Chicago-Kent Law Review

Volume 73
Issue 1 *Symposium on Second-Best Theory and Law & Economics*

Article 12

December 1997

The End Justifies the Means - Montana v. Egelhoff Intoxicates the Right to Present a Defense

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THE END JUSTIFIES THE MEANS? *MONTANA V. EGELHOFF* INTOXICATES THE RIGHT TO PRESENT A DEFENSE

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INTRODUCTION

In *Montana v. Egelhoff*,[1] the United States Supreme Court upheld a Montana statute that prohibits a jury from considering evidence of a criminal defendant's intoxicated state when determining whether he acted with the requisite mens rea.[2] The decision is significant inasmuch as it marks the first time that the Court has upheld an evidentiary rule which excludes probative, reliable defense evidence for the singular purpose of improving a state's conviction rate.[3]

Twenty-eight years ago, the Supreme Court established the constitutional requirement that, to attain a conviction, a state must prove every element of its charged offense beyond a reasonable doubt.[4] Today, however, this seemingly tough procedural safeguard is, for all intents and purposes, a hollow guarantee. As Professor Joshua Dressler observed in a recent interview, the Court is now allowing states "'incredible freedom' to get around [*Winship*'s] mandate by allowing states to redefine elements in certain contexts, such as intoxication . . . '[E]ach time they knock a little [more off] *Winship*.'"[5]

Following a brief historical background and a summary of the Court's opinion, Section A of the Analysis section of this Comment will address the *Egelhoff* plurality's application of relevant case law. One particular line of constitutional jurisprudence establishes that limitations placed on a criminal defendant's ability to present a defense can amount to a due process violation.[6] Yet, upon reading the plurality's conservative interpretation of this important line of prece-

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1. 518 U.S. 37, 116 S. Ct. 2013 (1996).

2. *See Egelhoff*, 116 S. Ct. at 2024.

3. *See* discussion *infra* Parts IV.B.2.a-b. for an analysis of why improving Montana's conviction rate is the only tenable purpose for the statute.

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

5. Stephanie Stone, *U.S. Supreme Court Approves Montana's Bar on Using Voluntary Intoxication Evidence to Negate Mens Rea*, WEST'S LEGAL NEWS, June 21, 1996, at 5955, *available in* 1996 WL 339404 (third alteration in original).

6. *See* discussion *infra* Part II.B.1.

dent, one might believe that no substantive right to defend ever existed.

As a general rule, a state's evidentiary exclusion does not violate due process unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[7] According to the *Egelhoff* plurality, however, a defendant's right to introduce evidence of intoxication as it pertains to his mental state is not fundamental.[8] Consequently, a state need only suggest a "valid justification" for excluding such evidence from jury consideration.[9]

Section B of the Analysis will assert that the Court's reliance on historical practice is unwarranted and does not adequately protect a defendant's interest in introducing exculpatory evidence. While historical pedigree should factor into the constitutional evaluation of a procedural rule, at least equal consideration must be given to modern concepts of fundamental fairness. A state's denial of a defendant's right to present relevant evidence at trial should be subject to a higher level of scrutiny than the "valid justification" test implemented by the *Egelhoff* plurality. Using this test, the Court seems willing to accept as "valid" a state's interest in improving its conviction rate by lowering the prosecution's burden.

A defendant's right to a fair trial is implicated, in particular, when the evidence in question is probative of the defendant's mental state. A defendant has a compelling interest to present such evidence because of the way in which the prosecution will attempt to prove its criminal charges. Generally, the only evidence submitted by the prosecution on the issue of mens rea will be circumstantial.[10] If the defendant is precluded from introducing exculpatory evidence to explain his mental state at the time of the offense, the level of culpability required for conviction will effectively be lowered from a subjective to an objective, "reasonable person" standard. This is fundamentally unfair because a defendant's intoxicated state may be his *only* explanation for why he acted in an *un*reasonable manner.

A final problem addressed in Section B of the Analysis is that the Court's conservative test does not compel states to look into less dras-

7. Patterson v. New York, 432 U.S. 197, 202 (1977) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

8. *See* Montana v. Egelhoff, 116 S. Ct. 2013, 2021 (1996).

9. *Id.* at 2022.

10. In fact, if the defendant has not confessed to the crime, the only way the prosecution can prove the defendant's mental state is through circumstantial evidence. *See* discussion *infra* Part IV.B.2.a.

tic means for accomplishing their goals, means which would both serve the states' professed interests and maintain a defendant's right to introduce reliable, probative evidence. In the context of voluntary intoxication, a blanket exclusionary rule effectively removes the question of reliability from the trial court's discretion and is thereby overinclusive, precluding jury consideration of reliable as well as unreliable evidence.

Finally, Section C of the Analysis will address Justice Ginsburg's concurring opinion in which she asserted that Montana's statute was not an evidentiary prescription at all—it was simply a redefinition of the crime of murder.[11] The eight other members of the Court disagreed with this interpretation inasmuch as it was not shared by the Montana Supreme Court.[12] Regardless of which interpretation is correct, one thing is clear: the Court will grant substantial deference to state legislatures when it comes to defining criminal offenses. This section of the Analysis will assess the functional structure of Ginsburg's "redefined statute" and will investigate the only real limit to states' authority in this area: the Eighth Amendment proportionality doctrine.

II. HISTORICAL BACKGROUND

Two lines of jurisprudence are relevant to the constitutional issues addressed in *Montana v. Egelhoff*. The first series of cases stands for the proposition that, in order to attain a criminal conviction, a state must prove every ingredient of the statutorily defined offense beyond a reasonable doubt.[13] This constitutional guarantee is grounded in the Due Process Clause of the Fourteenth Amendment.[14] The second line of cases establishes that a criminal defendant has a constitutional right to present a defense. This right is secured under both the Compulsory Process Clause of the Sixth Amendment[15] and the Due Process Clause of the Fourteenth Amendment.[16]

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

12. *See, e.g., id.* at 2031 (O'Connor, J., dissenting) ("We are, of course, bound to accept the interpretation of [state] law by the highest court of the State." (quoting Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976) (alteration in original))).

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

14. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

15. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI. *See also, e.g.*, Washington v. Texas, 388 U.S. 14, 17-18 (1967).

16. *See supra* note 14; *see also, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 285 (1973).

A. In re Winship *and Progeny: Proof Beyond a Reasonable Doubt of Every Ingredient of the Offense*

The Fifth and Fourteenth Amendments to the United States Constitution provide that no person may be deprived of life, liberty, or property without due process of law.[17] In 1970, in *In re Winship*,[18] the Supreme Court held that criminal due process requires proof beyond a reasonable doubt of every element of the prosecution's case.[19]

The analysis in *Winship* centered on the adjudicatory stage of New York's juvenile court process. Specifically, § 744(b) of the New York Family Court Act provided that a determination of guilt in the juvenile adjudicatory process was based on a preponderance of the evidence standard.[20] Three years earlier, in *In re Gault*,[21] the Court had determined that, although this type of hearing need not conform with *all* of the requirements of a criminal trial, it still required "the essentials of due process and fair treatment."[22]

Accordingly, the question confronted by the Court in *Winship* was whether proof beyond a reasonable doubt was one of the "essential" components of due process.[23] In a decision authored by Justice Brennan, the Court answered this question in the affirmative.[24] The majority reasoned that "[t]he accused during a criminal prosecution has at stake interests of immense importance," both because he is at risk of losing his liberty and also because of the stigma associated with a criminal conviction.[25] Moreover, the Court noted that the community's confidence in the criminal law would be undermined "by a standard of proof that leaves people in doubt whether innocent men are being condemned."[26] Justice Harlan worded his concurrence in a purely utilitarian manner.[27] He stressed that the reasonable doubt standard was essential because the "social disutility" associated with

17. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

18. 397 U.S. 358 (1970).

19. *See id.* at 364.

20. *See id.* at 360. A determination of guilt could result in commitment to a state juvenile institution until the minor's eighteenth birthday. *Id.*

21. 387 U.S. 1 (1967).

22. *See id. at 30.*

23. 397 U.S. at 359.

24. *See id.* at 364.

25. *Id.* at 363.

26. *Id.* at 364.

27. *See id.* at 372 (Harlan, J., concurring).

the conviction of an innocent person is far greater than the disutility of acquitting a guilty person.[28]

Winship therefore established the constitutional requirement that, in order to convict a defendant, a state must prove every fact necessary to constitute the crime with which he is charged beyond a reasonable doubt.[29] Initially, *Winship* was viewed by the states as a somewhat innocuous decision because it appeared to constitutionalize a procedural rule already accepted in virtually every state jurisdiction.[30] In *Mullaney v. Wilbur*,[31] however, the Court's literal application of the *Winship* doctrine had a far more intrusive effect.

The defendant in *Mullaney* was charged with murder.[32] He admitted to the killing but claimed that he did it in the heat of passion and, therefore, was guilty of the lesser offense of manslaughter.[33] The trial court had instructed the jury, consistent with Maine's homicide statute, that the prosecution carried the burden of proving beyond a reasonable doubt that the killing was unlawful and intentional.[34] Once the prosecution met its burden, the burden then shifted to the defendant to prove "by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation."[35] If the defendant met this burden, he was guilty only of manslaughter; if the defendant did not meet this burden, he was guilty of murder. The jury subsequently had convicted him of murder.[36]

In a unanimous decision, the Supreme Court affirmed the decision of the Court of Appeals reversing the conviction, asserting that the jury instruction violated the *Winship* doctrine.[37] The gravamen of the Court's holding was that the absence of provocation was an element of the crime of murder. Therefore, proof beyond a reasonable doubt that a defendant committed murder required that the prosecu-

28. *See id.*

29. *See id.* at 364. Justice Brennan used broad, flexible language in defining the new constitutional standard: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*

30. *Winship* was largely viewed as confirming the existing state of affairs—a state of affairs in which every jurisdiction employed the reasonable doubt standard in criminal adjudications . . . ." Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 31 (1977).

31. 421 U.S. 684 (1975).

32. *See id.* at 685.

33. *See id.*

34. *See id.*

35. *Id.* at 686.

