup> She wrote: "These cases, taken together, illuminate a simple principle: Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations."<sup>171</sup> Justice O'Connor asserted that § 45-2-203 kept relevant evidence out of the courtroom and thus denied Egelhoff "a fair opportunity" while easing the prosecution's burden of proof.<sup>172</sup>

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162. See *Egelhoff*, 116 S. Ct. at 2026 (O'Connor, J., dissenting).

163. See *id.* (O'Connor, J., dissenting).

164. *Id.* at 2029 (O'Connor, J., dissenting).

165. See *id.* at 2026-27 (O'Connor, J., dissenting).

166. *Id.* at 2027 (O'Connor, J., dissenting) (quoting *Egelhoff*, 116 S. Ct. at 2022 (plurality opinion)) ("[T]he plurality's characterization of *Chambers* as 'case-specific error correction' cannot diminish its force as a prohibition on enforcement of state evidentiary rules that lead, without sufficient justification, to the establishment of guilt by suppression of evidence supporting the defendant's case.") (citation omitted).

167. 476 U.S. 683 (1986).

168. See *Egelhoff*, 116 S. Ct. at 2028 (O'Connor, J., dissenting) (noting that plurality cited *Crane* for proposition that states may limit evidence for valid reason). Justice O'Connor, continuing the discussion on the right to present a defense, cited *Crane* for a number of propositions. For instance, she stated that *Crane* reaffirmed that states can exclude evidence if it is unfair or unreliable, but that absent such justifications, restrictions on evidence violate the Due Process Clause. See *id.* (O'Connor, J., dissenting) (citing *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986)). Such exclusions seriously impede a defendant's right to be heard in his defense, and the holding in *Crane* was a reminder that such limitations prevent the adversarial process from functioning properly. See *id.* (O'Connor, J., dissenting).

169. 388 U.S. 14 (1967).

170. See *Egelhoff*, 116 S. Ct. at 2027 (O'Connor, J., dissenting) (citing *Washington v. Texas*, 388 U.S. 14, 87 (1967)).

171. *Id.* (O'Connor, J., dissenting).

172. See *id.* at 2026 (O'Connor, J., dissenting) (maintaining importance of preserving burden of proof in due process analysis).

Justice O'Connor's dissent also addressed the applicability of the *In re Winship* doctrine. *In re Winship* established the standard that the prosecution in a criminal case must prove all elements of the crime "beyond a reasonable doubt."<sup>173</sup> According to the Montana Supreme Court, the state had to prove that Egelhoff had committed the murders "purposely or knowingly."<sup>174</sup> If a jury is to determine a subjective mental state, relevant evidence must be allowed to test the prosecution's case and to avoid creating the assumption that the defendant did in fact possess the statutory mental state.<sup>175</sup> In this way, the reasonable doubt mandate of *In re Winship* can be met. Additionally, Justice O'Connor asserted that the plurality's dismissal of the Montana Supreme Court's reliance on *Martin v. Ohio*<sup>176</sup> as dictum was incorrect.<sup>177</sup> *Martin*, which differentiated between allocating the burden of proof for a defense and the absolute bar of possibly exculpatory evidence, was an important reaffirmation of the doctrine forbidding the unjustified prohibition on relevant evidence.<sup>178</sup>

According to Justice O'Connor, the Court misrepresented the holdings in these cases, ignored their warnings against untested prosecution, and instead relied on them for the notion that a state may bar relevant evidence with sufficient justification.<sup>179</sup> Justice O'Connor argued that the Court's justifications, morality, and deterrence, were nothing more than justifications for why Montana would create statutes such as § 45-2-203 that would increase the likelihood of successful prosecutions in cases involving intoxicated defendants.<sup>180</sup> As for the argument that such evidence confuses juries and leads to "false acquittals," the exception that Montana

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173. *In re Winship*, 397 U.S. 358, 364 (1970).

174. *Egelhoff*, 116 S. Ct. at 2028 (O'Connor, J., dissenting) (citing *Montana v. Egelhoff*, 900 P.2d 260, 265-66 (Mont. 1995), *rev'd*, 116 S. Ct. 2013 (1996), and repeating the Montana Supreme Court's statements that "knowingly or purposely" still was an element of the crime after the passage of § 45-2-203).

175. *See id.* at 2027 (O'Connor, J., dissenting). Justice O'Connor argued that keeping this evidence from the jury had two results. The first result was that the prosecution had an easier time convincing a jury that Egelhoff possessed the required mental state, because evidence of intoxication was not allowed to cast doubt on their argument. *See id.* at 2028 (O'Connor, J., dissenting). Second, a jury would find it difficult to conclude that Egelhoff did not possess the required "subjective" mental state if the only evidence it hears is that of the prosecution. *See id.* (O'Connor, J., dissenting).

176. *See id.* (O'Connor, J., dissenting).

177. *See id.* (O'Connor, J., dissenting) ("[D]ictum or not, this observation explained our reasoning [in *Martin*] and is similarly applicable here.").

178. *See id.* (O'Connor, J., dissenting) ("[T]he State's right to shift the burden of proving an affirmative defense did not include the power to prevent the defendant from attempting to prove self-defense in an effort to cast doubt on the State's case.").