36. *See id.* at 687.

37. *See id.* at 690.

tion prove *every fact* necessary to constitute the crime, including the absence of provocation, beyond a reasonable doubt.[38] Justice Powell, writing for the Court, stressed the substantial differences in both punishment and stigma between murder and manslaughter convictions: "Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes."[39] Justice Powell asserted that to hold differently would allow states to circumvent the *Winship* doctrine at will.[40] That is, a state could simply redefine the elements of its various criminal offenses and then define a long list of mitigating factors.[41]

Mullaney was perceived as a far-reaching decision which appeared to sound the death-knell for many traditional affirmative defenses.[42] Only two years later in *Patterson v. New York*,[43] however, the Court made it clear that this was not the case.

New York defined second-degree murder as consisting of two elements: (1) "intent to cause the death of another" human being, and (2) causing such death or the death of a third person.[44] The statute allowed a defendant to raise the affirmative defense of "extreme emotional disturbance for which there was a reasonable explanation or excuse."[45] The court instructed the jury that the state carried the burden of proving the elements of murder beyond a reasonable doubt, but the defendant carried the burden of proving extreme emotional disturbance by a preponderance of the evidence.[46] On appeal, the defendant argued that the statute was unconstitutional, based on *Mullaney*, due to the shift of the burden of proof regarding extreme emotional disturbance.[47]

Nevertheless, the Court, in a five to three opinion written by Justice White, refused to strike down the statute and affirmed the defendant's conviction. The Court held that a state's use of a procedural

38. *See id.* at 704.
39. *Id.* at 698.
40. *See id.*
41. For example, a state could redefine murder as the killing of another human being, absent a mens rea element. The burden would then shift to the defendant to prove the absence of an intent to kill by a preponderance of evidence.
42. *See* Allen, *supra* note 30, at 32-33.
43. 432 U.S. 197 (1977).
44. *Id.* at 198.
45. *Id.*
46. *See id.* at 200.
47. *See id.* at 201.

rule does not violate due process unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[48] Thus, the Court simply ignored much of the reasoning of *Mullaney* (i.e., that the prosecution must prove every fact necessary to convict, including the absence of the defendant's asserted affirmative defenses) and, instead, focused on the potential problems associated with restricting legislative decisions.[49] Specifically, the Court noted the irony of forcing a state, under the guise of the Due Process Clause, to choose between abandoning its affirmative defenses altogether or disproving their existence beyond a reasonable doubt.[50] In response to the concerns voiced in *Mullaney*, that states might reallocate burdens of proof by redefining their offenses, the Court simply noted that "there are obviously constitutional limits beyond which the States may not go in that regard."[51]

Rather than expressly overrule *Mullaney*, the Court distinguished *Patterson* based on the differences between the Maine (*Mullaney*) and New York (*Patterson*) murder statutes.[52] Included in Maine's definition of malice aforethought was the requirement that the killing be unprovoked.[53] Therefore, placing the burden on the defendant to prove provocation by a preponderance of the evidence unconstitutionally shifted the burden of proof on an element of the crime of murder. By contrast, the New York statute in *Patterson* defined murder without any reference to provocation, so that proof of extreme emotional disturbance did not serve to negate an element of the crime itself.[54]

Consequently, the rule following *Patterson* was that a state must prove every *ingredient* of the offense beyond a reasonable doubt and that presuming the existence of that ingredient upon proof of the other elements of the offense violates due process.[55] The *Patterson* reasoning is also consistent with *Leland v. Oregon*,[56] decided twenty-

48. *Id.* at 201-02 (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

49. *See id.* at 207-08.

50. *See id. See also* Allen, *supra* note 30, at 42 ("If the constitutional interest in the reasonable doubt standard centers on liberty deprivation, how can the addition of a chance to mitigate a constitutional punishment invalidate the statute?").

51. *Patterson*, 432 U.S. at 210. Exactly what these constitutional limitations are, however, remains anything but "obvious." One potential limit to states' authority in defining criminal offenses is the Eighth Amendment. See *infra* notes 301-313 and accompanying text for a discussion of the Eighth Amendment Proportionality Doctrine.

52. *See Patterson*, 432 U.S. at 214-15.

53. *See id.* at 213.

54. *See id.* at 206-07.

55. *See id.* at 215.

56. 343 U.S. 790 (1952).

five years earlier, where the Court held that placing the burden of proving insanity beyond a reasonable doubt on the defendant is constitutional. In other words, proof of insanity does not serve to negate any of the elements of the offense itself; it merely operates as an excuse. Accordingly, the *Patterson* Court found a logically consistent method for distinguishing *Mullaney*.[57] It now appears, however, that *Mullaney* has been effectively overruled by *Martin v. Ohio*.[58]

In *Martin*, the Court addressed the constitutionality of an Ohio statute which placed the burden of proving self-defense on the defendant by a preponderance of the evidence.[59] The defendant argued that one of the elements of self-defense, an honest belief of imminent danger, negated the ingredient of "prior calculation and design" required for a conviction of aggravated murder.[60] In a five to four opinion, the Court upheld the statute, once again emphasizing the "preeminent role of the States in preventing and dealing with crime."[61] The Court acknowledged the defendant's assertion "that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former."[62] Nevertheless, the majority focused on the fact that the jury considered self-defense evidence in determining whether the state had proved the elements of aggravated murder beyond a reasonable doubt.[63] The Court further noted that an instruction which prevented the jury from considering such evidence would "plainly run afoul of *Winship*'s mandate."[64]

The four dissenters argued that this type of instruction has the potential to cause serious jury confusion as to the proper burden of proof.[65] For example, a defendant may not introduce sufficient evidence to prove that he had an honest belief of imminent danger to meet the preponderance standard. Such evidence *may* be enough, however, to establish a reasonable doubt as to whether he acted with the prior calculation and design required for aggravated murder. As Justice Powell argued in dissent, "[b]ecause [the defendant] had the burden of proof on this issue, the jury could have believed that it was

57. *See supra* notes 52-54 and accompanying text.
58. 480 U.S. 228 (1987).
59. *See id.* at 230.
60. *Id.* at 234.
61. *Id.* at 232.
62. *Id.* at 234.
63. *See id.*
64. *Id.* at 233-34.
65. *See id.* at 240 (Powell, J., dissenting).

just as likely as not that [the defendant's] conduct was justified, and yet still have voted to convict."[66]

In sum, the significance of *Martin* lies in the Court's abandonment of a literal interpretation of the *Winship* doctrine and a resurgent emphasis on historical criminal practice and deference to state legislative decisions when conducting due process analyses.

B. A Criminal Defendant's Constitutional Right to Present a Defense

1. Cases which establish the right

The second line of jurisprudence relevant to this Comment consists of cases where statutory limitations placed on a criminal defendant's ability to present a defense were held unconstitutional.[67] *Washington v. Texas*[68] addressed the constitutionality of a statute which provided that neither principals, accomplices, nor accessories of a crime could be witnesses for one another.[69] In compliance with the statute, defendant Washington's alleged accomplice, Fuller, was precluded from testifying at trial on Washington's behalf.[70] Washington was subsequently convicted of murder. Had he been permitted, Fuller would have testified that Washington tried to convince him to leave and then ran off before Fuller committed the murder.[71]

The Court reversed Washington's conviction, holding that the Compulsory Process Clause of the Sixth Amendment is a fundamental element of due process under the Fourteenth Amendment.[72] The Court acknowledged that the Sixth Amendment was not originally applied to state criminal trials and that common law courts originally precluded coparticipants of the same crime from testifying for one another.[73] Nevertheless, the Court concluded that

> [t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the

66. *Id.* at 243.
67. This line includes cases where the trial court precluded jury consideration of probative defense evidence.
68. 388 U.S. 14 (1967).
69. *See id.* at 15.
70. *See id.* at 16-17.
71. *See id.* at 16.
72. *See id.* at 17-18.
73. *See id.* at 18, 20-21.

> right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[74]

Several years later, in *Chambers v. Mississippi*,[75] the Court assessed the constitutionality of a trial in which the trial court precluded the defendant from introducing witnesses on his own behalf due to Mississippi's hearsay rule and also prevented him from cross-examining a witness because of Mississippi's "voucher" rule.[76] Chambers was one in a crowd of about fifty persons obstructing the attempts of five police officers to arrest a criminal suspect.[77] A scuffle ensued and someone in the crowd fatally shot one of the officers.[78] The wounded officer shot Chambers in the back as he was fleeing the scene and Chambers was subsequently arrested and charged with murder.[79]

Several months later, McDonald, who was in the crowd at the time of the murder, gave a sworn confession stating that he shot the officer.[80] Shortly thereafter, however, at a preliminary hearing, he retracted the confession, asserting that he was tricked into making it.[81] He also claimed that he was elsewhere with a friend, Turner, at the time of the murder.[82] At trial, the judge allowed the defendant to call McDonald to the stand, but precluded him from treating McDonald as an adverse witness due to a Mississippi common law rule that a party cannot impeach his own witness.[83] Under the rule, a party who calls a witness thereby "vouches" for his credibility. The trial court also refused to allow Chambers to introduce testimony of three other witnesses due to Mississippi's common law hearsay rule.[84] This refusal was significant because, shortly after the crime, McDonald had confessed to each one of the witnesses on separate occasions.[85]

Nonetheless, Chambers *was* permitted to introduce some evidence of McDonald's guilt. Despite Mississippi's exclusionary hearsay rule, Chambers was allowed to present McDonald's sworn confession to the jury.[86] Moreover, the defense counsel was permitted to ex-

74. *Id.* at 19.
75. 410 U.S. 284 (1973).
76. *See id.* at 294.
77. *See id.* at 285-86.
78. *See id.* at 286.
79. *See id.* at 285-86.
80. *See id.* at 287.
81. *See id.* at 288.
82. *See id.*
83. *See id.* at 291.
84. *See id.* at 292.
85. *See id.* at 292-93.
86. *See id.* at 291.

amine McDonald's alibi, Turner, who admitted on the stand that he was not with McDonald on the night of the murder.[87]