179. *See id.* (O'Connor, J., dissenting).

180. *See id.* at 2028-29 (O'Connor, J., dissenting).

makes for allowing evidence of involuntary intoxication indicates that such evidence is considered relevant and not misleading.<sup>181</sup> Justice O'Connor concluded that the sole justification for § 45-2-203 was to "keep from the jury's consideration a category of evidence that helps the defendant's case and weakens the government's case."<sup>182</sup>

In the second section of her dissent, Justice O'Connor acknowledged the common law's disdain for allowing evidence of voluntary intoxication.<sup>183</sup> She maintained, however, that during the nineteenth century, a significant number of courts recognized that voluntary intoxication could prevent a defendant from forming the required mental state.<sup>184</sup> It was this premise that motivated the Montana Supreme Court to hold that the "[e]limination of a critical category of defense evidence precludes a defendant from effectively rebutting the mental-state element" and that this limitation on the adversarial process was a due process violation.<sup>185</sup> Justice O'Connor argued that the failure to acknowledge this significant shift in doctrine prevented the plurality from performing a complete "fundamental principle of justice" analysis.<sup>186</sup> Rather, the analysis must include the "'fundamental principle' that a defendant has the right to a fair opportunity to put forward his defense in adversarial testing."<sup>187</sup> Justice O'Connor asserted that the shift in common-law doctrine was a response to this burgeoning right, and that as such, § 45-2-203 was unconstitutional.<sup>188</sup>

Finally, the third section of Justice O'Connor's dissent criticized Justice Ginsburg's contention that § 45-2-203 redefined the mental

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181. See *id.* at 2029 (O'Connor, J., dissenting) (indicating that bar on evidence of voluntary intoxication is inconsistent with allowing evidence of involuntary intoxication).

182. *Id.* (O'Connor, J., dissenting). The dissent noted that most permissible evidentiary restrictions are grounded in issues of reliability. See *id.* (O'Connor, J., dissenting). Montana made no effort to justify § 45-2-203 on the grounds that the evidence was unreliable, unlike the states in *Chambers* and *Washington*. See *id.* (O'Connor, J., dissenting). Rather, the only possible reason for keeping this evidence out of court was to avoid evidence that "helps the defendant's case and weakens the government's case." *Id.* (O'Connor, J., dissenting).

183. See *id.* (O'Connor, J., dissenting) (admitting that common-law doctrine was relevant to examining validity of § 45-2-203).

184. See *id.* at 2030 (O'Connor, J., dissenting). Contrary to Justice Scalia and the plurality, Justice O'Connor gave great weight to the 19th-century shift in allowing evidence of voluntary intoxication on mental state. See *id.* (O'Connor, J., dissenting). Justice O'Connor stated that the courts realized it was illogical to require a defendant to possess a given mental state, and then to forbid the defendant from presenting evidence that might defeat arguments on that subject. See *id.* (O'Connor, J., dissenting).

185. *Id.* (O'Connor, J., dissenting).

186. See *id.* at 2031 (O'Connor, J., dissenting).

187. *Id.* (O'Connor, J., dissenting).

188. See *id.* (O'Connor, J., dissenting).



state required to convict a person for deliberate homicide.<sup>189</sup> The Montana Supreme Court was clear that obtaining a conviction for deliberate homicides required proof that the defendant "knowingly or purposely" committed the crime.<sup>190</sup> The court initially determined that evidence of voluntary intoxication was pertinent to the requisite mental state.<sup>191</sup> The court then made it clear that part of the prosecution's burden in obtaining a conviction for deliberate homicide was to show that Egelhoff satisfied "the mental state element."<sup>192</sup> Thus, according to Justice O'Connor, Justice Ginsburg's determination that § 45-2-203 was constitutional as a redefinition of a criminal offense was untenable given the Supreme Court's duty to accept the interpretation of Montana law from Montana's highest state court.<sup>193</sup>

In sum, Justice O'Connor determined that the disallowance of evidence of voluntary intoxication in the past was not enough to justify such exclusions today.<sup>194</sup> Montana created the ban and kept relevant exculpatory evidence out of the jury's consideration in an attempt to improve its chances of successful prosecution.<sup>195</sup> Although the Court should grant states latitude in administering their criminal justice systems, "the Court must invalidate those rules that violate the requirements of due process"<sup>196</sup> under the right to present a defense; § 45-2-203 is one such rule.

### *D. Justice Souter's Dissent*

The crux of Justice Souter's dissent is similar to that of Justice O'Connor's. He argued that although states are permitted to redefine the elements of a crime, no such redefinition had occurred

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189. *See id.* (O'Connor, J., dissenting) ("Justice Ginsburg's reading of Montana law is plainly inconsistent with that given by the Montana Supreme Court, and therefore cannot provide a valid basis to uphold § 45-2-203's operation.").

190. *See id.* (O'Connor, J., dissenting).

191. *See id.* (O'Connor, J., dissenting) (citing *Egelhoff v. State*, 900 P.2d 260, 265 (Mont. 1995)).