In an eight to one decision, the Court reversed Chambers' conviction, observing that hearsay is generally deemed inadmissible because "untrustworthy evidence should not be presented to the triers of fact."[88] The Court further noted, however, the number of exceptions to the hearsay rule which had been created over the years in cases where the reliability of such evidence is otherwise assured.[89] Specifically, the Court held that each of McDonald's statements was made "spontaneously to a close acquaintance shortly after the murder," that each statement was corroborated by evidence adduced at trial, and that each statement was a declaration against interest.[90] The Court asserted that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[91]

Unlike *Washington*, in which the right to defend was based on the Sixth Amendment right to compulsory process,[92] the right to defend articulated by the *Chambers* Court rested purely on due process grounds.[93] Moreover, *Chambers* was a significant, far-reaching decision in that it established for the first time that the partial exclusion of defense evidence, while properly based on common law evidentiary rules, could amount to a due process violation.[94]

More recently, in *Crane v. Kentucky*,[95] the Court once again held that limitations placed on a defendant's ability to present a defense may violate due process. The defendant in *Crane* confessed to the charge of murder but moved to suppress that confession before trial.[96] During a pretrial hearing, the judge determined that the confession was voluntary and denied the defendant's motion.[97] Based on this pretrial determination, the court further precluded the defendant from introducing evidence at trial relating to the "physical and psy-

87. *See id.* at 292.
88. *Id.* at 298.
89. *See id.* at 298-99.
90. *Id.* at 300-01. A declaration against interest is a statement which is unlikely to be fabricated because at the time it is made it is contrary to the speaker's interest.
91. *Id.* at 302. *See also* Green v. Georgia, 442 U.S. 95, 97 (1979) (excluded hearsay testimony amounted to a due process violation where testimony was relevant in the punishment phase of the trial and where substantial reasons existed to assume its reliability).
92. *See* Washington v. Texas, 388 U.S. 14, 17-18 (1967).
93. *See Chambers,* 410 U.S. at 302.
94. *See id.*
95. 476 U.S. 683 (1986).
96. *See id.* at 684.
97. *See id.*

chological environment" in which his confession was made.[98] The judge felt that any such evidence related only to the "voluntariness" of the confession—an issue which had already been resolved as a matter of law.[99]

In a unanimous decision, the Supreme Court held that the ruling deprived the defendant of a fair trial.[100] Writing for the majority, Justice O'Connor distinguished between evidence bearing on the voluntariness of a confession and evidence bearing on its credibility.[101] The "voluntariness" determination, the Court maintained, is employed to protect a defendant's constitutional rights.[102] That is, if a confession has been extracted using particularly offensive interrogation techniques, it should not be presented to the jury.[103] Accordingly, the question of voluntariness is a question of law for the trial judge.[104]

Even confessions that have been found to be voluntary are not conclusive of guilt, however, and must be scrutinized by the jury in the context of the reasonable doubt standard.[105] Consequently, the Court held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[106] The trial judge's decision essentially eviscerated the defendant's right to an opportunity to be heard: "that opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence."[107] The Court, however, went on to indicate that the exclusion of such evidence might survive constitutional scrutiny given a "valid state justification."[108] Hence, the constitutional question will frequently revolve around the Court's willingness to accept as valid a state's reasoning for keeping a particular type of evidence from the jury.

98. *Id.*

99. *See id.*

100. *See id.* at 687.

101. *See id.* at 687-88.

102. *See id.*

103. *See id.* at 687. This prohibition is both to discourage the use of such techniques and because the evidence is unreliable and may prejudice the jury.

104. *See id.* at 688-89.

105. *See id.* at 689.

106. *Id.* at 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

107. *Id.*

108. *Id.* This statement was relied upon by the majority in *Egelhoff* to distinguish *Egelhoff* from previous "right to defend" cases.

2. Cases which limit the right

It is clear that a defendant does not have an unencumbered right to introduce all relevant evidence to the jury. For example, in *Taylor v. Illinois*,[109] the Court concluded that the use of sanctions in response to a defendant's willful violation of a discovery rule did not offend the Constitution.[110] Taylor was on trial for attempted murder for a shooting that took place during a violent encounter in which Taylor and several of his friends used clubs to beat Bridges, the victim.[111] At trial, the prosecution called witnesses who testified that Taylor shot Bridges in the back and then attempted unsuccessfully to shoot him in the head.[112] Witnesses for Taylor, however, testified that the gun was actually fired by Bridges' brother, who shot into the group and hit Bridges accidentally.[113]

The prosecution filed a pretrial discovery motion, as required by an Illinois statute, requesting a list of all defense witnesses.[114] On the second day of trial, however, the defense moved to amend the list to include two additional witnesses.[115] The trial judge found the defense guilty of a discovery violation and, as a sanction, precluded the testimony of one of the two additional witnesses.[116] Taylor was subsequently convicted of attempted murder.[117]

In a five to three decision authored by Justice Stevens, the Court affirmed the conviction.[118] The majority held that the right to present material defense witnesses is grounded in the Compulsory Process Clause of the Sixth Amendment, but that right is not absolute.[119] For example, "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[120]

The Court focused on two valid state justifications for the imposition of sanctions. First, the state has an interest in the orderly conduct of a criminal trial.[121] This interest would be compromised if a state

109. 484 U.S. 400 (1988).
110. *See id.* at 402.
111. *See id.*
112. *See id.*
113. *See id.* at 402-03.
114. *See id.* at 403.
115. *See id.*
116. *See id.* at 405.
117. *See id.* at 402.
118. *See id.*
119. *See id.* at 409.
120. *Id.* at 410.
121. *See id.* at 410-11.

was constitutionally prohibited from imposing sanctions for discovery violations.[122] Second, the state has a valid interest in precluding the admission of unreliable testimony.[123] Consequently, while less severe sanctions may sometimes be appropriate,[124] the Constitution does not compel a state to allow all relevant testimony when a criminal defendant fails to comply with procedural requirements.[125]

3. Statutory limitations

The exclusion of relevant evidence is also explicitly provided for by the Federal Rules of Evidence.[126] Federal Rule of Evidence 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[127] Evidence causing undue prejudice is evidence which may suggest a decision on an improper basis, "commonly, though not necessarily, an emotional one."[128] Thus, gruesome photographs of a defendant's alleged murder victim are generally excluded from jury consideration because of the fear that they may trigger an irrational, emotional response. Generally speaking, however, Rule 403 is considered an extraordinary measure which should be used infrequently.[129] As the rule itself explicitly states, the danger of unfair prejudice must

122. *See id.* As Justice Stevens averred, "[t]he adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case." *Id.*

123. *See id.* at 411-12 ("Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony.").

124. *See* FED. R. EVID. 403 advisory committee's note ("While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence.").

125. *See Taylor*, 484 U.S. at 414-15. *See also* Michigan v. Lucas, 500 U.S. 145, 153 (1991) (failure to comply with notice-and-hearing requirement of Michigan's rape-shield statute undermined legitimate state interest in protecting rape victims; resulting exclusion of witness testimony did not rise to the level of constitutional violation); United States v. Nobles, 422 U.S. 225, 227 (1975) (district court's preclusion of witness testimony was appropriate method of assuring compliance with its order).

126. *See* FED. R. EVID. 403.

127. *Id.*

128. FED. R. EVID. 403 (advisory committee's note).

129. *See, e.g.*, United States v. Morris, 79 F.3d 409, 412 (5th Cir. 1996) ("Because Rule 403 requires the exclusion of relevant evidence, it is an extraordinary measure that should be used sparingly."); Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1502 (11th Cir. 1985) ("[Rule 403] favors admissibility of relevant evidence and should be invoked very sparingly to bar its admission.").

substantially outweigh the probative value of such evidence.[130] Evidence which is tagged as "highly probative" is invariably deemed admissible notwithstanding its prejudicial effect.[131] For example, graphic autopsy photographs may be admitted if they evince a sufficient probative value.[132] According to the advisory committee's note to Rule 403, "[t]he availability of other means of proof may also be an appropriate factor" to consider.[133]

Rape-shield laws, now enacted in virtually every state jurisdiction, serve a purpose similar to Rule 403.[134] Such laws preclude the admission of evidence of the victim's prior sexual activities in cases of rape and sexual assault.[135] The limited probative value of such evidence, when compared with the potential for jury prejudice and potential emotional harm to the victim, warrants its exclusion in most cases.[136]

Finally, hearsay statements, though relevant, are inadmissible unless they fall within one of the exceptions to the hearsay rule.[137] Hearsay is an out of court statement "offered in evidence to prove the truth of the matter asserted."[138] Such statements are excluded from the jury based on reliability concerns. For example, out-of-court statements may easily be taken out of context. Moreover, the declarant is not under oath and his demeanor cannot be scrutinized by the jury. Most importantly, hearsay statements are not amenable to cross examination, a procedural vehicle considered crucial to the truth-finding process.[139]

In any case, the assertion that hearsay statements are inadmissible is misleading considering the number of hearsay exceptions that

130. FED. R. EVID. 403.

131. *See* United States v. Powers, 59 F.3d 1460, 1467 (4th Cir. 1995), *cert. denied,* 116 S. Ct. 784 (1996) (evidence of defendant's past violence against victim was highly probative of victim's failure to report molestation for significant period of time); United States v. Harris, 661 F.2d 138, 142 (10th Cir. 1981) (holding evidence of defendant's past abuse of son may well have been prejudicial but was nonetheless admissible because of highly probative nature of evidence).

132. *See, e.g.,* United States v. Yahweh, 792 F. Supp 104, 108 (S.D. Fla. 1992) (lifesize enlarged photographs of the murder victims were necessary to show the relevant details of how the victims were killed).

133. FED. R. EVID. 403 (advisory committee's note).

134. *See, e.g.,* People v. Wilhelm, 476 N.W.2d 753, 756 (Mich. Ct. App. 1991).

135. *See also* FED. R. EVID. 412.

136. FED. R. EVID. 412 advisory committee's notes. The Federal Rules of Evidence were amended in 1994 to preclude the admission of evidence of victims' past sexual behavior.

137. FED. R. EVID. 802.

138. FED. R. EVID. 801(c).

139. *See* Kentucky v. Stincer, 482 U.S. 730, 737 (1987) ("The right to cross-examination, protected by the Confrontation Clause, . . . is . . . designed to promote reliability in the truth-finding functions of a criminal trial.").

have developed over the years.[140] An in-depth discussion of hearsay exceptions is beyond the scope of this Comment. A feature common to statements falling into one of the exception categories, however, is that there is some reason to otherwise assume the statement's reliability.[141]

In sum, while all jurisdictions exclude relevant defense evidence from jury consideration, such exclusions are invariably based on reliability concerns or concerns that such evidence may mislead the jury and result in a judgment on an improper basis.

III. THE DECISION: *MONTANA V. EGELHOFF*

A. *Facts and Procedural History*

In July 1992, James Allen Egelhoff traveled to the Yaak region of Montana to pick mushrooms and camp out.[142] While there, he befriended Roberta Pavola and John Christenson, who were camping in the same area.[143] On July 12, 1992, Pavola, Christenson, and Egelhoff sold their mushrooms together, then went on a drinking binge for the rest of the day.[144] Later in the evening, they bought more alcohol and attended a party.[145] The three left the party sometime after 9:00 p.m. in Christenson's station wagon.[146]

It is not clear what took place over the remainder of the evening. One witness testified that Egelhoff and Christenson bought more alcohol from a grocery store at 9:20 p.m., and numerous witnesses testified to observing the station wagon swerving around the road later in the evening.[147] Law enforcement officers confirmed five areas where the car had veered off the road before it finally came to a complete stop.[148]

Officers arrived to find the station wagon in a ditch, with Christenson and Pavola dead in the front seat and Egelhoff in the rear yelling obscenities.[149] Each of the victims had been shot once in the

140. *See, e.g.*, Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 346 (1961) ("In the sea of admitted hearsay, the rule excluding hearsay is a small and lonely island.").

141. *See* RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 565-66 (3d ed. 1991).

142. *See* Montana v. Egelhoff, 116 S. Ct. 2013, 2016 (1996).

143. *See id.* In *State v. Egelhoff*, 900 P.2d 260 (Mont. 1995), *rev'd*, 116 S. Ct. 2013 (1996), Christenson's name is spelled Christianson.

144. *See Egelhoff*, 116 S. Ct. at 2016.

145. *See id.*

146. *See id.*

147. *See Egelhoff*, 900 P.2d at 262.

148. *See id.*

149. *See Egelhoff*, 116 S. Ct. at 2016.

head.[150] The officers found Egelhoff's .38 caliber handgun in the front of the vehicle near the brake pedal.[151] They took Egelhoff to the hospital, where he became combative and had to be physically restrained.[152] At that time, his blood alcohol content measured approximately .36%.[153] One officer testified that Egelhoff's wild behavior continued, on and off, for the five to six hours the officer was at the hospital.[154] When Egelhoff sobered up, he claimed that he had no recollection of the events which took place that evening.[155] His last memory was of attending the party and he remembered that the sun had not gone down during that time.[156]

Forensic testing identified gun powder residue on Egelhoff's hands.[157] The bullet which killed Pavola was never recovered.[158] The state's firearms examiner testified, however, that the bullet which killed Christenson "could have come from thousands of guns with characteristics" similar to Egelhoff's.[159]

Egelhoff argued at trial that, due to his highly intoxicated state, he was incapable of driving the station wagon or performing any of the physical tasks which the prosecution claimed he performed.[160] On the way to the hospital that evening, he continually asked ambulance personnel questions, such as "Did you find him?"[161] Although he did not remember specifically, Egelhoff theorized that there was a fourth party who became part of the group later in the evening who had committed the murders.[162] He argued that his lack of recollection of the evening's events was the result of an alcoholic "blackout."[163] A doctor who examined Egelhoff in the emergency room testified that, based on Egelhoff's blood alcohol level and behavior, this was probably the case.[164]

150. *See id.*
151. *See id.*
152. *See Egelhoff*, 900 P.2d at 262.
153. *See Egelhoff*, 116 S. Ct. at 2016.
154. *See Egelhoff*, 900 P.2d at 262.
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.*
159. *Id.*
160. *See id.* at 262-63. A prosecution witness testified that Egelhoff had to be physically restrained at the hospital and intentionally and accurately kicked a camera out of a detective's hands when the detective was preparing to take Egelhoff's photograph. *See id.* at 262.
161. *Id.* at 263.
162. *See id.*
163. *Id.* at 262-63.
164. *See id.* at 263.

At trial, the jury was instructed that in order to convict Egelhoff of deliberate homicide they had to find that he caused the death of Pavola or Christenson purposely or knowingly.[165] Montana defines "purposely" and "knowingly" as they are commonly defined, based on a subjective level of culpability.[166] The jury was further instructed that evidence of Egelhoff's intoxicated condition could not be considered when determining whether he acted purposely or knowingly.[167] Egelhoff was subsequently convicted of deliberate homicide.[168]

He appealed to the Montana Supreme Court, arguing that the foregoing instruction deprived him of due process.[169] The court agreed and reversed his conviction.[170] The court noted that the prosecution was permitted to introduce a substantial amount of evidence which tended to prove that Egelhoff had acted with the requisite culpability.[171] Egelhoff, however, was not permitted to rebut this evi-

165. *See* Montana v. Egelhoff, 116 S. Ct. 2013, 2016 (1996). The instruction was given in accordance with Montana's deliberate homicide statute which provided, in pertinent part: "A person commits the offense of deliberate homicide if: (a) he purposely or knowingly causes the death of another human being . . . ." MONT. CODE ANN. § 45-5-102(1)(a) (1995).

166. "Knowingly"—a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

MONT. CODE ANN. § 45-2-101(34) (1997).

"Purposely"—a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although the purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms, such as "purpose" and "with the purpose", have the same meaning.

MONT. CODE ANN. § 45-2-101(63) (1997).

167. The jury instruction—the focus of the constitutional issue addressed in this Comment—was read in accordance with the following Montana statute:

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).

168. *See Egelhoff*, 116 S. Ct. at 2016.

169. *See Egelhoff*, 900 P.2d at 261.

170. *See id.* at 267.

171. The court observed:

That evidence included the following: In order to commit the crimes, he had to take the gun from the glove compartment of the vehicle. He made an attempt to flee after he went into the ditch. He tried to avoid detection when Rebecca Garrison tried to approach the car. Ms. Garrison noticed a stick which she assumed must have been used

dence with evidence of his intoxication—evidence which the court deemed relevant to the question of mens rea.[172] As such, the prosecution's burden of proof was lowered in derogation of *In re Winship*[173] and its progeny, and Egelhoff was unconstitutionally denied "a fair opportunity to defend against the State's accusations."[174] Moreover, the court went on to assert that a criminal defendant has a constitutional right to present *all* relevant evidence at trial.[175]

B. *The Court's Analysis*

In a five to four decision, with the plurality opinion authored by Justice Scalia, the Supreme Court reversed the Montana Supreme Court's decision.[176] As a preliminary matter, the plurality characterized the Montana Supreme Court's ruling, that a criminal defendant has a constitutional right "to introduce all relevant evidence" at trial, as "indefensible."[177] The Court cited *Taylor v. Illinois*[178] and the Federal Rules of Evidence 403 and 802[179] as evidence that the Montana Supreme Court's holding was overly broad.

1. The rule

The Court then began its analysis with the oft-quoted[180] proposition that a state is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[181] Ac-

> by Egelhoff to depress the accelerator so that Egelhoff could drive from the back seat. He could talk. At the IGA store at 9:20 p.m., Egelhoff spoke well and did not slur his words. He later told Ms. Garrison to "stay away" and he talked to the ambulance driver. He had physical energy and strength. He tried to avoid detection by another of the witnesses who had stopped to give assistance. Detective Bernall testified that his coordination was good as was demonstrated by his kicking of the camera. The evidence was presented by the State to establish that Egelhoff acted "purposely" or "knowingly." Such evidence could be properly considered by the jury in its determination of whether or not he acted "purposely" or "knowingly."

Id. at 265.

172. *See id.*

173. 397 U.S. 358 (1970).

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

175. *See id.* at 266.

176. Montana v. Egelhoff, 116 S. Ct. 2013, 2024 (1996). Justice Scalia was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas. *Id.* at 2015.

177. *Id.* at 2017.

178. 484 U.S. 400 (1988).

179. Both *Taylor* and these Federal Rules of Evidence are discussed earlier in the historical background section of this Comment. *See supra* Part II.B.2-3.

180. Oft-quoted, that is, when the Court is ruling against a criminal defendant.

181. *Egelhoff*, 116 S. Ct. at 2017 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

cording to the plurality, the question boiled down to whether the use of voluntary intoxication evidence for the purpose of assessing a defendant's mental state was a "fundamental principle of justice."[182] Moreover, the "primary guide" for determining whether a principle is fundamental, asserted Scalia, is "historical practice."[183]

2. Historical practice

The Court launched into a summary of the historical treatment of the intoxicated criminal offender, beginning with the writings of Hale, Blackstone, and Coke.[184] Coke and Blackstone both believed that intoxication should be considered an aggravation of an offense, rather than an excuse.[185] Citing Blackstone and Hale, Justice Story had written that he "learned in [his] earlier studies, that so far from its being in law an excuse for murder, [drunkenness] is rather an aggravation of its malignity."[186]

At this point, it is important to note the distinction between the use of intoxication as an excuse (affirmative defense) and as evidence of mens rea. As discussed earlier in the *Winship* line of jurisprudence, the burden of proving affirmative defenses may be constitutionally placed on a defendant.[187] Thus, a defendant may act with the requisite mens rea for murder but will, nonetheless, be acquitted if *he* can prove the elements of self-defense by a preponderance of evidence. Few jurisdictions have established an affirmative defense of intoxication and there is little doubt that it is not constitutionally required.[188] The preclusion of evidence of intoxication altogether—evidence which is probative of an element of the offense itself (the defendant's mens rea)—is a far different matter. On this point, the plurality deemed it "inconceivable" that Hale, Coke, and Blackstone, who were quite familiar with the concept of mens rea, believed that evi-

182. *Id.*

183. *Id.*

184. *See id.* at 2018.