192. *See id.* (O'Connor, J., dissenting). Justice O'Connor cited two parts of the Montana Supreme Court opinion in support of her conclusion. The first was the conclusion that evidence of intoxication was relevant to the determination of "knowingly or purposely." *See id.* (O'Connor, J., dissenting) (citing *Egelhoff*, 900 P.2d at 265). Second, Justice Nelson wrote in his concurrence that § 45-2-203 excluded relevant evidence that lessened the prosecution's burden of proving the mental element of deliberate homicide. *See id.* (citing *Egelhoff*, 900 P.2d at 268 (Nelson, J., concurring)).

193. *See id.* (O'Connor, J., dissenting) (noting Supreme Court's duty to accept highest state court's interpretation of state law).

194. *See id.* (O'Connor, J., dissenting).

195. *See id.* (O'Connor, J., dissenting).

196. *Id.* (O'Connor, J., dissenting).

here.<sup>197</sup> Assuming that no redefinition had occurred, Montana still could limit the use of evidence if justified by valid state interests.<sup>198</sup> Justice Souter conceded that the plurality made a convincing argument for the rejection of intoxication evidence at common law, but asserted that the inquiry must include an analysis under the right to present a defense.<sup>199</sup> The ability of states to limit relevant evidence justifiably tempers this right to present a defense.<sup>200</sup> Justice Souter offered one possible justification, namely to prevent jury confusion.<sup>201</sup> Montana failed to assert this or any other justification for its actions, however, and § 45-2-203 therefore was found unconstitutional.<sup>202</sup>

Justice Souter also argued that Montana has achieved its desired end by redefining "knowingly" and "purposely" so as to exclude evidence of voluntary intoxication.<sup>203</sup> Under the Court's decision in *Patterson*, the wide latitude granted a state in defining its criminal justice system would permit such a redefinition.<sup>204</sup> As Justices O'Connor and Breyer noted in their dissents, however, it was impossible to read § 45-2-203 as having done so, given the decision of the Montana Supreme Court.<sup>205</sup>

#### E. Justice Breyer's Dissent

Justice Breyer wrote the third dissent in *Montana v. Egelhoff*. Considerably shorter than those of Justices O'Connor and Souter, Justice Breyer agreed with the other dissenters that § 45-2-203 could not be read as having redefined the mental element of deliberate

197. See *id.* at 2032 (Souter, J., dissenting) (stating personal belief that § 45-2-203 redefined elements of deliberate homicide, but that Montana Supreme Court held that it had not).

198. See *id.* (Souter, J., dissenting).

199. See *id.* at 2032-33 (Souter, J., dissenting) (referring to Justice O'Connor's development of right to present a defense precedent). Justice Souter indicated that the right to present a defense included the right to present relevant evidence. See *id.* at 2033 (Souter, J., dissenting).

200. See *id.* (Souter, J., dissenting) (stating that *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), and *Washington v. Texas*, 388 U.S. 14, 18-19 (1967), established the right to present relevant evidence absent justified exclusion by the state).

201. See *id.* at 2034 (Souter, J., dissenting) (citing Brief for State of Hawaii et. al., *Egelhoff* (No. 95-566)).

202. See *id.* (Souter, J., dissenting).

203. See *id.* at 2033 (Souter, J., dissenting).

204. See *id.* (Souter, J., dissenting). Justice Souter intimated that a redefinition of "knowingly and purposely" would not offend *In re Winship's* requirement of proof beyond a reasonable doubt. See *id.* (Souter, J., dissenting) (citing *In re Winship*, 397 U.S. 358, 364 (1970)). The due process analysis under *Winship* is dependent on how the state defines the elements of a crime, see *id.* (Souter, J., dissenting), and *Patterson* accords states "broad limits" as to how to define those elements. See *id.* (Souter, J., dissenting) (citing *Patterson v. New York*, 432 U.S. 197, 211, n.12 (1977)).

205. See *id.* (Souter, J., dissenting).

homicide.<sup>206</sup> He argued, however, that this was irrelevant to the constitutionality of the statute; even if § 45-2-203 had redefined the mental state, it still would be unconstitutional because “it turns guilt or innocence not upon state of mind, but upon irrelevant external circumstances.”<sup>207</sup> If it were the desire of the Montana Legislature to equate “knowingly or purposely” with voluntary intoxication, then it should have done so in a more deliberate manner.<sup>208</sup> As written, Justice Breyer believed § 45-2-203 was a constitutional violation.<sup>209</sup>

#### IV. CRITICAL ANALYSIS OF *MONTANA V. EGELHOFF*

Given the substantial acknowledgment by the Court in prior cases of a due process right to present a defense,<sup>210</sup> it is odd that the Court avoided applying this right,<sup>211</sup> and instead applied the “fundamental principle of justice” standard.<sup>212</sup> The facts in *Egelhoff* certainly are similar, if not identical, to other cases in which the Court has analyzed an evidentiary exclusion by determining whether the rationale underlying the exclusion justifies curtailing a defendant’s right to present a defense.<sup>213</sup> The Court’s approach in *Egelhoff* is all the more questionable given that the evidentiary bar was absolute; prior to *Egelhoff*, the Supreme Court consistently had found complete bans on reliable and relevant evidence unconstitutional.<sup>214</sup>

Justice Scalia attempted to limit the applicability of *Chambers* and the right to present a defense by characterizing the *Chambers* decision as “highly case-specific error correction.”<sup>215</sup> Justice Scalia thus ascribed great import to Justice Powell’s “limitation clause” in *Chambers*, which cautioned that the holding did not signal any new

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206. See *id.* at 2035 (Breyer, J., dissenting).