185. *See id.*

186. *Id.* (quoting United States v. Cornell, 25 F. Cas. 650, 657-58 (C.C. R.I. 1820) (No. 14,868)). Story's statement, however, has received some criticism. Professor Jerome Hall wrote that "[s]uch a statement by so great a judge reveals the complexity, if not the hopelessness, of the problem. The fact is that drunkenness was never a crime at common law, and it never served as an aggravation." Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1067 n.88 (1944).

187. *See supra* Part II.A.

188. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 201-02 (1977) ("preventing and dealing with crime is much more the business of the States than it is of the Federal Government").

dence of intoxication should be admissible in determining a defendant's culpability.[189]

The plurality conceded, however, that the courts carved out an exception to this evidentiary bar in the nineteenth century and, by the turn of this century, evidence of intoxication could be considered by juries in most American jurisdictions.[190] Nonetheless, argued Scalia, the admissibility of such evidence never attained a "fundamental principle" status.[191]

3. Policy considerations

The Court then examined several justifications for Montana's exclusionary statute.[192] After noting the substantial relationship between drinking and crime, the Court observed that the rule promotes general deterrence by "increasing the punishment for all unlawful acts committed in that state," and specific deterrence by keeping violent, inebriate offenders locked up.[193] The final policy concern noted by the plurality was the fear that jurors will be misled by evidence of voluntary intoxication.[194] In other words, jurors will be too quick to believe "that the defendant was biologically incapable of forming the requisite *mens rea*."[195] The Court concluded that policy reasons were sufficient to uphold the statute.[196] In sum, the rule allowing juries to consider voluntary intoxication evidence was of "too recent vintage" and had not been supported by a sufficient number of states to be deemed fundamental.[197]

4. Dealing with precedent

Once the historical significance and state justification for the rule were established, Scalia found it relatively easy to differentiate the Court's holding from relevant, seemingly adverse case law. *Chambers*

189. *Egelhoff*, 116 S. Ct. at 2018. "Hale's statement that a drunken offender shall have the same judgment 'as if he were in his right senses' must be understood as precluding a defendant from arguing that, because of his intoxication, he could not have possessed the *mens rea* required to commit the crime." *Id.* (quoting 1 M. HALE, PLEAS OF THE CROWN *32-33).

190. *See id.* at 2019.

191. *Id.* at 2019-20. Significantly, one-fifth of the states currently have statutes similar in function to Montana's. *Id.*

192. *See id.* at 2020. Such justifications "alone cast[ ] doubt upon the proposition that the opposite rule is a 'fundamental principle.'" *Id.*

193. *Id.*

194. *See id.* at 2021.

195. *Id.*

196. *See id.* at 2020-21.

197. *Id.*

v. Mississippi was effectively limited to its facts.[198] The plurality asserted that the *Chambers* holding was based on the state's use of common law hearsay and voucher rules which, in combination, eviscerated the defendant's right to present a defense. The plurality distinguished *Crane v. Kentucky* on the grounds that Kentucky lacked a valid justification for excluding from jury consideration the circumstances under which Crane made his confession.[199] By contrast, the plurality had already labeled Montana's justification for the exclusion of voluntary intoxication evidence "valid."[200]

According to the plurality, the *Winship* doctrine was not violated here because, notwithstanding the instruction on voluntary intoxication, the jury was advised that the state carried the burden of proving all elements of the offense beyond a reasonable doubt.[201] The Court noted the "considerable" amount of evidence brought forward by the state which tended to prove Egelhoff's guilt.[202] While it was true, the Court conceded, that the rule effectively lowered the prosecution's burden of proof, this was not unconstitutional unless the evidentiary rule *itself* violated a fundamental principle of justice.[203]

5. Ginsburg's concurrence

Justice Ginsburg, concurring in the judgment, agreed with the dissent that if the statute had been designed solely for the purpose of keeping relevant exculpatory evidence from the jury, then it was unconstitutional.[204] As she saw it, however, the statute simply redefined the mens rea element of deliberate homicide.[205] States are given substantial leeway in defining the elements of their criminal offenses.[206] A statute which redefines mens rea so that voluntary intoxication is irrelevant should not be classified as a rule of evidence at all—it is simply part of the definition of the criminal offense itself.[207] Accordingly, Montana's statute represents a state decision that a sober de-

198. *See id.* at 2022.
199. *See id.*
200. *See id.* at 2020-21.
201. *See id.* at 2022-23.
202. *Id.* at 2023. Such evidence included the fact that Egelhoff asked Pavola to put his gun in the glove compartment of the station wagon several hours before the murders and that the murders were accomplished in an "execution-style manner"—one shot to the head of each victim. *Id.*
203. *See id.*
204. *See id.* at 2024 (Ginsburg, J., concurring).
205. *See id.*
206. *See id. See also* Patterson v. New York, 432 U.S. 197, 201-02 (1977).
207. *See Egelhoff*, 116 S. Ct. at 2024 (Ginsburg, J., concurring).

fendant and an intoxicated defendant should be held equally accountable for their conduct, regardless of the effect of alcohol on the defendant's mental state.[208]

6. The dissent

Justices Stevens, Souter, and Breyer joined Justice O'Connor in dissent.[209] O'Connor argued that the plurality gave insufficient weight to both the *Winship* doctrine and the "right to defend" line of jurisprudence.[210] In response to Justice Scalia's assertion that criminal defendants have never enjoyed an unencumbered constitutional right to introduce all relevant evidence, O'Connor distinguished Scalia's exclusionary examples on the grounds that

> none of the "familiar" evidentiary rules operates as Montana's does. The Montana statute places a blanket exclusion on a category of evidence that would allow the accused to negate the offense's mental-state element. In so doing, it frees the prosecution, in the face of such evidence, from having to prove beyond a reasonable doubt that the defendant nevertheless possessed the required mental state.[211]

Moreover, continued O'Connor, the purpose of familiar exclusionary rules is not to ease "the State's burden, but rather, to vindicate some other goal or value—*e.g.*, to ensure the reliability and competency of evidence or to encourage effective communications within certain relationships."[212] In sum, the dissenters maintained that the adversary process is unconstitutionally distorted by an evidentiary rule which serves the sole purpose of bolstering the state's conviction rate.[213]

IV. ANALYSIS

In upholding the Montana voluntary intoxication statute, the Court in *Egelhoff* refused to acknowledge the significance of its decision. The fact is, *Egelhoff* marks the first time that the Court has upheld an evidentiary rule which operates to exclude probative, reliable defense evidence for the singular purpose of improving a state's conviction rate.

208. *See id.*
209. *Egelhoff*, 116 S. Ct. at 2026 (O'Connor, J., dissenting).
210. *See id.* at 2029.
211. *Id.* at 2026.
212. *Id.* at 2029.
213. *See id.* at 2026.

A. A Note on the Court's Application of Precedent

1. The state's burden of proof

Under the *Winship/Patterson* doctrine, the burden is on the state to prove every element of the criminal offense beyond a reasonable doubt.[214] The *Egelhoff* plurality asserted that this constitutional requirement was not implicated because the jury was instructed on the reasonable doubt standard.[215] Therefore, according to this argument, if Montana had failed to produce enough evidence to prove Egelhoff's mental state beyond a reasonable doubt, he would have been acquitted. This argument places form over substance. Obviously, if the defendant is precluded from introducing relevant, exculpatory evidence, the prosecution's burden is effectively lowered. Juries weigh the evidence on both sides of a case to determine whether they have a reasonable doubt about the prosecution's case. If the only interpretation of the evidence is that offered by the prosecution, the reasonable doubt standard is eviscerated.

For example, if the only evidence offered at trial is that *X* shot *Y*, the jury may infer that *X* acted intentionally. If *X* is precluded from introducing exculpatory evidence, the prosecution can simply paint its own picture of what happened. It is, therefore, an oversimplification to say that the prosecution's burden is the same regardless of what evidence the defendant is allowed to introduce. For the reasonable doubt standard to serve as a meaningful procedural safeguard, it must be thought of in the context of all relevant, probative evidence.

2. The defendant's constitutional right to defend

The "right to defend" line of jurisprudence was clearly the most difficult hurdle encountered by the *Egelhoff* plurality. Yet, upon reading Justice Scalia's analysis, one might believe that no substantive right to defend ever existed. Scalia simply refused to acknowledge the importance of *Chambers v. Mississippi*,[216] characterizing the case as "an exercise in highly case-specific error correction."[217] While it is true that the majority in *Chambers* maintained that they were establishing "no new principles of constitutional law,"[218] this was clearly not the case. *Chambers* did, in fact, create new constitutional law.

214. *See supra* Part II.A.
215. *See Egelhoff*, 116 S. Ct. at 2022-23.
216. 410 U.S. 284 (1973).
217. *See Egelhoff*, 116 S. Ct. at 2022.
218. *Chambers*, 410 U.S. at 302-03.

First, as Professor Robert Clinton observed, *Chambers* was one of the first right to defend cases which "rested on due process grounds, rather than on an incorporation of one of the specific guarantees of the [F]ifth or [S]ixth [A]mendments."[219] This is apparent based on much of the analysis in *Chambers*. For example, Justice Powell, writing for the majority, noted that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[220] This "right to an opportunity to defend" is not explicitly guaranteed by the Sixth Amendment.[221] Furthermore, while the Sixth Amendment grants a defendant the right to confront the witnesses *against him*,[222] as Professor Clinton points out, "McDonald never accused Chambers of anything; his testimony was important only because he had confessed to the crime himself."[223] Thus, *Chambers* was substantially resolved on due process grounds.[224]

Second, and most important, *Chambers* established that the *partial* implementation of traditional common law rules of evidence can amount to a due process violation.[225] Although Justice Scalia asserted that *Chambers* was a "fact-intensive" case from which it would be difficult to discern any generalized holding,[226] he never attempted to explain why the facts of Chambers' trial were more egregious than the facts of Egelhoff's. Indeed, it is difficult to understand why the blanket exclusion of evidence of intoxication—evidence which may be the defendant's only hope of explaining his mental state—is less offensive to the Constitution than the *partial* exclusions of hearsay and witness testimony. The narrow holding which Scalia *was* able to discern was "that *erroneous* evidentiary rulings can, in combination, rise to the level of a due process violation."[227]

219. Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 791 (1976).