207. *Id.* (Breyer, J., dissenting). Justice Breyer provided the following example to illustrate how the statute would pin guilt on “irrelevant” external circumstances:

An intoxicated driver stopped at an intersection who unknowingly accelerated into a pedestrian would likely be found guilty, for a jury unaware of intoxication would likely infer knowledge or purpose. An identically intoxicated driver racing along a highway who unknowingly sideswiped another car would likely be found innocent, for a jury unaware of intoxication would likely infer negligence.

*Id.* (Breyer, J., dissenting).

208. See *id.* (Breyer, J., dissenting).

209. See *id.* (Breyer, J., dissenting).

210. See discussion *supra* Part I (delineating creation of right to present a defense).

211. See generally discussion *supra* Part I.B (discussing post-*Chambers* cases and their treatment of right to present a defense).

212. See *Egelhoff*, 116 S. Ct. at 2017 (plurality opinion).

213. See discussion *supra* Part I.B (discussing right to present a defense after *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

214. See generally discussion *supra* Part I (detailing right to present a defense).

215. *Egelhoff*, 116 S. Ct. at 2022 (plurality opinion).

constitutional principles.<sup>216</sup> *Egelhoff* is the first case in the twenty-three years following *Chambers* in which the Court has seen fit to invoke the "limitation clause" to circumvent the import of *Chambers*.<sup>217</sup> The consistent rejection of the clause by the Supreme Court, as well as by the U.S. Circuit Courts,<sup>218</sup> makes Justice Scalia's characterization of *Chambers* suspect.

The Court accepted the existence of the right to present a defense. Although the Court may have attempted to downplay *Chambers*' importance by citing Justice Powell's statement, it could not ignore the constitutional right to present a defense. Justice Scalia explicitly stated that due process does afford protection against restrictions on "that right."<sup>219</sup> As the Court has acknowledged the right to present a defense and has used this right to invalidate evidentiary restrictions like that in *Egelhoff*, why did the Court avoid this simple way of affirming the Montana Supreme Court's decision? Why did the Court instead force *Egelhoff* to show that the narrow right to present evidence of voluntary intoxication on the issue of mens rea was "so rooted in traditions and the consciences of our people as to be ranked fundamental?"<sup>220</sup> There are two reasons, both unavoidably intertwined: morality and Justice Scalia.<sup>221</sup>

Justice Scalia has made it clear that his approach to fundamental right inquiries under the Due Process Clause requires that the right be "historically and traditionally protected."<sup>222</sup> He also has made it clear that the right examined should be narrowly defined, stating, "We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."<sup>223</sup> The combination of Justice Scalia's two requirements

216. See *id.* at 2023 (plurality opinion).

217. See discussion *supra* part I.B (noting post-*Chambers* treatment of right to present a defense). In fact, the Court in *Crane v. Kentucky*, 476 U.S. 683 (1986), specifically attempted to alleviate any affect that the "limitation clause" may have on the right to present a defense, stating: "We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard." *Id.* at 690.

218. See *supra* notes 55-64 and accompanying text (discussing treatment of *Chambers* by federal circuit courts).

219. See *Egelhoff*, 116 S. Ct. at 2017 (plurality opinion).

220. *Id.* (plurality opinion).

221. See Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 77 (1991) ("According to Justice Scalia, the state is permitted to act upon moral judgments."); see also *Barnes v. Glen Theatre*, 501 U.S. 560, 574 (1991) (Scalia, J., concurring) (agreeing with majority decision on grounds that statute reflected traditional moral belief that no one should expose his naked body in public).

222. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) ("In an attempt to limit and guide interpretation of the [Due Process Clause], we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental,' but that it be an interest traditionally protected by our society.").

223. *Id.* at 127 n.6.

assures that this "test" will not provide any constraints on the judiciary<sup>224</sup> and will allow courts to pass moral judgments on constitutional issues.<sup>225</sup>

Justice Scalia first requires that the right be traditionally protected. If the judge defines the relevant tradition, then there is little to prevent "personal and private notions" from dictating how that tradition is defined.<sup>226</sup> It then is very likely that the jurist will allow his or her personal morality to influence how to define the tradition.<sup>227</sup> This is especially dangerous because Justice Scalia's approach relies solely on tradition in determining whether a right exists.<sup>228</sup> This is in sharp contrast to other approaches that recognize the relevance of tradition but do not make it the sole criterion.<sup>229</sup> Because a jurist's definition of tradition depends largely on personal and private notions, Justice Scalia's exclusive focus on tradition ensures that his approach will serve as an illusory limitation on the judiciary.<sup>230</sup>

Justice Scalia's choice of generality in defining the right to be examined further illustrates the pretextual nature of his test. It is virtually impossible for a justice sitting today to define accurately or to understand the traditions of another era.<sup>231</sup> Additionally, it is highly likely that jurists attempting to reconstruct the past will be shaded by "their own world view."<sup>232</sup> There is an inherent danger

224. See Edward Gary Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1339 (concluding that test does not achieve an objective limitation on courts' discretion).

225. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1098 (1990) ("It is a construct to be deployed selectively, allowing judges to define rights more or less abstractly depending upon their own views . . .").

226. See Spitko, *supra* note 224, at 1349 (citing *Griswold v. Connecticut*, 381 U.S. 479, 519 (1965) (Black, J., dissenting)).

227. See *id.*; see also Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 27-28 (1994) (indicating that textualist approach will fail because human nature dictates that "moral experience" will affect legal conclusions); Tribe & Dorf, *supra* note 225, at 1059 (arguing that Justices of Supreme Court cannot avoid influences of personal feelings (citing ROBERT H. BORK, *THE TEMPTING OF AMERICA* 61 (1990))).

Justice Scalia acknowledges that legal opinions unavoidably reflect the morality of the jurist. See Antonin Scalia, *Morality, Pragmatism, and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y 123, 123 (1986) ("One would be foolish to deny the relevance of moral perceptions to law.").

228. See Spitko, *supra* note 224, at 1349 (arguing that Justice Scalia's approach hinges protection as fundamental right purely on existence of tradition).

229. See *Michael H. v. Gerald D.*, 491 U.S. 110, 140 (1989) (Brennan, J., dissenting) (asserting that plurality failed to acknowledge reasons for limiting place of tradition "in interpreting the Constitution's deliberately capricious language").

230. See Spitko, *supra* note 224, at 1349.

231. See *id.* at 1350-51 (arguing that traditions are hard to define because morals and beliefs that shaped those traditions reflect social environment of that time and will change).

232. *Id.* at 1351; see also Tribe & Dorf, *supra* note 225, at 1087 (stating that definition of tradition requires value judgments). Justice Scalia has acknowledged this very fact, admitting that "[originalism] requires . . . immersing oneself in the political and intellectual atmosphere of the

then in basing a constitutional test in tradition because of the high risk that the judge will characterize that right incorrectly. This risk is increased by requiring a narrow definition of tradition because broader principles most assuredly are easier to identify and apply.<sup>233</sup>

An examination of Justice Scalia's opinion in *Michael H. v. Gerald D.*<sup>234</sup> is illustrative. There the Court addressed the claim that due process protected an interest in the relationship between a father and child.<sup>235</sup> Justice Scalia required Michael H. to show that the interest in a parental relationship was "so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>236</sup> More importantly, Justice Scalia narrowed the asserted right to that between an adulterous father and his illegitimate child.<sup>237</sup> Relying on a common-law tradition that protected father-child relationships but did not provide specifically the same protection for adulterous fathers and their children, the plurality rejected Michael H.'s claim.<sup>238</sup>

In a strong dissent, Justice Brennan assailed Justice Scalia's analytical approach.<sup>239</sup> First, Justice Brennan labeled the dependence on tradition as a pretense, arguing that the concept was not an objective restraint because "tradition" is a nebulous term.<sup>240</sup> A related problem with the plurality's reliance on tradition was Justice Scalia's mandate for a narrow definition of the examined right.<sup>241</sup> The right at issue was not the one the plurality explored, but rather, whether the adulterous father-child relationship fell under the protection of the more general due process safeguards for parent-child relationships.<sup>242</sup> Toward that end, critics of the *Michael*

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time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57 (1989).

233. See Spitko, *supra* note 224, at 1352 ("[T]he broader tradition can be stated with confidence, whereas the narrower 'traditions' are uncertain.").

234. 491 U.S. 110 (1989).

235. See *Michael H.*, 491 U.S. at 119.

236. *Id.* at 125.

237. See *id.* at 126-27.

238. See *id.* at 124-27.

239. See *id.* at 136-38 (Brennan, J., dissenting).

240. See *id.* at 137 (Brennan, J., dissenting).

241. See *id.* at 141-42 (Brennan, J., dissenting) (arguing that Justice Scalia's characterization of asserted right was unnecessary because case does not present Court with new kind of interest; based on precedent, parent-child relationship clearly is a constitutional liberty).

242. See *id.* (Brennan, J., dissenting); cf. *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (asserting that case was not about fundamental right to engage in homosexual activity as framed by majority, but about broader "right to be left alone").

H. decision have argued that the plurality's analysis allowed Justice Scalia to base the holding in morality.<sup>243</sup>

Such is the case with *Montana v. Egelhoff*. Justice Scalia applied the narrow fundamental tradition approach to uphold the constitutionality of § 45-2-203 on moral grounds. The common-law history of voluntary intoxication evidence that Justice Scalia relied on evinced a clear moral reprobation of intoxicated defendants.<sup>244</sup> Justice Scalia attempted to justify reliance on the common law with more practical rationales, such as the propensity of intoxication evidence to mislead juries<sup>245</sup> and the ban's role in deterring intoxicated crimes,<sup>246</sup> but these justifications are simply false. It is the third justification that forms the basis of the decision: statutes like § 45-2-203 codify a moral disdain for intoxicated defendants.<sup>247</sup>

Similarly illustrative of Justice Scalia's moral reasoning in *Egelhoff* is his characterization of the right to be examined: the defendant must show that the right to present evidence of voluntary intoxication on the issue of mens rea is a fundamental principle of justice.<sup>248</sup> This formulation of the issue is too literal. By defining the right so narrowly, Justice Scalia makes the Due Process Clause a rigid doctrine unable to adapt to changes in society.<sup>249</sup> The fact that eighty percent of the states have abandoned the common-law doctrine used to justify the ban illustrates the unworkability of Justice Scalia's approach.

243. See Myers, *supra* note 221, at 76 (stating that Justice Scalia's analysis will find legislation based on moral tradition constitutional). See generally Elizabeth A. Hadad, Comment, *Tradition and the Liberty Interest: Circumscribing the Rights of the Natural Father*, 56 BROOK. L. REV. 291 (1990) (assailing morally motivated decision in *Michael H.*).

244. See *Montana v. Egelhoff*, 116 S. Ct. 2013, 2017-20 (1996) (plurality opinion) (detailing common-law history of voluntary intoxication evidence).

245. See *supra* note 130 and accompanying text (assailing Justice Scalia's assertion that such evidence misleads juries).

246. See *supra* note 128 and accompanying text (refuting Justice Scalia's contention that statutes such as § 45-2-203 will deter future crimes involving intoxication).

247. See *supra* note 129 and accompanying text (criticizing reliance on morality for upholding constitutionality of § 45-2-203).

248. See *Egelhoff*, 116 S. Ct. at 2017 (plurality opinion).

249. See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("[The Due Process Clause] is not a series of isolated points . . . . It is a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.") (citations omitted); Michael H. v. Gerald D., 491 U.S. 110, 141 (Brennan, J., dissenting) ("[C]onstruing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice . . . ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one . . . ."); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.), 316, 415 (1819) ("The Constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.").

This substantial shift is a strong indication that the reasons for the common-law tradition no longer are applicable. Quite simply, social mores have changed. For example, there is a large disparity in the scientific and psychological understanding of intoxication today than during the common-law period Justice Scalia relied upon.<sup>250</sup> It is unnecessary for a contemporary jurist to rely on the knowledge and social stigmas of an age long gone, especially when those factors have changed substantially and are no longer relevant.<sup>251</sup>

The relevant fundamental right here is the right to present a defense.<sup>252</sup> As such, the "fundamental principle of justice" test has no place in *Egelhoff*. The Court erred by abandoning the analysis applied in cases such as *Crane v. Kentucky*,<sup>253</sup> and in the process, incorrectly overturned the Montana Supreme Court on primarily moral grounds. The question then becomes whether *Egelhoff* harmed the right to present a defense doctrine.

The answer is no. The Court essentially was forced to apply the analysis common to right to present a defense precedent. The Court purported to apply the *Patterson* test, requiring *Egelhoff* to show that the right to consider intoxication evidence in determining mental state is a fundamental one, and concluded that he failed to show it as a fundamental right.<sup>254</sup> But the plurality was forced to acknowledge that the exclusion of such evidence was not fundamental.<sup>255</sup>

In applying the test used in right to present defense cases, the plurality attempted to justify its adherence to the common-law principles.<sup>256</sup> By suggesting that the relevancy and quality of intoxication evidence should be weighed against the state's justifications for excluding the evidence, the Court added *Egelhoff* to the growing list of decisions endorsing the balancing test for cases involving the right to a defense.

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250. See *supra* notes 128-30 and accompanying text (discussing state of knowledge concerning intoxication); cf. *Michael H.*, 491 U.S. at 140 (Brennan, J., dissenting) (maintaining that Justice Scalia's approach ignored modern day ability to identify father concretely with blood tests that were not available during time of common law).

251. See *Tribe & Dorf*, *supra* note 225, at 1090 (arguing that weakness in Justice Scalia's approach is its inability to reject inapplicable historical traditions).

252. Justice O'Connor and Justice Souter agreed with this assertion, stating that the Court should have addressed the right to present a defense. See *Egelhoff*, 116 S. Ct. at 2031 (O'Connor, J., dissenting); *id.* at 1032 (Souter, J., dissenting).

253. 476 U.S. 683 (1986).

254. See *Egelhoff*, 116 S. Ct. at 2021 (plurality opinion).

255. See *id.* at 2018-20 (plurality opinion) (recognizing shift toward allowing intoxication evidence in analysis of defendant's mental state).

256. See *id.* at 2020-21 (plurality opinion) (specifying policy rationales in favor of evidentiary exclusion); see also *supra* notes 127-30 and accompanying text (refuting posited justifications).



The reliance on fairly weak justifications, however, does not bode well for future application of the doctrine. If the Court is willing to accept ad hoc rationalizations<sup>257</sup> based on less than plausible evidence in upholding statutes such as Montana's,<sup>258</sup> then it is difficult to see how future defendants will be able to convince courts that the exclusion of evidence in their situations was justifiable. It is likely that the Court gave § 45-2-203 an added presumption of constitutionality because of its moral ramifications. The Court may not be so quick to accept ad hoc justifications with other evidentiary issues.