220. *Chambers*, 410 U.S. at 294.

221. *See* U.S. CONST. amend. VI; Clinton, *supra* note 219, at 788.

222. *See* U.S. CONST. amend. VI.

223. Clinton, *supra* note 219, at 788.

224. Alternatively, the holding in *Chambers* can be seen as emanating from a penumbra created by the Sixth and Fifth Amendments. In any case, the decision cannot stand on a literal interpretation of the Sixth Amendment.

225. *See Chambers*, 410 U.S. at 302. The exclusion was only "partial" because Chambers was permitted to introduce McDonald's signed confession to the jury. Moreover, Chambers was also allowed to examine Turner, McDonald's alibi, whose testimony undermined McDonald's side of the story.

226. *See Montana v. Egelhoff*, 116 S. Ct. 2013, 2022 (1996).

227. *Id.* (emphasis added).

This interpretation of *Chambers* is wholly unfounded and misleading. In reality, the evidentiary rulings at play in *Chambers* were not erroneous at all under Mississippi's rules of evidence. Mississippi was one of many states which did not recognize a hearsay exception for declarations against penal interest and which still recognized a form of the common law "voucher" rule.[228] The trial judge, nonetheless, applied the state's hearsay rules quite liberally by permitting Chambers to present McDonald's signed confession to the jury.[229] Consequently, it is not at all clear what Justice Scalia meant by labeling the evidentiary rulings "erroneous." If he meant that the evidentiary rulings were unconstitutional, then his interpretation of the *Chambers* holding is that "[unconstitutional] evidentiary rulings can, in combination, rise to the level of a due process violation"—a rather unremarkable assertion.[230]

Several of the Court's decisions establishing the constitutional right to defend would likely have been decided differently under the *Egelhoff* analysis. For example, using historical practice as a "primary guide,"[231] it is difficult to see how Mississippi's implementation of traditional, common law evidentiary rules in *Chambers* can offend some traditional, deeply rooted principle of justice. Similarly, the state evidentiary exclusion in *Green v. Georgia* should not offend due process inasmuch as the *only* evidentiary rule at play was the exclusion of hearsay.[232] The defendant in *Green* was sentenced to death for murder.[233] During the punishment phase of the trial, the court prevented him from introducing a witness who would have testified that a third party (who was already convicted in a separate trial for the same murder) confessed to sending the defendant off on an errand and then committing the murder himself.[234] Instead of involving itself in an in-depth historical analysis, the Court in *Green* held that, "[r]egardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the

228. *See* Clinton, *supra* note 219, at 786 n.358, 788.

229. *See Chambers*, 410 U.S. at 291.

230. *See Egelhoff*, 116 S. Ct. at 2022. The plurality would have been more intellectually honest to have simply overruled *Chambers*. One seemingly important factor which the plurality failed to mention was the fact that Chambers was a black defendant arrested during the civil rights movement in Mississippi. Accordingly, the *Chambers* Court probably evinced a heightened sensitivity to Chambers' due process arguments, notwithstanding the fact that the trial court properly followed Mississippi's common law rules of evidence.

231. *Id.* at 2017.

232. *See* Green v. Georgia, 442 U.S. 95, 97 (1979).

233. *See id.* at 95.

234. *See id.* at 96.

Due Process Clause of the Fourteenth Amendment."[235] As was the case in *Chambers*, the Court observed that the confession was against interest and was made "spontaneously to a close friend" shortly after the murders.[236] The testimony was, therefore, deemed sufficiently reliable and its exclusion from the jury was held unconstitutional.[237] Furthermore, using Justice Scalia's analysis outside the limited scope of the "right to defend" cases, many significant contemporary due process decisions would not pass muster.[238]

Justice Scalia is correct in his assertion that probative defense evidence may be withheld from the jury when a defendant willfully violates a procedural rule.[239] This type of evidentiary exclusion is clearly distinguishable, however, from the evidentiary exclusion in *Egelhoff*. For example, in *Taylor v. Illinois*, the Court held that

> there is something suspect about a defense witness who is not identified until after the 11th hour has passed. If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited.[240]

Reliability of witness testimony, therefore, is a major concern advanced by such a sanction. Montana, however, cannot justify its statute based on reliability concerns.[241] Moreover, it seems fair to penalize a defendant for intentional misconduct. No comparable level of culpability is necessarily required to trigger the operation of Montana's statute. Finally, and most importantly, sanctions for discovery violations are neutral in their operation. That is, they can be brought against the prosecution as well as the defense. Therefore, "when they do help [the prosecution], [they] do so only incidentally."[242]

235. *Id.* at 97.

236. *Id.*

237. *See id.*

238. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 74 (1985) (finding a constitutional right to psychiatric testimony when sanity is at issue); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (finding a due process right to hearing and counsel preceding revocation of probation); Sheppard v. Maxwell, 384 U.S. 333, 335 (1966) (finding a due process right to protection from prejudicial publicity); Brady v. Maryland, 373 U.S. 83, 86-87 (1963) (finding a constitutional right to discovery of exculpatory evidence).

239. *See, e.g.*, Michigan v. Lucas, 500 U.S. 145, 152 (1991).

240. 484 U.S. 400, 414 (1988).

241. *See infra* notes 279-80 and accompanying text (evidence of *involuntary* intoxication is admissible).

242. Montana v. Egelhoff, 116 S. Ct. 2013, 2029 (1996) (O'Connor, J., dissenting).

B. *The Lack of a Constitutional Test*

In describing the "right to defend" line of jurisprudence in 1976, Professor Clinton observed that "the cases almost totally fail to provide any rationale or consistent test to be applied."[243] Unfortunately, not much has changed over the past two decades.

1. The Court's current "test": historical practice plus contemporary notions of "fundamental fairness"

Clearly, the principal bone of contention between the plurality and dissent in *Egelhoff* involves the question of how much weight the Court should place on historical practice in answering due process questions. Justice Scalia sets the tone of the plurality opinion by declaring that historical practice is the "primary guide" for determining whether a procedural rule violates due process.[244]

In support of this statement, he cites *Medina v. California*.[245] In *Medina*, however, the Court relied on a *two-prong* test to reach its conclusion, only the first prong of which related to historical criminal practice.[246] Specifically, in upholding a statute which placed the burden of proving incompetency to stand trial on the defendant, the Court noted that the burden of proof in pretrial competency hearings was historically placed on the defendant.[247] Justice Kennedy, writing for the majority, explicitly stated that "[h]istorical practice *is probative* of whether a procedural rule can be characterized as fundamental."[248] The literal distinction, however, between the use of historical practice as a "primary guide" and as "probative evidence" of a rule's fundamental nature is rather obvious. Furthermore, on the second prong, the *Medina* Court addressed the question of whether the rule violated any principle of "fundamental fairness" currently in operation.[249] Therefore, from both a textual and an operative point of view, the plurality's reliance on *Medina* is somewhat misleading.

The *Egelhoff* plurality conceded that a criminal defendant has a constitutional right to present a defense.[250] It distinguished the "right to defend" line of precedent, however, on the grounds that the states

243. Clinton, *supra* note 219, at 795.
244. *See Egelhoff*, 116 S. Ct. at 2017.
245. 505 U.S. 437 (1992).
246. *See id.* at 448.
247. *See id.* at 446.
248. *Id.* (emphasis added).
249. *See id.* at 448.
250. *See* Montana v. Egelhoff, 116 S. Ct. 2013, 2022 (1996).

in those cases failed to come forward with a "valid" justification for their evidentiary exclusions.[251] The Court will therefore give *some* weight to non-historical concepts of fundamental fairness. The level of scrutiny with which the Court views a state's professed justification for its procedure, however, is extremely low. Based on *Egelhoff*, the Court is willing to accept as "valid" a state's interest in keeping dangerous people off the streets by lowering the burden on the prosecution. A state's "valid" interest in raising the state's conviction rate can thereby trump a defendant's fundamental interest in introducing exculpatory evidence related to his mental state.[252] The unfortunate result is that more innocent defendants may be incarcerated.

Over the years, the Court has failed to establish *any* clear test for dealing with criminal due process issues, opting instead to answer criminal due process questions on a case-by-case basis. This is particularly obvious in cases such as *Egelhoff* where historical criminal practice and modern notions of fundamental fairness come into conflict. The Court's decision to deal with right to defend questions in this manner is likely based, at least in part, on its fear that the open recognition of a constitutional right to defend would open the floodgates of litigation. As Professor Clinton suggests, however, "[t]he [case-by-case] approach, insofar as it fails to yield any guiding principles, seemingly *encourages* appeals seeking a sui generis ruling."[253]

2. The balancing test: a more "fundamentally fair" inquiry

There were hopeful signs in *Ake v. Oklahoma*[254] that the Court was moving towards a more structured, less deferential test. In *Ake*, the Court, in an opinion authored by Justice Marshall, held that the Constitution requires that a state provide the assistance of a psychiatrist to an indigent defendant when that assistance is necessary to his defense.[255] In conspicuously broad language, Justice Marshall asserted that an indigent defendant must have "a fair opportunity to present [a] defense."[256] In holding that Oklahoma deprived Ake of a fair trial, Marshall applied a balancing test with three relevant factors: (1) the private interest affected by the state action, (2) the state inter-

251. *See id.*

252. See *infra* Part IV.B.2.a. for an explanation of why a defendant has a fundamental interest in the introduction of such evidence.

253. Clinton, *supra* note 219, at 797.

254. 470 U.S. 68 (1985).

255. *See id.* at 83.