The most telling sign that the right to present a defense doctrine did not suffer severely in *Egelhoff* is the sharp division between the Justices. An analysis of Justice Ginsburg's concurrence shows that this easily could have been a 4-3 plurality finding a due process violation. Justice Ginsburg wrote that if § 45-2-203 amounted to a limitation on relevant evidence with respect to the mens rea, then the statute would be unconstitutional.<sup>259</sup> Justice Ginsburg's belief that the statute was constitutional rested on the notion that § 45-2-203 redefined the mens rea of deliberate homicide and that this was well within the bounds of permissible legislative activity.<sup>260</sup> Although Justice Ginsburg is correct that Montana may define deliberate homicide as it pleases, it is difficult to accept her assertion that this was what Montana had done. As Justices O'Connor,<sup>261</sup> Souter,<sup>262</sup> and Breyer<sup>263</sup> each argued in their respective dissents, the Montana Supreme Court determined that § 45-2-203 did not redefine the mental elements of the crime, as Justice Ginsburg mistakenly believed.<sup>264</sup> Given that the

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257. See *Egelhoff*, 116 S. Ct. at 2020 n.3 (plurality opinion) (refuting Justice Souter's contention that the state's lawyers should have offered policy justifications for § 45-2-203 so that it would be upheld). Although Justice Scalia's points are well taken, Justice Souter illuminates a source of concern in the analysis of *Egelhoff* as it pertains to the right to a defense. Assuming that future courts adopt *Egelhoff* as an endorsement of the balancing test in analyzing evidentiary exclusions, they should not be too liberal in creating justifications or, for that matter, in accepting those that are put forth by the state.

258. See *supra* notes 127-30 and accompanying text (refuting Justice Scalia's justifications for barring evidence of intoxication).

259. See *Egelhoff*, 116 S. Ct. at 2024 (Ginsburg, J., concurring).

260. See *id.* (Ginsburg, J., dissenting).

261. See *id.* at 2031 (O'Connor, J., dissenting).

262. See *id.* at 2032 (Souter, J., dissenting).

263. See *id.* at 2035 (Breyer, J., dissenting).

264. The Montana Supreme Court wrote that evidence of intoxication was relevant to the mens rea terms in the definition of deliberate homicide. See *State v. Egelhoff*, 900 P.2d 260, 265 (Mont. 1995), *rev'd*, 116 S. Ct. 2013 (1996). In addition, Justice Nelson wrote in his concurrence that by adopting § 45-2-203, the Montana Legislature reduced the state's burden in proving beyond a reasonable doubt the mental element of the crime. See *id.* at 268 (Nelson, J., concurring). The combination of these statements would seem to suggest that the Montana Supreme Court did not find that § 45-2-203 redefined the definition of deliberate homicide by

U.S. Supreme Court is bound by the Montana Supreme Court's interpretation of its own laws,<sup>265</sup> Justice Ginsburg's position that the statute was nothing more than a legislative redefinition of deliberate homicide is untenable. Thus, her statement that she would find constitutional fault with an evidentiary exclusion indicates that the Court could have affirmed the Montana Supreme Court's determination that § 45-2-203 infringed Egelhoff's right to present a defense. Given this precarious balance between overruling and affirming, *Egelhoff* may be an anomaly in the jurisprudence of the right to present a defense.

## V. RECOMMENDATIONS AND CONCLUSION

Courts should be wary of using *Montana v. Egelhoff* as precedent in cases involving the right to present a defense. The plurality's failure to recognize the standards established in case law under the right to present a defense doctrine is dangerous. Specifically, courts should be wary of applying the *Patterson* test instead of the balancing test. Requiring a defendant to show that the evidence in question invokes a fundamental principle of justice effectively upholds the exclusion of that evidence, distorts precedent, and allows the judge's personal morality to dictate the outcome. This inquiry ignores the rationale of *Chambers* and the right to present a defense: the adversarial process functions best when the jury hears relevant and reliable evidence. Accordingly, courts should continue to analyze evidentiary exclusions under the balancing test and allow such evidence to be presented when it is probative.<sup>266</sup>

Courts also should be careful not to rely on Justice Scalia's justifications for excluding intoxication evidence because they are highly suspect and are subject to scrutiny. Medical and legal experts generally agree that intoxication evidence is reliable and does not mislead juries.<sup>267</sup> Absent the moral belief that such evidence should be kept out of court, there is little support for the notion that intoxication evidence is any less important than evidence of insanity

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removing the mens rea terms.

265. See *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [state] law by the highest court of the State.").

266. See *Young v. Kernan*, 1996 U.S. Dist. LEXIS 17646, at \*19 (N.D. Cal. Nov. 11, 1996) (analyzing claim that exclusion of tape recorded police interrogation violated Due Process Clause). The court acknowledged the "fundamental principle of justice" standard of *Egelhoff*, but applied the balancing test. See *id.* The court ultimately concluded that the state's interest in excluding the interrogation outweighed the need to admit the evidence. See *id.*

267. See *supra* note 130 and accompanying text (discussing reliability of intoxication and potential to confuse juries).

or other potentially confusing issues, which is admissible in trials.<sup>268</sup> The Court's treatment of alcohol and intoxication is a regrettable affirmation of the law's inability to recognize that which society openly acknowledges. Courts should be encouraged to accept evidence of the mental and physiological effects of alcohol. In that way, the law can move past the moral issues surrounding alcohol and address the more important issue of how alcohol can affect the mental state of a defendant.

Undoubtedly, the debate over the merits of allowing intoxication evidence to show that a defendant failed to develop the mental requirements of a crime will rage on long after the effects of *Montana v. Egelhoff* have subsided. The Montana Supreme Court already has declined to review the issues raised in *Egelhoff*.<sup>269</sup> Additionally, the *Egelhoff* decision already has begun to appear in court decisions across the country.<sup>270</sup> The most widespread repercussion of *Engelhoff* may

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268. See *New Mexico v. Brown*, 1996 N.M. LEXIS 458, at \*25-26 (N.M. Dec. 5, 1996) (stating that intoxication evidence presents same potential concerns as other exculpatory evidence and that jury should decide weight of evidence).

269. See *Byers v. Mahoney*, No. 96-258, 1996 Mont. LEXIS 132, at \*7-8 (Mont. July 16, 1996) (refusing to accept Byers' request that court reaffirm its decision in *Egelhoff* on adequate and independent state grounds).

It is interesting that the Montana Supreme Court indicated that it "will not go quietly into that good night." *Id.* at \*8. In rejecting Byers' request to accept the Supreme Court's finding of unconstitutionality, the court stated that its conclusion in *Egelhoff* would not apply retroactively, making it irrelevant to Byers' due process claim. See *id.* The Montana Supreme Court did reserve the right to reaffirm its decision in *Egelhoff*. See *id.* The court quoted itself in stating that it refused to follow blindly the decisions of the Supreme Court when "constitutional issues are concerned, even if the applicable state constitution provisions are identical or nearly identical to those of the United States Constitution." See *id.*, at \*8 (citing *State v. Johnson*, 719 P.2d 1248, 1254 (Mont. 1986)). The court also stated that its refusal to review *Egelhoff* in light of the Supreme Court decision did not "preclude our review of *Egelhoff* on adequate and independent state grounds under the appropriate circumstances." *Id.* at \*9.

270. The Seventh Circuit recently relied on *Egelhoff* in rejecting a due process claim involving a jury instruction under Indiana law. See *Melendez v. Parke*, No. 95-2332, 1996 U.S. App. LEXIS 20390, at \*5-6 (7th Cir. Aug. 8, 1996). Melendez claimed that Jury Instruction No. 13, issued at his trial, violated his "right to present the jury with his defense that, due to voluntary intoxication, he lacked intent to commit murder." *Id.* at \*3. The instruction stated that under Indiana law, voluntary intoxication was not a defense to a crime, but that if the evidence suggested that voluntary intoxication prevented Melendez from forming the intent necessary under the definition of the crime, the jury should find him innocent of murder. See *id.* The Supreme Court of Indiana determined that the instruction was incorrect, but not such that it misled the jury. See *id.* at \*3-4.

The Seventh Circuit affirmed this decision. See *id.* at \*9. The court relied exclusively on *Egelhoff* in rejecting Melendez's claim that the instruction denied him the due process right to present a defense. See *id.* at \*5-6. The court argued that even if the trial court had instructed the jury that voluntary intoxication was not a defense and that voluntary intoxication could not be considered in relation to the formation of intent, there was no due process violation in light of *Egelhoff*. See *id.* at \*6. Although it appears from the facts of the case that the Seventh Circuit also relied heavily on the weakness of Melendez's case in arguing that he did not possess the required intent, see *id.* at \*8-9, the use of *Egelhoff* here is disturbing because the court is addressing a state law that allows evidence of intoxication in determining mental state. Thus, it appears initially that the *Egelhoff* decision may affect vicariously those states who allow voluntary

be a trend among state legislatures to enact similar statutes, given that the decision has opened the door to easier convictions for defendants who were intoxicated at the time of the crime.

The effect of *Egelhoff* on the right to present a defense doctrine will be clearer as courts begin to invoke its holding. The slim margin by which the Montana statute was ruled constitutional, the distortion of precedent, and the fairly mild attack on the right to present a defense doctrine will mitigate *Egelhoff*'s effect. *Egelhoff* is more indicative of an agreement with the moral condemnation of an intoxicated defendant than of a growing dissatisfaction with a defendant's due process right to present a defense.<sup>271</sup> Thus, *Montana v. Egelhoff* may prove to be only a footnote in the seemingly ever-evolving constitutional right to present a defense doctrine.

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intoxication evidence. It allows courts to justify suspect limitations or restrictions on the use of voluntary intoxication in states in which such evidence is permissible under law. See, e.g., *Geiger v. Morton*, No. 95-5290, 1996 U.S. Dist. LEXIS 9058, at \*11 (D.N.J. June 24, 1996) (citing *Egelhoff* for support of "fundamental principles" test in rejecting claim that court denied due process by denying defense of pathological intoxication); *Missouri v. Copeland*, 928 S.W.2d 828, 837 (Mo. 1996) (employing *Egelhoff* to support contention that due process does not guarantee admission of all relevant evidence in refuting claim that it was due process violation to exclude psychologist's testimony on battered spouse syndrome).

271. See *Indiana v. VanCleave*, 674 N.E.2d 1293, 1302 n.15 (Ind. 1996) (limiting holding of *Egelhoff* to premise that "Due Process Clause of the Fourteenth Amendment does not require states to allow voluntary intoxication as a defense").