256. *Id.* at 76.

est affected by the court's ruling, and (3) the probable value of alternate procedural safeguards.[257]

In applying the foregoing test to the case before it, the Court stated that "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."[258] On the second prong, the state's argument that such a requirement would result in a staggering financial burden on the state was summarily rejected.[259] The Court noted that many states, and the federal government, provided psychiatric assistance to indigent defendants and they had not found that the burden was too great.[260] Moreover, "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."[261] Finally, the Court opined that there were no reasonable procedural alternatives inasmuch as "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."[262]

Unfortunately, as described above, the Court abandoned this analytical approach in *Medina*, with the majority once again asserting that the ambiguous "fundamental principle" analysis was more appropriate for dealing with due process issues.[263] Had the Court, in *Egelhoff*, decided to apply the *Ake* test, the inequity of Montana's exclusionary statute would have been revealed. This is illustrated in the following discussion.

a. The defendant's interest

Professor Susan Mandiberg clearly articulated why a defendant has a fundamental interest in introducing evidence of intoxication on the question of mens rea.[264] Unless the defendant confesses to the crime, mens rea can never be proved by direct evidence.[265] The pros-

257. *See id.* at 77.
258. *Id.* at 78.
259. *See id.* at 78-79.
260. *See id.*
261. *Id.* at 79. This statement, standing alone, would seem to condemn the Montana statute, as the only comprehensible purpose of the statute is to endow the prosecution with a tactical advantage over the defense.
262. *Id.* at 80.
263. *See* Medina v. California, 505 U.S. 437, 445 (1992) (rejecting the "balancing test" for evaluating the validity of a state criminal procedural rule).
264. *See* Susan F. Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 FORDHAM L. REV. 221, 231-32 (1984).
265. *See id.*

ecution will only be able to submit circumstantial evidence from which the defendant's mental state can be inferred.[266] For example, if the defendant, waiting at a red light, suddenly accelerated through the light and killed the victim, most jurors would believe (absent any additional evidence) that the homicide was intentional.[267] In other words, "[i]f the only context available is that presented by the prosecution's evidence of the act and result, there will be no inclination to question the conclusion that the defendant intended both."[268] The level of culpability required for a conviction is thereby lowered from a subjective to an objective (negligence) standard as the defendant's mental state is judged based on purely external circumstances.

This concern was voiced by Justices Breyer and Stevens in dissent. They argued that this consequence also casts doubt on Ginsburg's conclusion that Montana simply rewrote its deliberate homicide statute:

> Why would a legislature want to write a statute that draws such a distinction, upon which a sentence of life imprisonment, or death, may turn? If the legislature wanted to equate voluntary intoxication, knowledge, and purpose, why would it not write a statute that plainly says so, instead of doing so in a roundabout manner that would affect, in dramatically different ways, those whose minds, deeds, and consequences seem identical?[269]

Accordingly, under the *Ake* framework it is clear that a defendant has a fundamental interest in presenting evidence of his intoxication as it pertains to his mental capacity.

b. The state's interest

The next question is: how important is the state's interest in placing a blanket exclusion on such evidence? Under contemporary due process analysis, if the right to introduce exculpatory evidence pertaining to mens rea is fundamental, then it cannot be abridged absent a compelling state interest.[270]

The link between alcohol and violent crime cannot be questioned. It is estimated that alcohol is involved in over one half of all homicides.[271] This statistical evidence, however, does not, by itself, warrant

266. *See id.* at 232.

267. This hypothetical illustration is borrowed from Justice Breyer's dissent in *Montana v. Egelhoff*. *See* 116 S. Ct. 2013, 2035 (1996) (Breyer, J., dissenting).

268. Mandiberg, *supra* note 264, at 232.

269. *Egelhoff*, 116 S. Ct. at 2035 (Breyer, J., dissenting).

270. *See* Mandiberg, *supra* note 264, at 236.

271. *See* HELEN ERSKINE, U.S. DEP'T OF JUSTICE, ALCOHOL AND THE CRIMINAL JUSTICE SYSTEM: CHALLENGE AND RESPONSE 8 (1972) ("In a study of 588 homicides . . . in 64% of the

the exclusion of intoxication evidence. In addition, there needs to be some showing that such evidence is inherently unreliable or unduly prejudicial. Moreover, if the state can achieve its goals by other means without interfering with a defendant's constitutional right to present a defense, such as a case-by-case evaluation, then such means should be investigated.[272] Accordingly, returning to Mandiberg's analytical framework, Montana has a legitimate interest in both reliable fact-finding and in incapacitating dangerous offenders.[273]

i. The state's interest in the reliability of evidence

Mandiberg believes that a state's professed concern for the reliability of evidence of intoxication masks a deeper concern that allowing juries to consider such evidence will result in the acquittal of more violent inebriate offenders.[274] Moreover, she avers that the blanket exclusion of such evidence presupposes that the risk of counterfeit evidence of intoxication is greater than for other types of evidence or that the consequences of failing to identify such fabricated evidence is greater in cases of voluntary intoxication.[275]

It is difficult to understand why the potential for fakery is any greater here than in other cases where "mistake of fact" or "extreme emotional disturbance" are involved. Professor Jerome Hall believes that the opposite conclusion seems more likely inasmuch as "the history of the defendant and the events preceding his wrongful act are examined in greater detail in the drunkenness cases than is usual."[276] Moreover, Hall continues, such "simulation" of an intoxicated condition "presupposes . . . high intelligence, histrionic ability, and careful calculation," traits generally not evinced by inebriate offenders.[277]

It is also argued—and implied by the *Egelhoff* plurality—that such evidence will cause undue prejudice or will confuse the jury.[278] It is difficult to understand, however, why the risk of jury confusion is

cases alcohol was a factor and in the majority of these alcohol was present in both offender and victim."); Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1681-82 (1981) ("About one-half of homicide perpetrators and victims are to some extent under the influence of alcohol at the time of the incident.").

272. *See* Mandiberg, *supra* note 264, at 229-30.

273. *See id.* at 231.

274. *See id.* at 245.

275. *See id.* at 239.

276. Hall, *supra* note 186, at 1047-48.

277. *Id.* at 1048.

278. *See* Montana v. Egelhoff, 116 S. Ct. 2013, 2021 (1996). Justice Scalia argued that the rule prevents juries, who might otherwise be misled, from being "too quick to accept the claim that the defendant was biologically incapable of forming the requisite *mens rea*." *Id.*

greater here than in the numerous other situations in which juries are expected to make factually complex decisions. In fact, most jurors will have at least some understanding of the effects of alcohol on mental competence. The risk of juror confusion, therefore, seems less likely here than in cases where a defendant invokes the defense of insanity, and the jury makes its determination based almost entirely on conflicting expert testimony.

Finally, evidence of *involuntary* intoxication may be considered by Montana juries when evaluating a defendant's mental state.[279] Consequently, any claim by Montana that evidence of intoxication will create jury confusion or prejudice is inconsistent with its own statutory provision for involuntary intoxication. As Justice O'Connor argues: "That exception makes plain that Montana does *not* consider intoxication evidence misleading—but rather considers it relevant—for the determination of a person's capacity to form the requisite mental state."[280]

ii. The state's interests in deterring crime and incapacitating dangerous offenders

The *Egelhoff* plurality recognized that Montana's statute promotes general deterrence by "increasing the punishment for all unlawful acts committed in [an intoxicated] state."[281] Upon close examination, however, the validity of this justification seems untenable.

Those criminal defendants who lack the required culpability for the offense because of extreme intoxication will not be deterred because, by definition, they acted without the required intent in the first place. In other words, an unintentional act cannot be deterred. Perhaps what the plurality meant is that the rule will deter those defendants who get intoxicated for the purpose of committing a crime, and then use their intoxication as a defense. Such cases are likely to be infrequent because "a person who planned to commit a crime would not wish to incapacitate himself by becoming grossly intoxicated (and that is the degree relevant to the moot issues of penal responsibility)."[282] In any event, a defendant who forms the requisite intent before he becomes intoxicated is guilty of the offense regardless of

279. *See* MONT. CODE ANN. § 45-2-203 (1997) (creating exception for defendants who were *involuntarily* intoxicated).

280. *Egelhoff*, 116 S. Ct. at 2029 (O'Connor, J., dissenting).

281. *Id.* at 2020.

282. Hall, *supra* note 186, at 1048.

how drunk he gets.[283] Moreover, allowing a defendant to use evidence of intoxication as it affects his mental state does not mean that he will be acquitted. He may still be guilty of any crime which requires recklessness or, possibly, negligence.[284]

Another significant problem with the Court's general deterrence argument is that it ignores the significant number of inebriate offenders who suffer from the disease of alcoholism and who, therefore, are not capable of being deterred. As indicated above, there is unquestionably a link between alcohol consumption and violent crime.[285] Consequently, one might logically infer a link between *alcoholism* and crime. This hypothesis is supported by statistical evidence.[286] In one study of 223 consecutively admitted male criminals, 43% were diagnosed as alcoholic.[287] Moreover, it is generally accepted by the medical community that alcoholism is a *physical* disease which renders the alcoholic unable to control his ingestion of alcohol.[288] Although no specific biological cause has been isolated, the American Medical Association posits six metabolic theories of causation.[289]

The foregoing casts some doubt on the assertion that all individuals who become intoxicated are in some way morally culpable or, as Justice Scalia argues, that Montana's evidentiary "rule comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences."[290] By contrast, Professor Steven Nemerson argues that

> [v]irtually every drink taken by an alcoholic is "voluntarily" taken, in the sense that it follows from a willed, muscular contraction. . . . But, for an act to be "voluntary," in the sense required for moral fault, the actor must also have the substantial capacity to will other than he does—he must be substantially capable of choosing not to engage in that act. . . . [And] as we have seen, the alcoholic lacks the substantial capacity to control his drinking.[291]

283. *See, e.g.*, Roberts v. People, 19 Mich. 401, 416-17 (1870) ("[I]f the defendant had formed the intent while in possession of his mental faculties, . . . his subsequent voluntary intoxication . . . would not shield him from a conviction . . . .").

284. *See, e.g.*, State v. Shine, 479 A.2d 218, 223 (Conn. 1984).

285. *See supra* note 271 and accompanying text.

286. *See* James J. Collins, Jr., *Alcohol Careers and Criminal Careers, in* DRINKING AND CRIME: PERSPECTIVES ON THE RELATIONSHIPS BETWEEN ALCOHOL CONSUMPTION AND CRIMINAL BEHAVIOR 152, 188-93 (James J. Collins, Jr. ed., 1981).

287. Robert A. Moore, *Legal Responsibility and Chronic Alcoholism*, 122 AM. J. PSYCHIATRY 748, 753 (1966).

288. *See* Steven S. Nemerson, *Alcoholism, Intoxication, and the Criminal Law*, 10 CARDOZO L. REV. 393, 398-400 (1988).

289. *See id.* at 400-01.

290. *See* Montana v. Egelhoff, 116 S. Ct. 2013, 2020 (1996).

291. Nemerson, *supra* note 288, at 414.

Accordingly, Montana's reliance on general deterrence principles in support of its statute rests on numerous inaccurate assumptions and, as such, is substantially unfounded.

The plurality also maintained that the Montana statute serves as a specific deterrent by incapacitating those inebriate offenders who are unable to control their violent impulses.[292] Undoubtedly, Montana's statute will have the effect of raising its conviction rate. This argument, however, can be made in support of virtually *any* exclusionary rule which prevents a defendant from introducing exculpatory evidence. Even Justice Scalia would have to admit that this "crime control" rationale, standing alone, cannot be "valid" enough to outweigh a criminal defendant's right to present exculpatory evidence.

c. *Alternate means for protecting states' interests*

Another significant problem inherent in the Court's "valid justification" test is that states are not compelled to look into less intrusive means for accomplishing their goals; that is, means which would not eviscerate a defendant's right to introduce probative, exculpatory evidence. Professor Peter Westen believes that an "alternative means" analysis should be constitutionally required:

> The "alternative means" analysis . . . prohibits the state from furthering its interests by burdening constitutional rights where less drastic alternatives adequately serve its interests. A less drastic alternative is *adequate* by that analysis, even if less effective, if the added effectiveness of the more drastic alternative is insufficient to justify the latter's burden on constitutional rights.[293]

Similarly, recall that the test applied by the Court in *Ake,* and subsequently abandoned in *Medina,* included an inquiry into the probable value of alternate procedural safeguards.[294]

With regard to evidence of voluntary intoxication, it is difficult to understand why a blanket exclusionary rule is necessary. As Mandiberg points out, although reliability concerns may demand total exclusion of intoxication evidence in some cases,

> there may be a number of occasions in which reliability can be equally well assured by effective cross-examination, jury instructions and oral argument. In the latter situation, in fact, reliability would be lessened by exclusion, because the jury would not hear probative, relevant evidence on a major issue in the case.[295]

292. *Egelhoff,* 116 S. Ct. at 2020.
293. Peter Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 149 (1974).
294. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985).
295. Mandiberg, *supra* note 264, at 244-45.

The Montana statute effectively removes the question of reliability from the discretion of the trial judge and is thereby over-inclusive, precluding jury consideration of both reliable and unreliable evidence. The evaluation of intoxication evidence on a case-by-case basis would clearly be less intrusive to a defendant's right to present exculpatory evidence.

C. *Ginsburg's Concurrence, the Definition of Offenses, and the Proportionality Doctrine*

Justice Ginsburg agreed with the dissent that the Montana statute was unconstitutional when viewed as an evidentiary prescription designed to exclude relevant exculpatory evidence.[296] She took the position, however, that the statute simply redefined the mens rea element of deliberate homicide.[297]

The eight other members of the Court disagreed with this interpretation inasmuch as it was not shared by the Montana Supreme Court.[298] In response to this concern, Justice Ginsburg argued that the Montana Supreme Court "simply did not undertake an analysis in line with the principle that legislative enactments plainly capable of a constitutional construction ordinarily should be given that construction."[299] Regardless of which interpretation is correct, one thing is clear: the Court will uphold state statutes which redefine mens rea so as to make voluntary intoxication irrelevant. Of the four dissenting justices, only Justices Breyer and Stevens left open any possibility that such a statute might be unconstitutional.[300]

According to Justice Ginsburg, the new "statute" has the following functional structure:

> To obtain a conviction, the prosecution must prove only that
> (1) the defendant caused the death of another with actual knowledge or purpose, *or*
> (2) that the defendant killed "under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication."[301]

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

297. *See id.*

298. *See, e.g., id.* at 2031 (O'Connor, J., dissenting) ("We are, of course, bound to accept the interpretation of [state] law by the highest court of the State." (quoting Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976) (alteration in original))).

299. *Id.* at 2025 (Ginsburg, J., concurring).

300. *See id.* at 2035 (Breyer, J., dissenting) ("I would reserve the question of whether or not such a hypothetical statute might exceed constitutional limits.").

301. *Id.* at 2024 (Ginsburg, J., concurring) (quoting Brief for American Alliance for Rights and Responsibilities et al. as Amici Curiae at 6) (alteration in original).

Thus, to be convicted of murder, a sober defendant must have the intent to kill or the knowledge that his actions will cause death. An intoxicated defendant, however, may be convicted of murder for mere negligent behavior, if his acts are sufficient to establish the knowledge or purpose of a sober person in his position.

Two classes of defendants will thereby be convicted for murder absent purpose or knowledge. The first class will be defendants who are so intoxicated at the time of the killing that they are biologically incapable of forming an intent to kill. Egelhoff arguably fell into this category. The second class will be defendants who are sober enough to have the ability to form the requisite intent but do not do so. Instead, their intoxicated state causes them to behave negligently. Under the foregoing statute, however, when a death results from such negligent behavior, the defendant will be convicted of murder if the circumstances of the killing would have been sufficient to establish intent in a sober person. Consequently, a defendant may be convicted of murder and sentenced to death or life in prison for behaving negligently. It is hard to believe that such a result is constitutional.

The only real limit to states' authority in this area is the Eighth Amendment proportionality doctrine.[302] The Eighth Amendment provides that "cruel and unusual punishments [shall not be] inflicted."[303] In *Weems v. United States*,[304] the Court interpreted "cruel and unusual punishment" to include punishment which is disproportional to the crime committed.[305] More recently, in a five to four opinion authored by Justice Powell, the Court affirmed the Eighth Circuit Court of Appeals' reversal of a defendant's sentence of life imprisonment without the possibility of parole.[306] The defendant was sentenced pursuant to South Dakota's habitual offender law after being convicted for fraudulently passing off a check for which there was no account.[307] He had been convicted on six previous occasions, including three convictions for burglary and one for driving while intoxicated.[308] The Court deemed the defendant's sentence unconstitutionally disproportionate punishment.[309] While Justice Powell agreed that courts should generally grant state legislatures considera-

302. *See* Weems v. United States, 217 U.S. 349, 366-67 (1910).
303. U.S. CONST. amend. VIII.
304. 217 U.S. 349 (1910).
305. *See id.* at 366-67.
306. *See* Solem v. Helm, 463 U.S. 277, 283-84 (1983).
307. *See id.* at 281.
308. *See id.* at 279-80.
309. *See id.* at 303.

ble deference in establishing punishments for crimes, he maintained that "no penalty is *per se* constitutional."[310]

In *Harmelin v. Michigan*,[311] Harmelin was convicted of possessing 672 grams of cocaine and, although it was his first conviction, received a mandatory sentence of life imprisonment without the possibility of parole.[312] In a five to four decision, in a part of the opinion written by Justice Scalia and joined only by Justice Rehnquist, the Court held that this sentence did not violate the Eighth Amendment.[313] Justice Scalia asserted that "the Eighth Amendment contains no proportionality guarantee," and would have overruled the entire line of jurisprudence.[314] Three Justices—Kennedy, O'Connor, and Souter—agreed that Harmelin's punishment was not disproportionate, but maintained that the proportionality doctrine was still good law.[315] Justices White, Blackmun, Stevens, and Marshall dissented.[316]

Although the Supreme Court has been less receptive to Eighth Amendment arguments in recent years, the Amendment has never been applied to a statute which prescribes death or life imprisonment for negligent behavior. Given the Court's resolve to address criminal due process questions on a case-by-case basis, it seems possible, given the right factual scenario, to attack the Montana statute on proportionality grounds.

V. CONCLUSION

Blanket exclusionary rules which preclude jury consideration of reliable, exculpatory evidence should be deemed unconstitutional absent a compelling state justification. The state's interest in improving its conviction rate cannot be considered compelling if "due process of law" is to remain synonymous with "fundamental fairness." Such exclusionary rules distort the adversarial process by lowering the prosecution's burden at trial, and thereby only serve to increase the state's conviction rate.

A fairer method for conducting due process analyses was implemented by the Court in *Ake v. Oklahoma*,[317] only to be abandoned

310. *Id.* at 290.
311. 501 U.S. 957 (1991).
312. *See id.* at 994.
313. *See id.*
314. *Id.* at 965.
315. *See id.* at 1008-09.
316. *Id.* at 1009, 1027. Significantly, three of the four dissenters in *Harmelin*—White, Marshall, and Blackmun—have retired from the Court.
317. *See* 470 U.S. 68, 77 (1985).

seven years later in *Medina v. California*.[318] Under the *Ake* test, a defendant's interest in introducing exculpatory evidence is weighed against both the state's professed interest in using its exclusionary rule and the probable value of alternate procedural safeguards.

Using the *Ake* formulation, it becomes clear that a criminal defendant has a fundamental interest in introducing reliable, exculpatory evidence. A defendant's right to a fair trial is implicated in particular in cases such as *Montana v. Egelhoff*,[319] where the evidence in question is probative of his mental state. Specifically, a defendant's intoxicated state may be his *only* explanation for why he acted in an unreasonable manner and may be his only hope of rebutting the circumstantial evidence submitted by the prosecution. If the defendant is precluded from introducing such evidence, the level of culpability required for conviction is effectively lowered from a subjective to an objective, "reasonable person" standard. This should be unacceptable in a society which places substantial weight on the distinction between intentional and negligent conduct. In other words, *Egelhoff* was wrongly decided.

318. *See* 505 U.S. 437, 445 (1992).
319. 116 S. Ct. 2013 (1996).